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Calcutta Weekly Notes.

REPORTS OF IMPORTANT DECISIONS

OF THE
CALCUTTA HIGH COURT
AND OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON

Appeal from India

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JUDGES OF THE HIGH COURT.

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50 of the Act was not applicable to cases of rent in kind. **Held**—That sec. 50 of the Bengal Tenancy Act applied and the tenants were tenants at fixed rents. The presumption under sec. 50 is applicable to a tenure-holder of a raiyat holding at a rent payable partly in cash and partly in kind or entirely in kind. The term "rent" in the said section is not restricted to "money rent" and bears the meaning attributed to it in sec. 3, d (3) of that Act. Reference to the Report of Select Committee and proceedings of Legislature is not permissible in aid of the interpretation of a statutory provision. **DINA NATH PAL v. RAJA SATI PRASAD GARGA BAHADUR**

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son to prove with facility that he is a tenant at fixed rate. **Sarbeswar Patra v. Mondaraja or Bijoy Chaud Mohalap**, 26 C. W. N. 155 (1911) and 243 (1921) and **Binsidha v. Jagadip Narain Chowdhury**, 1 L. P. 24 Cal. 152 (1896), referred to and cited on. That the Defendant was entitled to the benefit of sec. 50 notwithstanding the fact that he was recorded as an occupancy raiyat. If the discontinuous receipts produced show that rent has been paid at the same rate for the years covered thereby, the Court may, by an application of the principle of continuity, infer that there has been no change in the intervening periods. What has to be established is not actual payment of rent but the fact that the tenancy has been held at a certain rate. **Kattiyani Datta v. Soonduree Dabee**, 2 W. R. (Act & Rules) 60 (1865) **Elahee Baksh v. Rongun Telee**, 7 W. R. 284 (1867), **Secretary of State v. Upendree**, 30 C. L. J. 336 (1922) and **Mohankanta v. Prayanath** 1 L. R. 19 Cal. 661 S. C. 35 C. L. J. 109 (1922) referred to. **Held further**—That sec. 105 does not debar the Defendant from the benefit of sec. 50 as that section does not come into operation until all possible proceedings under Chap. X have been exhausted. **Pirthi Chand Lal v. Basarat Ali**, 1 L. R. 37 Cal. 30 S. C. 13 C. W. N. 1149 (F. B.) (1909), referred to and followed. **NARENDRALAL CHOWDHURY v. BINODI BEHARI SADDHU KHAN**

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s. 105, settlement or fair and equitable rate in respect of tenures held at a fixed rate of rent. Construction of documents, upon consideration of all the terms of the instruments—Quotation of rates of rent when the entire evidence is before the Court, how far material—Jamadani—It imports fixity of rate of rent in perpetuity. Certain tenures under the direct management of the revenue authorities were in 1856 settled with some tenant-holders who had been in occupation in many instances from before the date of the Permanent Settlement of 1793. In the documents, by which the settlements were made, specified amounts were mentioned as jamakamel, in some cases from the commencement and in some cases after a period of two years. The landlords made the present applications under secs 105 and 105A of the Bengal Tenancy Act for settlement of fair and equitable rent in respect of the lands held by their tenants. **Held**—That the construction of the grants must depend upon the interpretation of all the terms of each instrument, and except in a case of ambiguity, extrinsic evidence would not be admissible. It had nothing to do with the questions whether the tenures were in existence in 1793, whether they had been held at a uniform rate of rent since then, or whether by application of s. 50 of the Bengal Tenancy Act they were presumed to have been so in existence and held at a uniform rate of rent during the period mentioned. **N. E. Railway v. Hastings**, [1909] A C 261, **Hebbert v. Purchas**, 1 R 3 P C 605 (1871), **Dhunput v. Gooman**, 11 M L A 433 (1867) and **Suttosurran v. Mohesh**, 12 M L A 263 (1868) and several other cases referred to. Each case must be considered on its own facts, and in order to ascertain the effect of the grant resort must be had to the terms of the grant itself and to the whole circumstances so far as they can be ascertained. **Upadishtha v. Divi**, 1 R 46 I A 123 s c 21 C W N 129 (1919) and **Chidambara v. Veerama**, P C 15th May 1922. Reported 27 C W N 217, referred to. The word jamakamel means "the full amount of rent or the highest rent payable." The word being preceded by the word "sahana" (annual) and followed by the word "haishel" (all years to come) the three terms taken together unmistakably pointed to the conclusion that the rent mentioned was the highest rent ever payable, which indicated fixity of rent. The landlord therefore, had precluded himself by his grant from claiming rent at an enhanced rate. No debate on the question of burden of proof arises when the entire evidence on both sides is once before the Court. **Seturatham v. Venkatachala T.**, R 47 I A 76 s c 25 C W N 45 (1919).

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ss. 105, 109—Application for settlement of fair rent before Revenue Officer—Withdrawal—Suit to recover rent at enhanced rate, if lies—Jurisdiction of Revenue Officer to grant leave to bring a suit; An application for settlement of fair rent made under sec. 105 of the Bengal Tenancy Act and withdrawn has not the same effect as if the application had never been made. Sec. 109 of the Act therefore operates in such a case as a bar to the maintainability of a subsequent suit in the Civil Court by the landlord for rent at an enhanced rate. *Quere*—Whether the Revenue Officer has jurisdiction to grant leave to withdraw proceeding before him with liberty to bring a suit in a Court of different jurisdiction. *Soroj Kumar Acharji v Umed Ali Howladar*, 25 C W N 1022 (1921), referred to. *Abeda Khatun v Majubali*, 1 L R 48 Cal 157 s c 24 C W N 1020 (1920), *Cheodditti v Tulsi Singh*, 1 L R 40 Cal 428 s c 17 C W N 167 (1912), *Aswini Kumar Aich v Saroda Charan Basu*, 24 C L J 79 (1916) and *Kamini Sundari v Abdul Habin*, 28 C L J 251 (1918), considered. *SASI KANTA CHARJA CHOUDHURY v SALJM SHEIKH* 987

s 106, suit under, for correction of entries in record-of-rights—S. 103B, presumption of correctness of entry in record-of-rights, if can be rebutted by road cess returns and quinquennial register prepared under Reg. 48 of 1793—Road cess returns, admissibility in evidence; The rent of a tenure was recorded as fixed in the record-of-rights. In a suit under sec. 106, Bengal Tenancy Act, for correction of the entry the landlords alleged that the rent was enhanced and produced quinquennial registers prepared under Reg. 48 of 1793 and the tenants contended that the rent had remained unvaried for over 20 years and filed some road cess returns. *Held*—That having regard to the provisions of the Cess Act the road cess returns in question were not admissible in evidence at all. To start with there was a presumption in favour of the tenants from an entry under sec. 103 Bengal Tenancy Act. Therefore the onus of proof rested entirely on the landlords to negate the effect of the said presumption. Assuming that the entry in the quinquennial register was admissible in evidence, the said entry by itself was not sufficient to negative the presumption in favour of the tenants. *PROMODE CHANDRA ROY CHOUDHURY v BINAYAKIAS ACHARYA CHOUDHURY* 948

s 115, scope and effect of—S. 115, if excludes presumption under s 50 as to fixity of rent in support of entry in the record-of-rights—Presumption as to grounds on which an entry has been made; An entry in a finally published record-of-rights described a certain holding as a holding at a fixed rent (*kaim karsha*). The landlord sued for recovery of its pos-

session from the heirs of the purchaser of the interest of the original tenant. The lower Appellate Court held that to make the holding transferable the tenant would have to prove uniformity of rent since the Permanent Settlement, as the presumption under sec. 50 of the Bengal Tenancy Act would not be available to him under sec. 115 in consequence of the framing of the record-of-rights. *Held*—That sec. 115 of the Bengal Tenancy Act does not exclude evidence of uniform payment of rent for the statutory period in support of an entry of fixity of rent in the record-of-rights, such entry being presumably based on the evidence of such uniform payment. The tenant, if denied liberty to prove this, would be deprived of the presumption under sec. 50, not only "after" the particulars under sec. 102 (b) of the Act have been recorded, but also in respect of the period prior to its publication. *Prithichand Lal Choudhury v Basarat Ali*, 1 L R 37 Cal 30 s c 13 C W N 1119 (F 73) (1909) *Secretary of State v. Kajimuddi*, 1 L R 26 Cal 617 (1899) and *Harihar Persad Bajpai v Ajub Misir*, 1 L R 45 Cal 930 (1913) distinguished. *RASH BIHARI GUHA v DWARKA NATH BANDOPADHYA* 936

sec. 115 if excludes presumption under sec. 50 in proceedings under sec. 105. See Bengal Tenancy Act 740

sec. 114, cause of action and jurisdiction. Court in suits between landlord and tenant. See Suit for rent 512

s 118 (c) Claim for rent against tenants joined with a claim for money due and received against persons who have wrongfully realised same—Trial of the case as a rent suit, without raising formal issues—Trial whether irregular or without jurisdiction. *Prejudice*; Where with a claim for rent against the principal Defendant, the Plaintiff framed an alternative claim against the *pro forma* Defendants in case they should have realised the same from the principal Defendant, and the suit was tried as a rent suit without framing formal issues. *Held*—That in dealing with the latter claim, which was not a claim for rent but for money due and received, according to the procedure laid down in sec. 118 (c) of the Bengal Tenancy Act, the trial Judge did not act without jurisdiction and in the absence of proof that the Appellants were prejudiced, the case was covered by sec. 99 of the Civil Procedure Code. The procedure prescribed in sec. 118 of the Bengal Tenancy Act is not a special procedure but a summary procedure. *TINKARI BOSE v NAGENDRA PRASAD BASU* 716

s. 153, proviso, revisional powers of the Additional District Judge in rent suits—Civil Courts Act (XII of 1887), s. 8, Additional District Judge's power to hear an application under the proviso to s 153 transferred to him by the District Judge; Where an application under the proviso to sec. 153 of the Bengal

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Tenancy Act presented to the District Judge was transferred by him to the Additional District Judge for hearing and was dismissed by the latter. **Held**—That the District Judge in transferring the application to the Additional District Judge no doubt acted under the general powers conferred on him by sec 8 of the Civil Courts Act, the provisions of which are wide enough to enable an Additional District Judge to hear an application under the proviso to sec 153 of the Bengal Tenancy Act transferred to him for disposal by the District Judge. The jurisdiction conferred by the proviso on the District Judge is a function of the District Judge which under the Civil Courts Act he may assign to an Additional Judge. **Gaudna Bihari v. Jabanulla Mandul**, 5 C W N. (Short Notes) 18 (1900), distinguished **LAL BEHARI BASAK v. AKIL CHANDRA SANTRA**

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s. 155—Suit for ejectment and compensation—Misuse of tenancy—Notice, validity of—Where misuse capable of remedy, notice without requiring the tenant to remedy the same, effect of—Suit, if maintainable; Where a notice under sec 155 of the Bengal Tenancy Act did not require the tenant to remedy the misuse, though upon evidence it was found that it was capable of remedy but only asked for compensation to remedy the misuse: **Held**—That the notice was not valid according to the requirements of sec 155 of the Bengal Tenancy Act and the suit was not maintainable, and a claim for compensation was not sustainable. **SHIB CHARAN CHAKRABARTTY v. BEPIN BEHARI CHAKRABARTTY**

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s. 158B, sub s (2)
- Omission to give notice of sale in execution of rent decree obtained by a co-sharer landlord to the other co-sharer landlord, effect of—Knowledge of the sale and acquiescence therein by the latter—Waiver—Scope and purpose of s 158B; The omission to serve upon the co-sharer landlord the notice contemplated by sub-sec (2) of sec 158B of the Bengal Tenancy Act does not nullify the sale or alter its character to that of a sale held in execution of a money decree, if he has knowledge of the sale and acquiesces therein. **Ahamad Biswas v. Binoy Bhusan Gupta**, 23 C W N 931 (1919) and **Sarip Hechan v. Tilattama Debi**, 43 Ind Cas 3 (1917), distinguished **Nando Lal Chowdhury v. Kala Chand Chowdhury**, 15 C W N 820 (1910) and **Raghunath Das v. Sunderdas Khatri**, L R 41 I A 251 s. c. I L R 42 Cal 72; 18 C W N 1058 (1914), referred to. The provision of sub-sec (2) of sec 158B of the Bengal Tenancy Act has been enacted for the benefit of the co-sharer landlord and it is open to him to waive the benefit of that section. When the provisions of a statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to the nature

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scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity. The safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection, if he can waive it, it amounts to an irregularity, if he cannot it is a nullity. **Holmes v. Russell**, 9 Dowe 28 referred to. **RAJANI KANTA GHOSH v. SHEIKH RAHAMAN GAZI**

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sec 170—Decree in form a rent-decree—Attachment of holding—Claim under Civil Procedure Code (Act V of 1908), Or. 21, r 58 if entertainable—Question, whether decree rent-decree or money-decree, it may be gone into; Where leasehold property is attached in execution of a decree which in form was a rent-decree, the Court has jurisdiction at the instance of a claimant under Or 21 r 58 of the Civil Procedure Code to enquire whether the decree was in fact a rent-decree, so as to attract the operation of sec 170 of the Bengal Tenancy Act. In view of the character of the leasehold property, the Court finds that the decree was not a rent-decree, it may properly entertain the claim. **JOTIN DRA MOHON PAL v. BHOLA NATH BHAKAT**

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sec 188, not applicable to rent suit. See Rent Suit. Ch. X, Part II, proper procedure for enhancement of rents in temporary settled estates. See Re-assessment of revenue, etc.

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Sch III, Art 3, limitation for suit for recovery of possession when the dispossession at the instigation of the landlord by two of his sons, to whom the landlord granted a settlement; Certain riyats were forcibly dispossessed of their riyati holding at the instigation of their landlord by two of his sons to whom he had granted a settlement, and his **barkandazes** assisted in the dispossession. The dispossessed riyats brought a suit for recovery of possession more than two years after the dispossession. **Held**—That where a person has been dispossessed by another who subsequently takes settlement from or is recognized as tenant by the landlord and the landlord has had no hand in the ouster, such dispossession does not amount to dispossession by the landlord and in such a case the Plaintiff will not be barred by Art 3 of Sch 3, nor in a case where the landlord simply favoured the dispossession by a third party. **Ranjula v. Ishab Dhal**, I L R 29 Cal 610 s. c. 6 C W N 702 (F B) (1909) and **Basanto Kumari v. Nanda Ram**, 18 C I J 86 (1913), distinguished **Kedar Nath v. Mohesh Chandra**, 28 C I J 216 (1915) **Sheikh Eradut v. Daloo Sheikh**, 1 C W N 573 (1893), **Rudra Narain v. Natabar**, 15 C I J 89 (1913) and **Krishna Chandra Bagdi v. Satish Chandra Banerjee**, 20 C W N 872 (1915) referred to. But where the landlord as in the present case, granted

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 a settlement to some of his peons and the
 dispossession was effected by them with
 the help of his *barkandazes*, and at the
 instigation or the landlord, all of them
 acting in concert, the case comes under
 Art. 3 of Sch. III of the Bengal Tenancy
 Act *ARMAN PEADA v. MANIK SARKAR* 86
- , Sch. III, Art. 3,
 if applicable when landlord had nothing to
 do with the dispossession See Limitation
 Act, Art. 128 etc. 259
- BETTING LOSSES—Hundi executed by loser**
 in favour of winner in consideration of the
 latter withdrawing his name from R C T.
 C. and preventing his being posted as de-
 faulter, whether such consideration legal
 and suit lies on Hundi—Business of book-
 makers, if illegal—Indian Contract Act (IX
 of 1872), ss. 2 (d), 23 and 30—Bengal Public
 Gambling Act (IV of 1913, B. C.), s. 2 and
 Bengal Amusements Tax Act (V of 1922, B.
 C.), considered. The Defendant lost a sum
 of Rs 8,500 to the Plaintiff firm on bets
 on horse races and on his failure to pay
 was reported to R C T C. The Defend-
 ant subsequently executed in favour of
 the Plaintiff firm a Hundi for a sum
 of Rs 8,500 in consideration of their with-
 drawing his name from the R C T C
 and thereby preventing his being posted
 as a defaulter. Held (in a suit brought
 on the Hundi to recover the said sum)—
 That the consideration for the Hundi was
 the Plaintiff firm's promise to withdraw
 the Defendant's name from the R C T C
 in order to prevent the Defendant from
 being posted as a defaulter, that such con-
 sideration was legal and that therefore
 the Plaintiff was entitled to recover
Hyams v. Stuart King, [1908] 2 K B 696,
 followed. Contracts by way of wagering
 and gaming are void but not illegal
Juggernath Sew Bux v. Ram Dayal J L
R. 9 Cal 791 (1883), followed. There is
 nothing illegal in the agreements which it
 is the business of a partnership firm of
 book-makers to make, nor are such agree-
 ments prohibited by law. Therefore a suit
 by such a firm is maintainable. *Thwaites*
v. Coulthwaite, [1861] 1 Ch 496. *Hyams v.*
Stuart King, [1908] 2 K B 696 and *O'Connor*
and Ould v. Ralston, [1908] 3 K B 451, re-
 ferred to. *LEICESTER & CO v. S P*
MULLICK 442
- BONA FIDE auction-purchaser for value**
 without notice of fraud of deceiver-holder, if
 necessarily protected. See Suit for cancel-
 lation of ex parte decree 587
- BOND**, taken by pleader commissioner from a
 party in discharge of an untaxed bill of
 fees, etc., if legal and can be sued upon.
 See Commissioner Pleader 450
- BOOK-MAKERS** (of race books), business of,
 if illegal. See Betting losses 442
- BROKER'S COMMISSION**, when payable—
 Principle of quantum meruit, if applies
 when broker fails to complete transaction
 on terms specified—Plaint amendment at a
 time when now suit would be time-barred.
 Where the Defendant authorised the
 Plaintiff to negotiate a lease on certain
 terms specified by him and the Plaintiff
 secured a party who accepted the lease on
 those terms subject to certain qualifica-
 tions and the Defendant took up the posi-
 tion that there was no concluded contract
 for a lease. Held—That the Plaintiff
 having failed to complete the transaction
 on the terms specified by the Defendant
 was not entitled to the remuneration prom-
 ised to be paid to him by the latter.
 Where the remuneration of an agent is
 payable upon the performance by him of
 a definite undertaking, he is entitled to be
 paid that remuneration as soon as he has
 substantially done all that he undertook
 to do. Even if the principal acquires no
 benefit from his services, and except
 where there is an express agreement or
 special custom to the contrary, even if the
 transaction in respect of which the re-
 muneration is claimed fails through, pro-
 vided that it does not fail through in con-
 sequence of any act or default of the agent.
 Several cases referred to. Where the parties
 have made an express contract for remun-
 eration, the amount of the remuneration and
 the condition under which it becomes pay-
 able must be ascertained by a reference to
 the terms of that contract and no implied
 contract can be set up to add to or deviate
 from the original contract, though it can
 be introduced by a reference to custom, not
 inconsistent with it. *Howard Houlder and*
Partners, Ltd. v. Manx Isles Steamship Co.,
Ltd [1923] 1 K B 110 at p 114 (1922), re-
 ferred to. Held also—That in the circum-
 stances of the case the broker was not en-
 titled to any remuneration on the basis
 of quantum meruit. *Howard Houlder and*
Partners Ltd v. Manx Isles Steamship
Co., Ltd [1923] 1 K B 110 at p 114 (1922)
 and *Kishan Prasad Sinha v. Purnendu*
Narain Sinha 15 C L J 40 (1911) referred
 to. *Semble*—It is competent to the Court
 to allow a plaint to be amended even after
 the expiry of the period prescribed for the
 institution of a new suit. *SATCHIDAN-*
ANDA DUTT v. NITYA NATH MITTER 1907
- BURDEN OF PROOF** as to knowledge of true
 fact, whether on mortgagor or mortgagee.
 See Hindu Law 913
- CALCUTTA IMPROVEMENT TRUST ACT**
 (Bengal Act V of 1911) as amended by
 Bengal Act III of 1915, sec. 63, sub-sec. 2—
 Notice published affecting premises—Pre-
 mises sold, buyer and seller not aware of
 the notice—Whether sale may be set aside
 —Indian Contract Act (IX of 1872), sec.
 20—"Mistake as to a matter of fact essen-
 tial to the agreement"—Whether ignorance
 of said notice is such mistake—Transfer
 of Property Act (IV of 1882), sec. 55 (1) (a)
 —Seller's duty of disclosing "material
 defect" in property sold. The Defen-
 dant who had been appointed Receiver of a
 certain property by Court sold the same
 by public auction to the Plaintiff who,
 being the highest bidder at such sale,
 deposited a certain sum with the Defen-
 dant in part payment of the purchase-price.
 Before the date of the auction, notice

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 had been given by the Calcutta Improvement Trust under the Calcutta Improvement Trust Act, sec. 63 (2), of a proposed public street, passing, inter alia, through the said premises whereof neither the Plaintiff nor the Defendant had any personal knowledge on the date of the auction. The Plaintiff, on discovering that a notice had been so given, instituted this suit for a declaration that the agreement of sale was void and for return of the deposit: **Held**—That the notice given by the Calcutta Improvement Trust created a liability to restriction upon the user of the premises by the purchaser and was therefore "a matter of fact essential to the agreement" within the meaning of sec. 20 of the Indian Contract Act and that the Plaintiff and the Defendant having been both ignorant of the said notice the agreement of sale was void, and the Plaintiff was entitled to get back the deposit.
NURSING DASS KOTHARI v. CHUTTO LALL MISSEER

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CALCUTTA MUNICIPAL ACT (III, B. C., of 1893), ss. 14 (xi), 357, 556—Acquisition of land by Municipality to provide dhamshala for pilgrims to Kalighat Temple—"Public purpose," acquisition, if for, and for carrying out a purpose of the Act—Discretion given by statute to Municipality, if may be questioned in Court. The provision of suitable and decent accommodation for the large numbers of worshippers who at certain seasons crowd into and about the Temple of Kali in a part of the town is, in view of the general questions involved, of public convenience, proper sanitation and the prevention of danger and disease to the worshippers themselves and to the ordinary resident population, a "public purpose" and not the less so because the persons mainly interested would be the worshippers and dignitaries of the Temple. By the construction and maintenance of a dhamshala, the Corporation of Calcutta carries out a purpose of the Act within the meaning of cl. (xi) of sec. 14 of Act III, B. C., of 1893. Sec. 556 of Act III, B. C., of 1893, plainly confers upon the Corporation of Calcutta power to acquire land and buildings which are, in the opinion of the Corporation, necessary for carrying out a purpose of the Act. The exercise by the Corporation of the discretion thus expressly placed with it by secs. 14 and 556 of the Act cannot be questioned in a Civil Court.
AMULYA CHANDRA BANERJEE v. THE CORPORATION OF CALCUTTA

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CALCUTTA MUNICIPAL ACT—cont'd.

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of a Municipal requisition.] The Calcutta Municipal Corporation called upon the Plaintiffs to carry out certain improvements in their bustees and, upon their failure to comply with the requisition, instituted successive criminal prosecutions to compel execution of the works. The Corporation also undertook under sec. 409 of the Calcutta Municipal Act to carry out the improvements at the cost of the owner, as some of the tenants of the land having obstructed improvements in their portions, the owner failed to carry out fully the required improvements. It appeared that Plaintiffs had taken proceedings against the tenants under sec. 623 of the Act. **Held**—That though some of the tenants refused to afford facilities to the Plaintiffs and thus rendered it impracticable for them to carry out completely all the improvements required by the Corporation, the Plaintiffs could have carried out some at least of the improvements. It would be unreasonable to construe sec. 623 (3) in the sense that an owner, who has not complied with the requisition at all, is discharged from liability merely because the occupier of a portion of the land has rendered compliance impracticable only in part. The owner is discharged from liability only to the extent that compliance is rendered impossible by the conduct of the occupier. It cannot be said that if the General Committee of the Corporation decides to take recourse to sec. 409, the owner is forthwith absolved from the liability he has already incurred by reason of his failure to comply with the requisition under sec. 408. If the requisite improvements are carried out by the General Committee under sec. 409 the default on the part of the owner vanishes, but till the work has been completed, the default remains, entire or partial, and the liability of the owner to be prosecuted still continues in operation. **Emperor v. Nader Shah, 1 L. R. 29 Bom 35 (1904)**, distinguished. The tendency of modern decisions is that even if the Court has jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by a statute for breach of its enactments, it will not interfere as a general rule. The principle deducible from the decisions is that though the extreme position cannot be maintained that there is absolutely no jurisdiction in the Court to restrain proceedings before a Magistrate, the Court will not interfere unless in very special circumstances by way of injunction or declaration of right where the legislature has pointed out a mode of procedure before a Magistrate. A Court of Equity may in a proper case interfere by injunction to restrain an act or proceeding, criminal or quasi-criminal in form, which tends to the impairment of property rights, and proceedings for the enforcement of Municipal ordinances, such as the present one, have been treated as quasi-criminal. There is however, the well-settled rule that it is not the practice of the Court to interfere with corporate bodies, unless

s. 622 (3), owner of land, who has not complied with a Municipal requisition; if discharged from liability, merely because occupier of a portion of the land rendered compliance impracticable only in part—Sec. 408, decision of the Corporation to take action under s. 409, if operates as a waiver of the notice under—Specific Relief Act (I of 1877), s. 55 (c), jurisdiction of Court to restrain criminal proceedings for breach

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CALCUTTA MUNICIPAL ACT—concl'd.
they are manifestly abusing their powers
Mayor of York v Pilkington, [1742] 2 Atk
302. Holderstaffe v. Saunders, 6 Modern 12.
Saul v Browne, L R 10 Ch 61; 44 L J,
Ch 1. Emperor of Austria v Day, 3 DeG
F. & J 217 (253), 130 R R, 101 (121) (1861)
and Duke of Bedford v Dawson, L R 20
Eq 353 (1875), and several other cases re-
ferred to. **Quære:**—How the law in regard
to this matter has been affected by sec 56
(e) of the Specific Relief Act **THE
CORPORATION OF CALCUTTA v. BIJOY
KUMAR ADDY** 787

CALCUTTA MUNICIPAL CORPORATION.
decision of, to take action under sec 409,
if operates as a waiver of the notice under
sec. 408 of the Calcutta Municipal Act
See Calcutta Municipal Act 787

CALCUTTA RENT ACT (III of 1920, B. C.), ss.
2 (1) (a) and 15 (a)—sub-letting by the ten-
ant of a portion of the premises—rent
letting—standard rent or the portion sub-
let, how to be calculated; when a tenant
sub-lets a portion of the premises, the
standard rent of the portion so sub-let is
to be determined according to the provi-
sions of sec 15 (3) of the Act and not
under sec 2 (1) (a) of the Calcutta Rent
Act. Under sec. 15 (3) the part sub-let is
taken to have been first let when the entire
premises were let out to the tenant
W. ROBERTO v. ELIAS S. M. JACOB 569

s. 18, jurisdiction
of President of the Tribunal to revise Rent
Controller's order fixing the standard rent
under s. 2 (f) (ii)—President's jurisdiction
to revise, if limited to standard rents fixed
under s. 15 only—"Fix," meaning of; In
respect of certain premises let out "after
the first day of November 1918," the
Rent Controller, after a consideration
of the evidence, determined the standard
rent of the premises under sec 2 (f) (ii)
of the Rent Act On an application to
the President of the Tribunal under sec
18 for revision of the order, he held that
revision under sec. 18 could be made only
in cases where the Controller fixed the
standard rent under sec 15 of the Act
and that hence the present order was not
open to revision by him. **Held:**—That the
order of the Rent Controller is liable to
revision by the President of the Tribunal
under sec 18 of the Act. The Act contem-
plates fixing of the standard rent by the
Controller even in cases not coming under
sec. 15 in other words, in cases coming
under sec 2 (f) (ii). In the absence of
any definition in the Act, the word "fix"
means "to settle," "to specify" or "to
determine," and there is no sufficient rea-
son for limiting the word to the case of
settlement of the rent by the Controller,
when there is no clear indication in the
Act that the word is used in that restricted
sense. **ASHUTOSH CHATTERJEE v.
UPENDRA CHANDRA AICH** 50

s. 18, jurisdiction of
the President of the Improvement Tribunal
to revise order of the Rent Controller
where the Petitioners had contended before

CALCUTTA RENT ACT—concl'd.

the Controller that the subject-matter of
the order did not come within the defini-
tion of "premises." In a standard rent
case the landlord contended that the room
in question could not be described as "pre-
mises" within the meaning of the Calcutta
Rent Act and as such the Controller of
Rents had no jurisdiction to fix a standard
rent. The Controller fixed a standard rent
and on the landlord's application to the
President of the Improvement Tribunal for
revision of that order under sec 18 of the
Calcutta Rent Act the President held that
he had no jurisdiction in the matter inas-
much as the Petitioner himself had con-
tended that the room did not come within
the definition of "premises" in the Act.
Held:—that under sec 18 of the Calcutta
Rent Act the landlord Petitioner was en-
titled to a decision from the President of
the Tribunal as to whether or not the
Controller had jurisdiction to fix any
standard rent in the case which was
brought before him. **MESSRS DAMA-
NIA BROTHERS & CO. v. MESSRS V.
JASTON & CO** 387

CAUSE OF ACTION, splitting up of See
Civil Procedure Code ... 802

CERTIFICATE for appeal to Privy Council,
question of wide public importance, when
can be a ground for grant of See Civil
Procedure, Code, sec. 110 ... 201

CERTIFIED PURCHASER, person claiming
under, right of See Civil Procedure Code,
Or 21, r 93 ... 24

CESTUI QUE TRUST when can obtain an order
for accounts against trustee on the footing
of wilful default See Civil Procedure
Code ... 989

CHIEF JUSTICE, whether may appoint Bench
to try an issue or issues only in a suit.
See Policy of Insurance ... 955

CIVIL COURTS ACT (VII of 1887) sec 8,
Additional District Judge's power to hear
an application under sec. 153 proviso,
Bengal Tenancy Act transferred to him
by the District Judge. See Bengal Ten-
ancy Act ... 315

CIVIL PROCEDURE CODE (Act V of 1908),
s. 2 (2), Or 20, rr. 12-18—Suit for accounts

—Preliminary decrees, more than one, if
may be passed—Liability of trustee de son
tort to account from the date of assuming
Office—Cestui que trust when can obtain
an order for account against trustee on
the footing of wilful default—Death of
debtor, during pendency of appeal, if
affects claims of his personal estate for
indemnity from the trust estate; After
the passing of a preliminary decree for
accounts, the Court passed a further order
determining the period and the mode of
accounting: **Held:**—That the order was a
preliminary decree within the meaning of
sec. 2 (2) of the Civil Procedure Code and
appealable as such. **Chanaiswami v. Gan-
gadharappa, I. L. R. 39 Bom 339 (F B)
(1914), approved. Kamini Debi v. Prama-
thanath, 10 C. W. N. 755; s. c. 20 C. L.
J. 478 (1914), followed. Shup Indar
Bahadur v. Bijai Bahadur, I. R. 27 I. A.**

CIVIL PROCEDURE CODE—contd.

209: s. c I. L. R. 23 All. 152, 5 C. W. N. 52 (1900), and other cases referred to. It is not essential that an adjudication should be covered by one of the specific cases of preliminary decrees mentioned in Or 20 of the Civil Procedure Code in order that it may form the basis of a final decree. Where the son of a previous shebait assumed the office of shebait immediately on his father's death, though he did not become entitled thereto till his uncles died. **Held**—That this did not make any difference in the liability of the son. If a person, by mistake or otherwise, assumes the character of trustee when it really does not belong to him and so becomes a trustee *de son tort*, he may be called to account by the *cestui que trust* for the moneys he received under colour of the trust, such a person cannot be held to pay for his own benefit that he had no right to act as a trustee. *Lyell v. Kennedy*, 14 A. C. 437 (1889) and other cases referred to. **Held**, further—That in order to obtain an account on the footing of wilful default against a trustee, the *cestui que trust* must allege and prove at least one instance of wilful default. He must consequently prove that there is some part of the trust funds which should have been received but was not. When the *cestui que trust* has charged wilful default in his pleadings, either originally or as amended, but has not obtained a judgment on that footing the Court at any stage of the proceedings order an account to be taken on that footing, if evidence of wilful default is adduced. *Noyes v. Pollock*, 32 Ch. Div. 53, 61 (1880) and *Cooper v. Carter*, 2 De G. M. & G. 292, 95 R. R. 111 (1852), and other cases referred to. The death of the shebait during the pendency of the appeal does not affect the terms upon which his personal estate can claim an indemnity from the debutter estate. *Kumeda Charan v. Ashutosh*, 17 C. W. N. 5 (1912), referred to. *RAJA PEARY MOHON MOOKERJEE v. MANOHAR MOOKERJEE*

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sec. 10, Court if bound to stay rent suit claiming cesses, pending the decision of appeal in which the question of cesses for previous period is in issue. Two suits involving claims for certain cesses against the Petitioners were decided against them and were pending in appeal, when a rent suit was brought against the Petitioners. They thereupon applied for stay of the suit under sec. 10, C. P. C., inasmuch as it concerned cesses alleged to be due for a subsequent period. **Held**—That though for this purpose suits include appeals, sec. 10 did not apply to the present case. It was a suit for a different debt altogether and for a debt which was not in existence when the last of the previous suits was brought. Under the new Code the section does not apply unless the previous suit is before a Court which is competent to grant the relief claimed in the subsequent suit. In the suits under appeal, the Court could not possibly give judg-

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ment for cesses that fell due long after the institution of those suits. *Bepin Behary Mukherjee v. Jogendra Chandra Ghose*, 24 C. L. J. 514 (1916), followed. *CHOWDHURY, JAMINI NATH MALLIK v. MIDNAPUR ZEMINDARY CO.* .. 772

s. 20
(c)—Cause of action—Jurisdiction—Fraud—Suppression of summons—Suppression of real fact, misleading of Court by—Decree obtained in one District and executed in another—Suit to declare the decree fraudulent and to injunction restraining execution if maintainable in the latter District—Ex parte decree in Calcutta Small Cause Court—Suit in Sylhet. Where an ex parte decree obtained in the Calcutta Small Cause Court was transferred for execution to a Court at Sylhet within the jurisdiction of which the judgment-debtor resided, and thereupon the judgment-debtor brought a suit in the Court at Sylhet to have the said ex parte decree declared as fraudulent and for an injunction restraining the decree-holder from executing the decree. **Held**—That the Court at Sylhet had jurisdiction to entertain the suit, and that Court was competent to issue an injunction, and in order to grant that relief it had the power to go into the question whether the ex parte decree was obtained by fraud. *Kedar Nath Mukherjee v. Prassanna Kumar Chatterjee*, 5 C. W. N. 559 (1901), referred to. **Held** also—That upon the facts found the ex parte decree was a fraudulent one, and it was not a question of obtaining a decree by perjured evidence. *THE INDIA PROVIDENT CO. LD. v. GOVINDA CHANDRA DAS* .. 379

sec. 47
—Power of execution Court to enlarge or alter the decree by consent of parties—Sec. 47, if bars a Defendant in a fresh suit from setting up a defence which could have been made a ground of objection under the section—The section, if applies when the fresh suit is based on a different cause of action—Sec. 11, res judicata, the principle, if applies to a new suit when one of the parties to the suit was not a party to the compromise in the execution proceeding. Certain persons having sued for recovery of four pakhis of land, got a decree for three pakhis of land measured according to a certain standard rod. During execution proceedings before the Commissioner by consent of the parties, excepting one who was absent, the decree-holders were given possession of three pakhis of land measured according to a different standard rod, the result being that they got 3½ pakhis of land measured according to the standard in the decree. They were subsequently dispossessed by the judgment-debtors and brought a suit for recovery of the 3½ pakhis of land. **Held**—That sec. 47 of the Civil Procedure Code had no application as the suit was based upon a different cause of action. That it was competent to the Defendants to set up a defence based upon

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an objection which could have been taken under sec 47. **Nilkamal v Jahnabi**, I. L. R. 26 Cal 946 (1899). **Bhiram v Gopi**, I. L. R. 24 Cal 355 (1897). **Durga v Karamat**, 7 C. W. N. 607 (1903) and **Chandramoni v. Halijunessa**, 9 C. L. J 464 (1908) followed. That as one of the Defendants was not a party to the agreement in the execution proceeding, and the length of the measuring rod was not in issue in the previous case before a Court of justice and there was no adjudication on that point, the elements constituting *res judicata* were wanting and hence "the principle underlying sec. 11, C. P. C., was not applicable to these proceedings. The executing Court is not competent to enlarge, extend or modify the decree, even by consent of parties subsequent to the decree, unless it is in adjustment of the decree, and the only adjustment of decrees of which the execution Court can take cognizance is the adjustment contemplated by Or 21, r 2, C. P. C. **Kashya Lal v. The Court of Wards**, 16 W. R. 275 (1871), followed. **SURADHANI DUTTA v. SITOO SHEIKH**

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sec 47, Or. 21, rr 2 (3) and 29—Separate suit—Uncertified adjustment—Suit by judgment-debtor for declaration of satisfaction and for injunction restraining decree-holder from executing decree, if maintainable—Execution of decree, stay under Or. 21, r. 29; In an application for execution of a rent decree, the judgment-debtor set up an agreement for satisfaction of the decree, but the executing Court refused to recognise the alleged satisfaction as it was not certified to that Court. A suit was thereupon instituted by the judgment-debtor for a declaration that the rent decree had been satisfied and for a perpetual injunction restraining the decree-holder from executing the decree and also for a temporary injunction. The Court below held that such a suit was not maintainable but allowed stay of execution of the decree on taking security from the judgment-debtor under Or 21, r 29 of the C. P. C. Held—That the provisions of Or 21, r 29 of the C. P. C., are inapplicable to a case like the present. **Azizan v. Matuk Lal Sahu**, I. L. R. 21 Cal. 437 (1893) and **Dina Bandhu Nandi v. Hari-mati Dasi**, I. L. R. 31 Cal 480 s. c. M. C. W. N. 395 (1903), referred to. The language of Or. 21, r 29 of the C. P. C., is very wide and if the rule stood alone, the Court would have the power to stay execution of the decree, "as provided in the Rule. But in view of the sec 47 and Or. 21, r 2 (3) of the Code, the Court had no such power, and the order of the lower Court staying execution of the decree was set aside. **MAJOR A Y REILY v. GO-EAP KHAN**

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sec. 60 (1) (k) and Provident Funds Act (IX of 1897), sec. 4, sub-sec. (1), if exempt, "compulsory deposit" in Railway Provident

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Funds from liability to attachment. See General Provident Fund Rules

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sec. 66, if applicable where benamdar makes no claim—Or. 21, r. 72—Purchase by mortgagee without permission of Court—Void or voidable—Discretion of Court—Limitation—Defendant in possession, if barred by time from urging the illegality of the sale.) Where at a sale in execution of a mortgage decree, the mortgagee purchased benami the mortgaged property without having obtained the Court's permission to bid at the sale and thereafter allowed the mortgagees to remain in possession on certain terms and those terms not having been observed, instituted the present suit for possession. Held—That sec. 66 of the Civil Procedure Code had no application in a case where the benamdar himself did not claim under the sale-certificate. Held, also—That the purchase by the mortgagee was not void but voidable, and the Defendant who in the lower Courts treated the sale as absolutely void and did not place before the Courts material for the exercise of their discretion under Or 21, r 72, cl (3), could not in second appeal ask their written statement to be treated as an application under Or 21, r. 72. Per **Shraward, J.**—The Defendant being in possession was entitled to urge by way of defence in the suit that the Plaintiff's purchase without permission was not enforceable against him, irrespective of the question of limitation. **SARA-DINDU CHAKRAVARTI v. GOSTA BE-HARI PRAMANIK**

sec 66, operation, if retrospective See Benami transaction

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sec. 92, scheme of management of debutter property, if may be framed under. See Hindu Law

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sec. 102, second appeal in suit for compensation for removal of trees. See Provincial Small Cause Courts Act

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s. 103, Or. 41, r. 25—Second appeal—Issue not decided in the lower Court—Discretion of High Court to decide issue on evidence on record or remit same to the lower Court—Inamdar, suit by, to eject cultivating tenant—Question whether kudiwaram in former or latter, to be decided on facts of each case—Initial presumption in favour of either party, if exists—Onus, where parties have adduced evidence—Grant of inam, if conveys kudiwaram—Zemindar or Pelygar when may convey kudiwaram—Act I (Mad.) of 1868, scope of—Act whether affects rights in litigation when passed.) Under sec. 103 read with Or. 41, r. 25 of the Civil Procedure Code, the High Court, in second appeal, has power to determine an issue of fact left undetermined by the Court of first appeal on the evidence on the record, or to remit the case to the lower Court for a finding on that issue, with liberty

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to the parties to adduce additional evidence if they choose to do so. When in a dispute between the cultivating tenant and an inamdar or pattadar, the question arises whether the latter is entitled to both the *melavaram* and the *kudiwaram* or whether the former have occupancy right (*kudiwaram*) in the land, the issue must be dealt with in each case upon its own facts with special regard to the evidence and the circumstances therein. There is no suggestion in *Suryanarayana v. Pothanna*, L. R. 45 I. A 209 s c 23 C. W. N. 273 (1918) and in *Seturatnam Aiyar v. Venkatachela Goundan*, L. R. 47 I. A 76 s c I. L. R. 43 Mad 567; 25 C. W. N. 485 (1919) of an initial presumption in favour of the inamdar or pattadar on the one side or of the ryot on the other, and the inference drawn by the Full Bench of the Madras High Court in *Muthu Goundan v. Perumal Iyer*, I. L. R. 44 Mad 588 (1921) in favour of such a presumption is not correct. When the entire evidence on both sides is once before the Court, the debate as to onus is purely academical. The use of the term "inam" in a grant by a zamindar or polygar gives no indication of the intention of the donor to convey the *kudiwaram* to the grantee, even if he had the right to bestow it. *Prima facie*, a zamindar or polygar is a rent-receiver and his right to direct possession of the lands is confined to his private lands and the "old waste land." It does not extend to *raiyati* land. The question whether Act I of 1908 (Mad.) applies to rights in litigation at the time of the passing of the Act did not require decision in the case as the tenants were found to have acquired occupancy rights by prescription long before the statute came into force. *SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADITHAL v. VIKRAMA REDDI* ..

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question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit. *Banarsi Parshad v. Kashi Krishna Narain*, L. R. 28 I. A 11 s c I. L. R. 23 All 227, 5 C. W. N. 193 (1900), referred to. In a suit for rent under Madras Act I of 1908, sec 77 the Defendants being admittedly occupancy riyats having permanency of tenure and other rights attaching to that position. *Held*—That although past practice may have its weight as one of the elements which are considered in fixing under the Act what are the fair and equitable conditions of a particular puttah, it cannot derogate from the status privileges and obligations of the parties under the statute, and the riyats cannot validly maintain that payments made during the course of 20 years should form the lines and limits of their obligations for all time. *Parthasarathy Appa Row v. Cheendra Venkata Narasayya*, I. R. 37 I. A 110 s c 14 C. W. N. 938 (1910), referred to. As *muchuksas* decreed for any revenue year remain in force until the beginning of the the year for which fresh ones are exchanged or decreed, the decision in respect of one *Fasli* year cannot operate as *res judicata* in regard to a dispute as to the rent payable in a subsequent *Fasli* year. But it stands to reason and is in accordance with secs 27 and 28 of the Act that the old rent decreed shall continue until reduced or enhanced by special applications under the statute. Even in regard to penal provisions with a strict construction, it is a sound general principle that no construction is open to a Court of Law which is in violation of what that Court considers to be the true meaning of the provisions. *RADHA KRISHNA AIYAR v. SUNDARASWAMIER*

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ss. 109, 110—
Appealable value—Determination as to value by Court granting or refusing leave, if conclusive—Amount sued for, not sole criterion—*Madras Estates Land Act* (I of 1908, Mad.), s 77, suit under—Decree for one year, if *res judicata* in suits for subsequent years—Proper use of such Decree—*Ss. 27, 28*—Past practice, reference to, for what purposes justified—Past practice, if derogates from statutory rights and obligations—Penal provision, construction of—Strict construction, if justifies departure from true construction.] Since the repeal of the Order of Council of 10th April 1838 by a subsequent Order in Council, dated 9th February 1920, the value of the subject-matter of an appeal to His Majesty in Council is not concluded by the certificate of the Court admitting the appeal. Nevertheless, the Judicial Committee will always naturally and very greatly defer, on a subject of this nature, to the certificate given by the High Court. The sum of money actually at stake may not represent the true value. The proceeding may, in many cases such as a suit for an instalment of rent or under a contract, raise the entire

, s. 110, pecuniary test, if satisfied when the decree indirectly affects title to property of the statutory value but which was not the subject-matter of the suit or the appeal—*S. 109 (e)* question of wide public importance, when can be a ground for granting certificate under] In certain applications for leave to appeal to the Privy Council, the subject-matter of the appeals, when taken together did not amount to ten thousand rupees, but the Appellants urged that the decree would indirectly affect a large number of other resumed lands which were not the subject-matter of the present suit but whose value would be over ten thousand rupees, and further that the decision involved a question of wide public importance affecting many zamindars in Bengal benefitting by the resumption of *chakran* lands. *Held*—That on the present applications it was not possible to hold that the decree involved directly or indirectly a claim or question respecting property of the statutory value, because in order to do that, it would be necessary to investigate the terms and conditions of leases in respect of lands which were not included in

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these suits. Further, before it could be held that the decision involved a question of wide public importance, there should be some evidence that the rights of zemindars and putnidars in Bengal in respect of similar lands are, generally speaking, Defendant upon the same facts as appeared in the present suits and that the terms of the leases regulating such rights were similar to the terms of the pattas in these suits. **BIHUPENDRA NARAYAN SINGH v. NURPUT SINGH**

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s. 144—Execution sale set aside after purchase money applied to satisfy attaching creditors—judgment-debtor, if may recover without making good purchase money—judgment-debtor, it bound to make good moneys paid by auction-purchaser to incumbrancers—Voluntary and compulsory payments, difference between—Equity—Subrogation; it is the duty of the Court under sec. 144 of the Civil Procedure Code to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed. But apart from that action it is inherent in the general jurisdiction of the Court to act rightly and fairly, according to the circumstances, towards all parties involved, and one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the primary Court or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. **Rogers v. The Comptoir d'Escompte de Paris**, L. R. 3 P. C. 465 at p. 475 (1871), referred to. An execution sale of certain properties was set aside, but before that event the purchase money was distributed amongst creditors of the judgment-debtor who had attached the property and the auction-purchaser had also discharged two mortgage bonds to which according to the sale certificate granted to the purchaser the property was subject. Held—That it would be inequitable and contrary to justice that the judgment debtor should be restored to the property without making good to the auction-purchaser the moneys which had been applied for his benefit to satisfy the attaching creditors but the payment to the mortgagee which was an optional payment, made without any order of the Court, stood on a different footing and the making good of this payment could not be made a condition of restoration to the judgment-debtor. **Semble**—The payment to the mortgagee entitled the auction-purchaser to stand in the shoes of the mortgagee as holder of the mortgage bonds. **JAI BARHAM v. KEDAR NATH MARWARI**

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s. 148 Judge enlarging time for payment of deficit court-fee ordered to be paid by decree passed by

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his predecessor-in-office, legacy of. In decreeing a suit by a judgment, dated 20th February 1918, the Judge made the decree dependent upon Plaintiffs paying within one month from the date of the order a further court-fee of Rs. 65, and signed the decree on the 26th February 1918. The Plaintiffs did not carry out the order within the time limited by the order. On an application dated 5th July 1920, after the Judge who passed the decree had been transferred, his successor permitted the Plaintiffs to deposit the further court-fee of Rs. 65 as mentioned in the aforesaid judgment and decree. Held—That assuming, though not deciding that no appeal lay, the circumstances of the case demanded that the appeal should be treated as a petition under sec. 115 of the C. P. Code, the order made being without jurisdiction. That the decree which was drawn up on the 26th February 1918 was in itself a final decree and, the default provisions mentioned in the judgment of the 20th February 1918 having been incorporated in it, it was a self-contained decree. Therefore, subject to such rights of amendment as for instance the rectification of a clerical error and so forth, it could not be modified by the Court which passed the decree. **NAWAB KHAFEH HABIBULLA v. SRIMATI GOTA ASMATA KHATUN**

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(Act XIV of 1882), s. 278 order under, bar to suit after, it has become final, even though wrong. Certain properties were mortgaged to L. by a deed of 10th January 1882. On 21st March 1885 the properties were again mortgaged to L. by a deed which expressly provided that the mortgage of 10th January 1882 should continue. L. sued on both mortgages and got a decree under sec. 88 of the Transfer of Property Act for sale of the mortgaged properties on 12th January 1886 and had the properties attached on 20th May 1886. Meanwhile one K. had obtained a money decree against the mortgagor on 2nd April 1884 and having attached the properties on 27th June 1884 in execution thereof had the properties sold and purchased them on 16th August 1884. On 8th September 1886, K. objected to the attachment by L. under sec. 278 of the Civil Procedure Code. On 14th September 1886, the Court passed order exempting the properties purchased by K. from L's attachment. L. did not appeal against the order. On 10th January 1912 the Plaintiffs, who meanwhile had purchased L's decree executed it and purposed to purchase the properties in execution thereof in proceedings to which K. or his representatives were not parties, sued to recover from the latter possession of the properties on the strength of such purchase. Held—That it was unnecessary to enquire whether the order of 14th September 1886 was right or wrong. Not having been appealed from the order became final and binding upon L. and upon those who claimed title under L. **SARITH PRASAD MISSIR v. MAKSUDAN CHOUDHURY**

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s. 294—Leave to bid refused to decree-holder—Purchase by decree-holder in benami of another, if a nullity—Sale voidable—Questions which arise upon proceeding to set aside sale—Limitation—Limitation Act (IX of 1908), Art. 12.] A purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. The fact that the decree-holder had actually applied for permission and had been refused would make no difference. The question upon an application to set aside such purchase is not whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside; if it had, then it did not matter that the decree-holder bought without permission or that he had applied and been refused. The sale being voidable only and not void, Art 12 of the Limitation Act applies and the suit must be brought within one year. **RAI RADHA KRISHNA v. BISHESHAR SAHAY**

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secs. 312, 313, 314, 315—Civil Procedure Code (Act V of 1908), Or. 21, rr. 91 and 93—Auction-purchaser's right to refund of purchase-money if the sale is set aside on the ground that judgment-debtor had no saleable interest, to be enforced, if by suit or application under the Code—Right to bring a suit for refund, accrued under the Code of 1882, if extinguished by the promulgation of the Code of 1908.] The Plaintiff purchased certain immoveable property at a sale held in execution of a mortgage decree. The sale was confirmed and the sale-certificate granted on the 11th of December 1908. Being unable to obtain possession, the Plaintiff instituted the present suit, on the 16th April 1917, against several persons, among others, the mortgagees who had received the purchase-money, for recovery of possession and in the alternative, for recovery of the purchase-money. The claim for possession being negatived the question arose whether the Plaintiff was competent to maintain the suit for the recovery of the purchase-money or whether the only remedy left to him was an application under Or. 21, r. 93 read with r. 91 of the Civil Procedure Code of 1908. **Held**—That under the provisions of the Civil Procedure Code of 1882, the Plaintiff, on the 11th of December 1908, acquired a right to obtain a refund of the purchase-money either by application or by suit within the period prescribed by law in one contingency, namely, if it should be discovered that the judgment-debtor had no saleable interest at all in the property sold, and that this right could not be deemed to have been extinguished by the promulgation of the Code of 1908 which came into operation on the first day of January 1909; and that accordingly the Plaintiff was competent to

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maintain the present suit for the recovery of his purchase-money. **Munna Singh v. Gajadhar Singh**, 1. L. R. 5 All 577 (F. B.) (1905), followed. **Colonial Sugar Refining Co. v. Irving**, [1905] App. Cas. 369 referred to. **MAKAR ALI v. SARFADDIN**

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(Act V of 1908), Or. 1, r. 3—Joinder of parties—Parties, if can be joined as Defendants in one suit when cause of action against one of them was outside jurisdiction.] Where X had distinct and separate causes of action against A and B and the cause of action against A arose within, and that against B outside the jurisdiction of the Court, and X brought a suit against A and B claiming relief against both. **Held**—That the joinder of A and B as Defendants in one suit in the circumstances stated is not contemplated by Or. 1, r. 3 of the Civil Procedure Code and that the cause of action against B having arisen outside jurisdiction, the Court was not competent to try the suit as against him on the ground that it was competent to try the suit as against A. **Per Woodroffe, J.**—Or. 1, r. 3 is a provision which relates to joinder of parties, and it assumes the existence of a suit in a proper forum, the Court having jurisdiction to try the suit. If the Court has such jurisdiction, then Or. 1, r. 3 may come into play. **Per Richardson, J.**—Rules defining the jurisdiction of the Court must be distinguished from rules regulating the procedure of the Court in respect of causes of action within jurisdiction. Argument from convenience might be of assistance if the relevant statutory provision is of doubtful or ambiguous import but not where no such doubt or ambiguity exists. **THE BENGAL & NORTH-WESTERN RY CO. LTD. v. SADARAM BIFATRODAN**

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Or. 11, r. 2—Possession, decree for—Symbolical possession, delivery of, though judgment-debtor in actual possession—Suit for recovery of mesne profits up to delivery of symbolical possession—Omission to claim mesne profits accrued before suit, but after delivery of possession, if bars fresh suit for same—Test—Identity of cause of action.] Plaintiffs, in execution of a decree obtained symbolical possession through Court and instituted a suit for recovery of mesne profits from the date of the institution of the suit to the date of delivery of possession. After this suit was decreed, Plaintiffs instituted another suit for recovery of mesne profits for the period subsequent to the date of delivery of symbolical possession. **Held**—That the claim for mesne profits for the period subsequent to the delivery of symbolical possession up to the institution of the previous suit was not barred by Or. 2 r. 2 of the Civil Procedure Code. The test to be applied was whether the claim in the subsequent suit was based on the cause of action which was the foundation of the claim in the previous suit. The claims for mesne profits prior and subsequent to the delivery

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of possession could not be deemed to be based on an identical cause of action, because the delivery of symbolical possession was the line of demarcation between possession antecedent and possession subsequent, whereby the adverse possession of the judgment-debtor was interrupted, this being the case, even where the decree-holder was entitled to actual possession. **Thakur Sri Sri Radhakrishna Chanderji v. Ram Bahadur**, 22 C W N 330 (1917), **Juggobandhu Mukerjee v. Ram Chandra Bysack**, 1 L R. 5 Cal 584 (F. B.) (1880) and other cases referred to **Mahammad Hafiz v. Mahammad Zakoria**, 1 L R 49 I A. 9. s. c. 26 C W N 297 (1921), distinguished. **KULADA PRASAD CHATTERJEE v. KHUDIRAM MISRA** . . . 673

Or. 2, r. 2—Mortgage, stipulation in mortgage that on failure to pay interest, mortgagee may sue for both principal and interest—Suit to realise interest only by sale of property, decreed personally—Suit for principal, if lies—Cause of action, splitting up. Where a mortgage provides for an independent obligation to pay the principal and the interest, suit to obtain a personal judgment in respect of the interest alone will not, under Or. 2, r. 2 of the Civil Procedure Code bar a subsequent suit for the payment of the principal, as in such a case the cause of action would be distinct. But where under the terms of the mortgage, non-payment of the interest causes the principal money also to become due, the same cause of action, namely, non-payment of the interest, gives rise to two forms of relief, viz., for principal and interest, which cannot be split up under the Code. Where therefore, according to a stipulation in the mortgage, both principal and interest became payable upon default by the mortgagor to pay interest, and the mortgagee sued to realise the interest alone by sale of the mortgaged property. **Held**—That though in that suit only a personal decree was passed in the mortgagee's favour, a second suit to realise the principal money by sale of the mortgaged property was barred by Or. 2, r. 2, Civil Procedure Code. **Muhammad Hafiz v. Muhammad Zakariya**, L. R. 49 I A 9 s. c. 26 C W N 297 (1921), referred to. **KISHAN NARAIN v. PALA MAJ.** . . . 802*

Or. 7, r. 11—Plaint insufficiently stamped—Court's duty—Court Fees Act (VII of 1870), s. 7, cl. 5, sub-cl. (a)—Cl. 4, sub-cl. (c)—Declaratory decrees with consequential relief, what is. Where the Plaintiffs brought a suit for possession of revenue-paying lands against the Defendants alleging that after the dismissal of an appeal to High Court preferred by them from a mortgage decree relating to those properties obtained by some of the Defendants there was an adjustment of the decree and in contravention thereof it was fraudulently executed and the properties were purchased by the decree-holders in the name of another person, and it was sought by the Plain-

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tiffs "to have a two-fold declaration, namely, first, that their title to the mortgaged properties had not been affected by the execution proceedings and, secondly, that a supplemental personal decree subsequently passed could not have been validly made against them. **Held**—That the suit was not one to set aside a decree or to obtain a declaratory decree with consequential relief under sec. 7 cl. 4, sub-cl. (c) of the Court Fees Act, but was one for possession under cl. 5, sub-cl. (a); the declaration prayed for that a personal decree could not have been made against them would be consequential on the success of their substantial claim in the suit, as the personal decree could be made only if there had been a valid and operative sale which had led to a partial satisfaction of the amount due under the mortgage-decree. **Held further**—That when a plaint is insufficiently stamped, the Court is bound to give the Plaintiff time to make good the deficiency. The provisions of Or. 7, r. 11, C P C are mandatory and can be brought into operation at any stage of the suit. The fact that the objection is heard at a time subsequent to the registration of the suit is immaterial. **RADHA KANTO SAHA v. DEBENDRA NARAIN SAHA** . . . 566

Or. 12, r. 6—Judgment on admission, if the Plaintiff can have judgment when the Defendant pleads that the action is premature—Object of Or. 12, r. 6—Judgment if can be claimed as of right. A suit was instituted by the Plaintiff Company against Saleji & Co. as principal and against Galstaun as surety. The Defendant Galstaun in his written statement took the plea that the conduct of the Plaintiff had been such as to absolve him from liability under the guarantee and that the suit was premature. Subsequently Galstaun, in course of his deposition before the Registrar in Insolvency in a certain proceeding, in answer to the question "Up to now you have had nothing to pay as guarantor?" said, "But I shall have to pay." Thereupon an application was made for judgment on admission. Mr. Justice Greaves allowed the application. On appeal it was held that the statement in the deposition of Galstaun could not be construed to imply that he had abandoned his defences in their entirety and that judgment on admission should not have been pronounced. In order to entitle the Plaintiff to have judgment on admission there must be a clear admission that the money is due and recoverable in the action in which the admission is made. **Koramall v. Mongilal**, 23 C W N 1017 (1919), approved. **Landergan v. Feast**, 34 W. R. (Eng.) 691; 53 L. T. 42, referred to. The admission also must be clear and unequivocal. **Hughes v. London, Edinburgh and Glasgow Assurance Co. Ltd.**, [1891] 8 T. L. R. 81, referred to. Object of the rule as explained in **Ellis v. Allen**, [1914] 1 Ch. D. 904, approved. A judgment on admission cannot be claimed as a matter of right. **Pross-**

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suk Das v. Udairam, 1 L. R. 45 Cal. 138
 s. c. 22 C. W. N. 204 (1917), *Mellor v. Sidebottom*, L. R. 5 Ch. D. 342 (1877), *In re Wright, Kirke v. North*, [1895] 2 Ch. D. 747 and *Gilbert v. Smith* L. R. 2 Ch. D. 689 (1876), referred to *J. B. GALSTAU v. E. D. SASSOON & CO., LTD.* .. 783

—, Or. 21, r. 89,
 sale by the Registrar under order of High Court following a decree passed on an award of arbitrators appointed by Court, if a sale in execution of a decree and may be set aside under See Suit for partition 466

—, Or. 21, r. 95—Auction-purchaser, entitled to actual possession, given symbolical possession on only of immovable property—Effect—Limitation, fresh start to—Person claiming under certified purchaser, right of. Where under Or. 21, r. 95 of the Civil Procedure Code actual possession should have been given, delivery of symbolical possession operates nevertheless as a complete transfer of possession as against the judgment-debtor so as to give a fresh start of limitation to the person to whom such possession is given. This principle can be availed of by a person claiming under the certified purchaser. *Jugobundhu Mookerjee v. Ram Ch. Bysakh*, 1 L. R. 5 Cal. 584 (F. B.) (1880) and *Jogobundhu Mitter v. Purnananda Gossami*, 1 L. R. 16 Cal. 530 (F. B.) (1889), referred to. *Umbicka Churn Goopla v. Madhab Ghoshal*, 1 L. R. 4 Cal. 870 (1879), *Shyama Charan Chatterji v. Madhab Ch. Mukherji*, 1 L. R. 11 Cal. 93 (1884) and *Harimohon Shaha v. Baburahi*, 1 L. R. 24 Cal. 715 (1897), followed. *Pearce Mohun Poddar v. Jugobundhu Sen*, 24 W. R. 418 (1875) and *Mohadev Sakharain Parkar v. Janu Namji Hatle*, 1 L. R. 36 Bom. 373 (F. B.) (1912), disented from. *BHULU BING v. JATINDRA NATH SEN* 24

—, Or. 22, r. 10 and sec. 47—Lessee under Defendant in a successful suit for possession, if may be added as a party after mesne profits finally assessed—Case, if one of devolution of interest—Question if may be raised in execution proceedings. Plaintiff's suit to recover possession of certain villages with mesne profits against R. was dismissed by the trial Court but decreed preliminarily on appeal. Between the dates of the two decrees R. granted a lease of a term of years of the right of mining for mica and otherwise exploiting the jungle to M. who subsequently to the Appellate decree surrendered his lease. In pursuance of that decree, to which M. was no party, mesne profits were assessed and finally decreed against R., and no appeal was preferred against that decree. Meanwhile Plaintiff had applied under Or. XXII, r. 10 of the Civil Procedure Code to make M. a party in the proceedings so as to have the mesne profits ascertained in his presence and thereby avoid future objections by M. M. inter alia disputed the Plaintiff's title to the minerals which

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he averred belonged to the superior landlord, the zemindar. The application was refused by the trial Court but granted on appeal by the High Court long after the decree passed against R. Held, reversing the High Court—That the liability, if any, of M. to pay damages for removal of the mica was not a liability which devolved to him from R., they both being liable, if liable at all, as trespassers. That there being no assignment, creation or devolution of any interest within the meaning of Or. XXII, r. 10, C. P. C., that rule did not apply. That the questions which arose between Plaintiff and M. could not be raised in execution proceedings under sec. 47 of the Code. What should in reality form the basis of an independent suit against a separate party for some act done by himself cannot be introduced as a question to be tried in execution proceedings in another suit. *Prosunno Coomar Sanyal v. Kali Das Sanyal*, 1 L. R. 19 I. A. 166, s. c. 1 L. R. 19 Cal. 683 (1892), referred to. *MAHARAJA SIR MANINDRA CHANDRA NANDI v. RAM KUMAR LAL BHAGAT* 29

—, Or. 22, r. 10, conversion of application for substitution of heirs into one for adding Respondents on the ground of devolution of interest. —Such application, if can be made during appeal—Partition suit—Failure to substitute heirs of deceased Defendants, owing to ignorance—Omitted heirs made parties in appeal—Suit, if should be dismissed. In an appeal from a final decree in a suit for partition one of the Respondents, whose share in the property had been sold and which share had been subsequently re-acquired by his heirs, having died, the Appellant applied for substitution of his heirs out of time. Held—That on the death of the said Respondent, his interest was not in his heirs, but having devolved on a third party, who was made a party before the appeal came on for hearing, Or. 22, r. 10 of the Civil Procedure Code applied. The three months' limitation does not apply to a case of assignment or devolution of interest pending the suit. An application under Or. 22, r. 10 can be made in the Appellate Court, even though the devolution of interest occurred when the case was pending in the trial Court. When, in a partition suit, all the heirs of certain deceased Defendants were made parties to the appeal and all persons interested in the property were before the Court though the deaths occurred and the heirs of the deceased Defendants were not substituted while the suit was pending in the Court below. Held—That inasmuch as it appeared that the Plaintiff was not aware of the deaths of the Defendants in the Original Court, the suit should not be dismissed at that stage on the ground that the heirs were not substituted in the original Court. *RAJANI KANTA ROY v. RAJA JYOTI PRASAD SINGH DEO* 710

—, Or. 22, r. 10
 —Settlement of suit—Terms of settlement

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filed in Court, but no decree drawn up, whether suit is pending and whether purchaser of Plaintiff's interest in suit may be substituted as Plaintiff. Where in a suit, terms of settlement between the parties had been filed in Court, but no decree was drawn up in accordance therewith and a stranger to the suit who had bought the interest of the Plaintiff before the terms of settlement were filed in Court applied to be substituted as the Plaintiff in the suit. Held—That as the decree had not been drawn up the suit was pending at the time the application was made. *Jotindra Mohan Tagore v Bejoy Chand Mahatab*, 1 L R 32 Cal 483 (1904) and *Madaneswar Singh v. Mohamaya Prosad Singh*, 13 C. L. J 487 (1911), referred to. *Script Phonography Co. v. Gregg*, 59 L J Ch. 406 (1890). *King v Davenport*, 4 Q B D 402 (1879) and *Metcalfe v British Tea Association*, 46 L T. Rep 31 (1881), distinguished. Held also—That an applicant who invokes the aid of r 10, Or 22, C. P. C., is not entitled as a matter of right to an order in his favour, regardless of delay or laches and the Court has undoubtedly a discretion in the matter which must be judicially exercised. *Veeraraghava Reddi v Subba Reddi*, 1 L R 43 Mad 37 (1919) and *Afzal Begum v Akbari Khanu*, 1 L R 37 All 326 (1915) referred to. Held, on the facts of the case—That to avoid multiplicity of litigation the purchaser should be substituted as the Plaintiff in the suit so that the bona fides of the settlement made be investigated. *CHUNDER DEY v. SM NIKUNJAMONI DASST* ..

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Or 34, r 14, sale in contravention of, if a nullity. See *Transfer of Property Act*, sec 99

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Or. 41, rr. 11, 31—Judgment of lower Appellate Court dismissing appeal summarily, what it should contain. The dismissal of an appeal under Or. 41, r. 11 of the Civil Procedure Code, by a Court whose decision may be subject of an appeal does not relieve the Appellate Court from the necessity of writing a judgment which, however, need not be a long one. But the judgment, whatever it be, should show the points raised, the decision upon those points and the reasons for the decision. *Rani Deka v. Braja Nath Saikia*, 1 L R 25 Cal 97 (1897). *Rakhai Chunder Tewari v. Satindra Deb Rai*, 5 C L J 348 (1906) and *Pachi Dassi v Bala Das*, 13 C. W. N 1031 (1909) referred to. *SURENDRA NATH SOME v. RAGHUNATH DUTT* ..

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Or. XLI, r. 11 and Or. XLVII, r. 1—Review—Second appeal, dismissed at the preliminary hearing—Discovery of new material, if ground for review. The High Court has no authority to review an order dismissing a second appeal under Or. 41, r 11, on the ground of alleged discovery of new and important evidence subsequent to the pass-

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ing of the order. *Rajani Kanta Das v. Kali Prosonna Mukherjee*, 1 L R. 41 Cal. 809 (1914), *Bhyrub Nath v. Kally Chunder*, 16 W. R. 112 (1871) and *Panchanan Mukerjee v Radha Nath Mukerjee*, 4 B. L. R. (A C J) 312 (1870), followed. *SM SAILA BALA DEI v. GADAUHAR HAZRA* ..

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Sch. II, cl. 3—Order of reference to arbitration made by Court, whether power may be given to arbitrators to extend time—Court's jurisdiction to supersede arbitration proceedings—"The Court . . . shall fix such time as it thinks reasonable for making of the award"—Provision, if mandatory—Misconduct of arbitrator, time for urging, after award. Matters in difference in a suit were by a consent order, referred to two arbitrators under the provisions of the Second Schedule to the Civil Procedure Code. The order provided, inter alia, that the arbitrators should make their award within six months from the date on which an office-copy of the said order should be served on them or within such further time as they might allow themselves by endorsement on the said office-copy. The arbitrators, from time to time, enlarged the time for making their award under the said order. After a considerable number of sittings had been held extending over a period of two years the Plaintiff applied that the reference should be recalled or superseded and the suit proceeded with. Held, re-alling the reference—That the provision in cl 3 of Sch II of the Civil Procedure Code, viz., "the Court shall . . . fix such time as it thinks reasonable for the making of the award," is mandatory, an order which allows the arbitrators to enlarge the time, in the manner aforesaid for making their award is not a compliance with it, and, if by such an order an unlimited authority to extend the time was meant to be given to the arbitrators, it was bad and of no effect. *Co-Operative Hindusthan Bank v Bhola Nath Borooah*, 19 C W N 165 (1914) dissented from. *Raja Har Narain Singh v Chaudhrai Bhagwant Kuar*, 1 L R 13 All 300 (P. C.) (1891) and *Lachmandas v Abparkash*, 1 L R 30 All 169 (1908), referred to. *Chattarbhuj v Raghubar Dayal*, 1 L R 36 All 854 (1914), adopted. Held also—That the Plaintiff by consenting to the order of reference was not estopped from making the application. *Patto Kumari v Upendra Nath Ghose*, 4 P L J 263 (1919), distinguished. Under Sch II of the Civil Procedure Code, the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed. *ROBINDR A DEB MANNA v. JOGENDRA DEB MANNA* ..

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CLAIM under Or. 21, r. 58, C. P. C., against attachment of holding in execution of a decree in form a rent-decree, if entertainable. See *Bengal Tenancy Act* ..

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COLLECTOR'S power to proceed with valuation, in spite of agreement as to price of

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COLLECTOR'S POWER—concl'd. land acquired on behalf of Municipality. See Compulsory acquisition, etc. ...	418	COMPROMISE—concl'd. • Mere expressions of opinion, no bar to Judge passing a different order finally. Although the Court can and must approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of their next friend or guardian ad litem. <i>Re: Birchall. Wilson v. Birchall</i> , 16 Ch D 41 (1880), followed. Until a final order is definitely passed in any matter, the Judge is free to change an opinion previously expressed by him. <i>HEMANGINI DASI v. BHAGWATI SUNDARI DASI</i>	792
COMMISSIONER PLEADER, taking from a party a mortgage bond in discharge of an untaxed bill of fees, etc.—Bond, if legal and can be sued upon—Duties of a Commissioner—Liability of party at whose instance appointment made to indemnify Commissioner.) A pleader Commissioner took a mortgage bond from a party, at whose instance he had been appointed, by which the said party promised to pay a certain sum as his fees, etc., and the Commissioner sued upon that bond. <i>Held</i> —That the taking of the mortgage bond by the Commissioner was a breach of duty towards the parties and to the Court and it could not be sued upon as being an illegal contract. The duties of a Commissioner are inconsistent with approaching an individual party and getting him to pay sums of money in discharge of an untaxed bill of costs. It is an improper advantage obtained by an officer of Court by abuse of his position as such officer. <i>Gopalaratanamayyar v. Bupalanarasimma Nayadu</i> , 1 L R 4 Mad 399 (1882), distinguished. There should be no doubt cast on the broad rule that a Commissioner appointed by a Court must keep himself clear of any ambiguous conduct towards any party in the matter of his fees. The work done by the Commissioner is not work done for the party but work done for the Court. His right to sue the party at whose instance he was appointed does not arise out of a contract of employment with that party, but upon a different principle, namely that where one party does work or incurs an obligation at the instance of another, there is, in certain circumstances, an implied provision of indemnity. <i>PPAMATHA NATH SEN GUPTA v. SHEIKH ABDUL AZIZ MIAH</i>	430	COMPULSORY acquisition of land on behalf of Municipality—Starting of proceedings, if precludes parties agreeing as to price.—Court's power to enforce agreement—Power of Collector to proceed with valuation, inspite of, agreement After proceedings for compulsory acquisition of land have been set on foot, the parties to the proceedings remain as competent as before to come to a binding agreement regulating the amount of the purchase price, and an agreement so made is capable of being enforced in the Courts in the ordinary way. <i>Semble</i> :—The power of the Collector to determine what in his view the price should be, after he had evidence of a complete contract on the point, remains, notwithstanding such agreement. <i>THE PORT PRESS CO. LD v. THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY</i>	418
COMMON MANAGER, it can be appointed to a portion of an estate or tenure See Bengal Tenancy Act	1040	"COMPULSORY DEPOSITS" significance of See General Provident Fund Rules	472
COMPROMISE by limited (Hindu) owner, when valid See Hindu Law	263	CONSTRUCTION of even penal provisions with a strict construction, if justifies departure from true construction See Civil Procedure Code, sees 109, 110	1
Decree in mortgage suit—Decree, it may be executed without obtaining a decree absolute—Intention of parties—Waiver of privilege by mortgagor.) The mortgagor Defendant can waive the advantage of the rule of law requiring a preliminary decree to be made final before execution can be levied. Where upon an appeal from a preliminary mortgage decree, the parties compromised and a decree for a smaller amount carrying a reduced rate of interest and payable in two years was made. <i>Held</i> , on a construction of the decree—That the parties intended that the mortgagee would be competent to realise the amount by sale of the property immediately on the expiry of the two years. <i>RAJA HEMENDRALAL SINGH DEO v. FAKIR CHAND DUTT</i>	621	of statute See Letters Patent, cl 12	
not consented to by guardian ad litem, if may be approved by Court—		of Will, on which an order in an administration suit is based, if <i>res judicata</i> . See Hindu Law	174
		approved in English cases, if applicable to Will in English language by a Parsi—Exclusion of widow of son in case son died childless, if limited to son predeceasing the testator See Will in English language by a Parsi	199
		of documents upon consideration of all the terms of the instruments See Bengal Tenancy Act	328
		of lease—"Miras-hortto" in tenancy, if imports permanency and heritability—Grant of right to plant trees and erect brick-built buildings, how far determines the nature of the tenancy—"Selling building," if imports selling building with the land } Where a lease granted right to plant and grow trees on the land, to erect brick-built buildings and "acquiring miras-hortto" to continue to make residence, and further gave the tenant the right to sell the buildings on payment of a fourth of the price to the lessor. <i>Held</i> —That by the use of the words "growing miras right," it was intended that the tenancy should be heritable to be enjoyed by the grantee from generation	

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to generation. The word <i>miras</i> means inheritance or heritability. The right to plant and grow trees and erect buildings coupled with the acquisition of the <i>miras</i> right should point to one conclusion only, namely, that the lease was intended to be permanent and heritable. By "selling building" it is ordinarily understood selling building with the land on which it would be standing and not selling building materials, and the stipulation that a fourth of the price on such sale should be paid to the landlord is not inconsistent with the permanent nature of the tenancy. Nema Chandra Bose v. Mahommed Basir , 9 C L J 475 (1907), referred to AYI-MANNESSA BIBI v. PANNALAL SILL 1037		Sch. II of the Court Fees Act and hence liable to a fee of two rupees. HARIDAS DEBI v. GOPESHWAR PYNE 646	
CONTRACT, if part may be enforced. See Specific Relief Act 693		as amended by Bengal Act (IV of 1922), Sch. II, Art. 17 (iii)—Suit for a declaratory decree where no consequential relief is prayed, but should have been prayed for—Suit dismissed under Specific Relief Act (I of 1877), s. 42—Appeal—Proper court-fee on memorandum of appeal. A suit for a declaratory decree was dismissed on the ground that the Plaintiff might and ought to have prayed, but did not pray, for consequential relief. The Plaintiff stamped his memorandum of appeal against this decision with the fixed fee provided by Art. 17 (iii) of Sch. II of the Court Fees Act. Held—That in determining the amount of court-fee payable, the Court is not to consider whether the suit is properly framed, whether the Plaintiff is entitled to the declaration asked for or what would be the effect if the Plaintiff succeeds in obtaining a declaration as prayed for. The Court has only to see whether it is a memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed, and if it is such a suit, the fixed fee of Rs. 20 is sufficient under the provisions of Sch. II Art. 17 (iii) of the Court Fees Act. Deokali Koer v. Kedar Nath , 1 L. R. 39 (Calcutta) (1912), referred to. IDOL SRI SRI GOKUL NATH JIU v. THE NEW BIRBHUM COAL CO., LD. 972	
ACT (IX of 1872), sec. 65, agreement void from inception, if within section. See Oudh Estates Act 949		COURT FEES at the enhanced rate prescribed by the Bengal Court Fees Amendment Act (IV of 1922) is to be paid for grant of letters of administration in respect of assets outside Bengal as well. See Bengal Court Fees Amendment Act 812	
CONVEYANCE of property by guardian as his own, what passes by. See Permanent lease 1029		COURT FEES, payable on a memorandum of appeal in a suit for a declaratory decree where no consequential relief is prayed, but should have been prayed for. See Court Fees Act 972	
CO-SHARER'S possession if and when may be adverse. See Suit for possession, etc. 621		COURT if bound to stay rent suit claiming cesses pending decision of appeal in which the question for cesses for the previous period is in issue. See Civil Procedure Code sec. 10 772	
COURT FEES ACT (VII of 1870), s. 7, cl. iv (a)—Suit for declaration of right, administration of estate and appointment of Receiver, whether one for declaration where consequential relief prayed— <i>It ad valore</i> court-fee payable—Value of reliefs sought whether same as market value of property where possession not prayed for. In a suit the Plaintiff prayed <i>inter alia</i> for declaration of his right, administration of the estate and for the appointment of a Receiver. Held—That the suit was one for declaration where consequential relief was prayed for and <i>ad valore</i> court-fee was payable under sec. 7, cl. iv (c) of the Court Fees Act. Held, further—That the market value of the property cannot be taken to be the value of the reliefs sought where the Plaintiff did not seek possession of the property. Held also—That the valuation of the relief sought in cases coming under sec. 7, cl. iv rests with the Plaintiff and not with the Court. RUP CHAND GHOSE v. SM KSHIRODAMAYI DAS 157		if can review order passed by the Registrar in Insolvency. See Presidency Towns Insolvency Act 916	
sec. 7, cl. 5, sub-cl. (a), cl. 4, sub-cl. (c), declaratory decree with consequential relief what is. See Civil Procedure Code, Or. 7, r. 11 566		COURTS jurisdiction to supersede or recall arbitration reference. See Civil Procedure Code Sch. II cl. 3 420	
s. 19 (xx) or Art. 1, Sch. II, which of them applies to an application to High Court for refund of money deposited for costs of preparation of paper-book of the Privy Council appeal. An application to the High Court for refund of money deposited in Court towards costs of preparation of paper-book of a Privy Council appeal is not an application for payment of money due by Government to the applicant within the meaning of sec. 19, cl. (xx) of the Court Fees Act and is hence not exempt from payment of court-fees. It is an application or petition which was presented to the High Court and consequently it comes within the provisions of Art. 1,		jurisdiction to vacate an order. See Presidency Towns Insolvency Act 908	
		CREATION of a fresh putni co-ordinate with a putni already in existence, if gives the new putnidar any legal right over the previous putnidar. See Putni Regulation 189	
		CREDITIBILITY of witnesses, matter for trial Court. See Will 797	
		CROWN GRANTS ACT (XV of 1893), sec. 3—family custom, proof of antecedent to sanad if admissible. See Oudh Estates Act sec. 23 129	
		DEALINGS with equity of redemption by mortgagor after sale thereof, admissibility in evidence. See Secondary Evidence 9	

- DEBUTTER**, conversion of into secular property consent of entire family interested in the sheba if necessary See Hindu Law 218
- , description by owner as, effect of See Hindu Law 1033
- DECREE** in one's favour, declaring him entitled to succeed after widow's death, if confers vested interest in estate See Hindu Estates Act 949
- DEDICATION** if absolute, where property dedicated to a single debata, though sheba of other debatas prescribed See Hindu Law 218
- or alienation of a small fraction of the estate by a Hindu female for continuous benefit of the soul of deceased owner, validity of See Hindu Law 653
- , proof from user, though word wakf not used See khankahs 701
- DEED OF SALE**, if may be nullified by simple surrender See Secondary Evidence 8
- DHARMAKARTHA**, position of, distinguished from shebait or mohant See Trust Property 317
- DISCRETION** given to Municipality by Calcutta Municipal Act, if may be questioned by the Court See Calcutta Municipal Act, secs 11 (vi), 357, etc 125
- OF HIGH COURT to decide, in second appeal, issue (not decided by lower Court) on evidence on record or remit same to the lower Court See Civil Procedure Code, secs 103, etc 245
- of arbitrator to refuse to state a special case for the opinion of the Court See Indian Arbitration Act, sec 10 494
- EJECTMENT**, suit for, against transferee of occupancy holding without landlord's permission—Estoppel; In a suit by proprietors of land to eject one D who came upon the land as a tenant, the High Court found that the latter, being a rayat, could not be ejected without notice to quit. Pending an appeal by the proprietors from the decree of the High Court to the Privy Council, the tenant died and his administrator sold the lands to M and C, whereupon the proprietors being notified of the sale by petition stated that though they did not admit the validity of the sale to M and C, they were advised that they should be added as Respondents, and on their prayer M and C were so added. In a suit by the proprietors to eject M and C, on the ground that the lands being those of a non-transferable occupancy holding M and C had acquired no title by their purchase and were trespassers, the Courts in India held that the proprietors were estopped by their presentation of the petition referred to above and the statements therein made from denying that M and C had acquired title to the lands as tenants. Held—That there was no estoppel, the position of the proprietors then and afterwards having all along been that M and C were trespassers without any title to the possession of, or interest in, the lands. **DAMODAR NARAYAN CHOWDHURY v. S. A. MILLER** 461
- ELECTION** of temple trustees—English law, how far applicable in India—Person not entered in voters' list, it can vote; Where the validity of the election of Dalai or the head priest of the Madhub temple at Hajo in Kamrup who is elected by the Burdeories whose names are recorded in a list prepared for that purpose was assailed on the ground that persons whose names were not entered in the list of voters were permitted to participate in the election. Held—That there was nothing in the scheme of election which ordained that the right to vote was dependent on the entry of the names of voters in the voters' list, nor did it provide or follow, in the absence of an express direction to that effect, that those not so entered could not vote. There was therefore no infringement of any mandatory rule. **Shyam Chand Basak v Chairman, Dacca Municipality**, I L R 47 Cal 524, 24 C W N 189, 30 C L J 270 (1919), referred to. Held also—That the English common law of parliamentary elections should not be applied to regulate the election of temple trustees in this country though the principles which underlie that law may be involved if they appear to the Court to be in conformity with the rules of justice, equity and good conscience. **RAGHUNATH SARMA v JIBAN CHANDRA SARMA** 312
- ENFORCEMENT** of award* in execution, if bars suit to set aside award. See Indian Arbitration Act 660
- ENLARGEMENT** of time for payment of deficit court-fee ordered by predecessor, legality of See Civil Procedure Code 720
- ENHANCEMENT** of rent under sec. 30 (b), Bengal Tenancy Act, if depends on the use to which the holding is put See Bengal Tenancy Act 962
- ENTRY** in record-of-rights as to area of holding, if conclusive as to question of dispossession from a portion See Bengal Tenancy Act 982
- ESTOPPEL**—Mortgagor if may deny title to property which he professes to mortgage and ask for a personal decree only against himself; Whatever interest a mortgagor has in property which he mortgages is bound by the mortgage and it is not open to him to say that he has no interest in the property and that consequently the Court can pass a personal decree only against him. **BHOLANATH SEN v BALARAM DAS** 607
- AND ACQUESCENCE, when pucca structures built by tenant, without objection by landlord See Landlord and Tenant 969
- EVIDENCE ACT** (I of 1872), sec. 70, executant's admission of his signature, coupled with a denial of the presence of attesting witnesses, if amounts to "an admission of execution by himself," within the meaning of the section—"Execution," meaning of; In a suit for enforcing a simple mortgage bond, the Defendant admitted his own signature on the bond but denied execution in the presence of attesting wit-

EVIDENCE ACT- contd.

nesses. No attesting witness was examined and the suit was dismissed on the ground that there was no reliable evidence to show that the bond was executed in the presence of two attesting witnesses. *Held*, per Richardson, J.—That an admission of execution is sufficient proof as against the party making the admission and dispenses with the necessity for calling an attesting witness or giving any other evidence. *Nibaran v Ram*, 22 C. W. N. 444 (1917) and *Satish v Jogendra*, 1 L. R. 44 Cal 345, s. c. 20 C. W. N. 1044 (1916), followed. *Jogendra v Nital*, 7 C. W. N. 354 (1903), referred to. But the case is different when the admission of the signature is coupled with an express denial that the document was signed in the presence of the attesting witnesses. The policy of the law makes the ceremony of attestation essential to the validity of a mortgage instrument, and no admission of execution is effective under sec. 70 of the Evidence Act unless it amounts to an acknowledgment of the formal validity of the instrument. What the Defendant said in the present case amounted not so much to an admission of execution as a denial of execution. "Execution" of a document means something more than the mere signing by the party. It must certainly include delivery, and it also includes signing in the presence of witnesses where witnesses are necessary. *Shama Patter v Abdul Kadir*, 1 L. R. 39 I. A. 218 s. c. 1 L. R. 35 Mad 607, 16 C. W. N. 1009 (1912), referred to. Per Suhrawardy, J.—Sec. 70 of the Evidence Act qualifies sec. 68 of the Act but does not affect or control sec. 59 of the Transfer of Property Act, which is a later enactment. Hence it follows that whatever may be the meaning, technical or ordinary, of the term "execution," the word is used in sec. 70 of the Evidence Act in the sense of due execution or execution in the way in which a particular document is required to be executed and admission of execution means execution in the manner in which a document is required by law to be executed. *ARJUN CHANDRA BHADRA v KAILAS CHANDRA DAS* 263

sec. 92—Admissibility of evidence of conduct to prove contract not intended to be acted upon—[impossibility of performance.] The Plaintiff brought a suit for the recovery of damages on account of the Defendant's failure to deliver certain papers under the terms of a patni kabulyat. The defence was that during 35 years since the execution of the kabulyat the patnidar never submitted any paper nor did the zemindar demand the same and that the stipulation was never intended to be acted upon. *Semble*:—That evidence of the conduct of the parties was admissible to prove that the stipulation was never intended to be acted upon, i.e., from the very beginning. *Preonath Shaha v Madhu Sudan Bhuiya*, 1 L. R. 25 Cal. 603 s. c. 2 C. W. N. 562 (F. B.) (1898), *Khankar Abdur Rahman*

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v Ali Hafz, 1 L. R. 28 Cal. 256 (1900), *Mahomed Ali Hossein v. Nazar Ali*, 1 L. R. 28 Cal. 289, s. c. 5 C. W. N. 326 (1901), *Kailash Chandra v Darbaria*, 20 C. W. N. 347 (1915) and *Manindra Chandra v Durga Sundari*, 20 C. W. N. 680 (1915), referred to. *Balkeshen Das v Legge*, 1 L. R. 27 I. A. 58 s. c. 1 L. R. 22 All. 149; s. c. 2 C. W. N. 153 (1899), distinguished. *Held*, upon a construction of the kabulyat—That the stipulation was impossible of performance. *NARENDRA LAL KHAN v BHOLA NATH BHUYA* 336

s. 52, oral evidence to show that the consideration for a conveyance was more than the sum recited in the deed, admissibility of—A party, if competent to prove that he had committed a fraud—A party, if can be permitted to establish a case which is contrary to his pleadings. In a mortgage suit the Plaintiff set up a conveyance, the consideration for which was stated in the plaint to be Rs. 3,600. The Defendants alleged that the sale had been effected not for Rs. 3,000 but for Rs. 2,000, and the conveyance, when produced, showed that the consideration was Rs. 2,000. The Plaintiffs thereupon asked for leave to amend the plaint, which being refused, they adduced oral evidence to show that although the conveyance recited the consideration as Rs. 2,000, the actual consideration was Rs. 3,000. *Held*—That while want or failure of diligence in kind of the consideration may be proved, evidence to vary the amount of consideration in a registered sale-deed is inadmissible. If such a course were permissible the protection afforded by sec. 92 of the Evidence Act would be completely nullified. *Adityam Iyer v Rama Krishna Iyer*, 1 L. R. 38 Mad. 511 (1913), followed. *Achal Ram v Raja Kazim Hossein Khan*, 1 L. R. 32 I. A. 113 s. c. 1 L. R. 27 All. 271, 9 C. W. N. 177 (1905), *Hanifunnissa v Faizunnissa*, 1 L. R. 33 All. 340 s. c. 15 C. W. N. 521 (P. C.) (1911) and *Gopal Singh v Laloo Lal*, 10 C. L. J. 27 (1909), referred to. That the Plaintiff could not be permitted to contradict the statement in the conveyance, as thereby he would be permitted to prove that he had violated the law and committed a fraud upon the revenues of the country. A party cannot come into Court with fraud on his lips and ask for a relief, as to such the Courts of justice are not open. *Gregory v Haworth*, 25 California 622 at p. 657, referred to. *Held further*—That the parties should not be permitted to depart from their deeds and to establish a case which is contrary to their pleadings. A recovery if had must be secundum allegata and must be grounded upon facts which are averred in the complaint and not upon those which are denied. The determination in a case should be founded upon a case either to be found in the pleadings or involved in and consistent with the case thereby made. *Eastern Chandra Singh v Shama Churn*

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EVIDENCE ACT—concl'd.		FACT—concl'd.	
<i>bnatto</i> , 11 M. L. A. 7 (1866). <i>Mylapore Jyasawmy Moodiar v Yeo Kay</i> , L. K. 14 L. A. 168; s. c. L. L. R. 14 Cal. 501 (1887). <i>Malraju Lakshmi Venkayamma Row v. Venkatadri Appa Row</i> , 25 C. W. N. 651 s. c. 33 C. L. J. 171 (P. C.) (1920). <i>Nabadipendra Mukerjee v. Madhusudan Mandal</i> , 18 C. W. N. 473 (1912) and other cases referred to. <i>ANNADA CHARAN SILL v. HARGOBINDA SILL</i> 496		evidence needed to establish case Where the question was whether at the Plaintiff's marriage with her deceased husband, which took place 36 years before this suit against his estate for her dower money, the latter had verbally agreed to a dower of a lakh of rupees. Held—that in view of the fact that the Plaintiff's case came (in the absence of documentary evidence) to rest entirely on the recollection of persons who were present at the marriage, the evidence of the agreement had to be clear and convincing in order to establish her claim against her husband's estate. That though it appeared that the social standing of the Plaintiff's family was much below that of her husband's in whose family the customary dower of females was proved to be a lakh of rupees, as the marriage appeared to be a love match, there was no inherent improbability in the husband, infatuated as he seemed to be with her, agreeing to such a large dower if the Plaintiff's relations insisted. But in the absence of evidence of such insistence and having regard also to the generally unsatisfactory character of the evidence adduced by the Plaintiff, the Judicial Committee advised the High Court in dismissing the suit though the same had been decreed in the Original Court. <i>MUSAMMAT HAFIZAN BIBI v. MUSAMMAT SUBA BIBI</i> 854	
(c) and (1)—Sale of estate for arrears of revenue—Accounts kept in the Collectorate—Presumption that they are correct—Revenue Sale Act (XI of 1859), sec. 37, 4th Excp.—“Garden,” “wells,” meaning of—All important points in issue to be decided by Courts below to avoid remand. Under sec. 114, illus. (e) and (f) of the Indian Evidence Act, the Court is entitled to presume that the accounts of arrears due in respect of a revenue-paying estate kept by a clerk in the Collector's office under the supervision of the Collector were correctly kept until the contrary is proved. “Gardens” in the fourth exception to sec. 37 of Act XI of 1859 must mean permanent gardens, and very shallow and small wells are not covered by that exception. The desirability, in appealable cases, of the Courts in India pronouncing their opinions, as far as may be practicable, on all important points in order to enable the Judicial Committee to dispose of the case finally and thus avoid a remand, adverted to. <i>Tara Kant Banerjee v. Puddo Money Dossee</i> , 5 W. R. P. C. 63, 10 M. L. A. 476 488 (1866), referred to. <i>MAHOMED SOLAIMAN v. KUMAR BIRENDRA CHANDRA SINGH</i> 749		FEES not allowed on taxation, if can be retained by solicitor. See Solicitor and client 537	
—, s. 154, cross-examination of witness though not considered and declared hostile by Judge, propriety of. See Will 797		FINDING OF FACT, High Court if may interfere with, in second appeal, when the decision rests on inference from documents. See <i>Thakbast maps</i> 925	
EVIDENCE admitted without objection in the trial Court when can be challenged in appeal. See Indian Evidence Act, sec. 68 134		“GARDEN” in sec. 37, Revenue Sale Act, meaning of. See Evidence Act 749	
— necessary to prove the nature of tenancy. See Landlord and Tenant 969		GENERAL CLAUSES ACT (X of 1897), sec. 3 (20), “good faith,” definition of, if applicable to Indian Contract Act (IX of 1872) See Indian Contract Act, secs. 99, etc. 231	
EXAMINATION of insolvent and of creditor or his assignee under sec. 36, whether and when admissible in proceeding under sec. 56, Presidency Towns Insolvency Act. See Presidency Towns Insolvency Act 611		GENERAL PROVIDENT FUND RULES , if apply to State Railway Provident Fund—State Railway Open Line Code, Vol. II, App. I, r. 30 and r. 22, money standing to the credit of a retired State Railway officer in the State Railway Provident Fund, if attachable in execution of a decree—“Compulsory deposits,” significance of—“Discharged,” meaning of—Civil Procedure Code (Act V of 1908), s. 60 (1) (k) and Provident Funds Act (IX of 1897), s. 4, sub-s. (1), if exempt “compulsory deposits” in Railway Provident Funds from liability to attachment. A sum standing in a State Railway Provident Fund to the credit of a person who was formerly in the employ of a State Railway but had left the service of the Railway, was sought to be attached in execution of a money decree. Held—That the Rules regulating the General Provident Fund do not apply to the State Railway Provident Institution, which is governed by the Rules contained in the State Railway Open Line Code, Vol. II, App. I. The amount at the	
“EXECUTION,” (of document), meaning of. See Evidence Act, sec. 70 263			
— Court, power of, to enlarge or alter decree with consent of parties. See Civil Procedure Code, s. 47 280			
EX PARTE award by arbitrators, when may be set aside by Court. See Interest on award 933			
EXORBITANT interest, if one of the ordinary incidents of tenancy. See Interest at unusual and exorbitant rate, etc. 502			
FACT , issue of—Reversal of judgment of trial Court on appeal, upheld—Oral agreement to pay a dower of a lakh of rupees alleged to have been made at marriage which took place 36 years before suit—Nature of			

GENERAL PROV'T FUND RULES—concl'd.

concl'd. credit of the aforesaid officer which consisted entirely of deposits which when they were made were "compulsory deposits" within the meaning of r 30 of the latter Rules and of the Provident Funds Act, was exempted from liability to attachment under the said r 30, read with sec 60 (1) (k) of the Civil Procedure Code and sec 4, sub-sec (1) of the Provident Funds Act. That the fact that the deposits became repayable to the officer when he left the service did not remove them from the category of compulsory deposits. *Per Richardson, J.*—A compulsory deposit is a deposit which goes into the fund as a compulsory deposit and is at that date received and classified as such, and there is no ground for a different classification of such deposits or a different description being applied to them after the officer's death or retirement. As long as the deposits subsist in the fund, so long, at any rate, both as matter of legal construction and in the common and ordinary way of speaking, they are properly and correctly described as compulsory deposits. In this respect no distinction exists between the deposits made by the depositor himself on the one hand and the contributions in respect of those deposits and the interest or increment accrued on them on the other. *Veerchand v. B. B. & C. I. Ry.*, 1 L. R. 29 Bom. 259 (1904) and *Miller v. B. B. & C. I. Ry.*, 5 Bom. L. R. 454 (1903), followed. *Seth Manna Lal Parruck v. Jain*, 1 L. R. 35 Cal. 641 s. c. 12 C. W. N. 633 (1906) and *Hindley v. Joy Narain*, 1 L. R. 46 Cal. 962 s. c. 24 C. W. N. 288 (1919), referred to. The word "discharged" in r 30 does not necessarily mean "dismissed". It is wide enough to include the case of a servant who has been permitted to retire or take his discharge. *Per B. B. Ghose, J.*—The deposit did not become "payable on demand" by reason of the fact that it became payable under the rules on one of certain events happening afterwards. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAJ KUMAR MOOKURJEE**

GIFT, inter vivos, conditions of See *Oudh Talugdar*

HAIKAI MEMONS of Porebunder—Succession governed by Hindu law, as customary law, though opposed to Mahomedan law—**Judgments as evidence**—*Held*—That the High Court has correctly decided that, in the matter of succession the Haikai Memons of Porebunder are governed by Hindu law engrafted as a custom on the Mahomedan law, although not in accordance with the rules of the Koran. **Judgments of the Courts of Porebunder, dealing with questions of succession among the Haikai Memons of Porebunder, do not settle the question but are good as evidence** **KHATUBAI v. MAHOMED HAJI ABU**

HINDU LAW—Mitakshara—Mortgage of ancestral property, when binds descendants in absence of necessity and consent—"An-

HINDU LAW—cont'd.

antecedent debt, what is—**Mortgage illegally effected, if may support subsequent sale as for "antecedent debt"**—"Pious obligation" to pay, if arises in father's life-time. The antecedent debt for which in the absence of justifying necessity a Mitakshara Hindu can mortgage ancestral property without the consent, express or implied, of his descendants who are his co-partners in the property must be quite distinct from the debt incurred in the mortgage in fact as well as in time. It must, as laid down in *Sahu Ram Chandra v. Bhup Singh*, 1 L. R. 44 I. A. 126 s. c. 21 C. W. N. 698 (1917), be incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. *Jogi Das v. Ganga Ram*, 21 C. W. N. 957 (P. C.) (1917), referred to. A mortgage of ancestral property effected by the ancestor without necessity and without such consent and not for an antecedent debt in the above sense cannot, on the principle of "antecedent debt," form the consideration for a sale of such property subsequent to the mortgage. The doctrine of "pious obligation" cannot be invoked in the lifetime of the father of the person sought to be charged. **CHIT RAM v. RAM SINGH**

-----, **Trust—Debtor—Property whether given absolutely to idols or to individuals charged with their maintenance—Trust, private—Civil Procedure Code (Act V of 1908), s. 92, scheme of management, if may be framed under—Administration suit, order in, based on particular construction of Will—Construction, if res judicata**—The question was whether the testatrix by her Will intended to make a gift of certain properties to idols or to any person or persons charged with the maintenance of the idols. *Held*—That according to the true construction of the Will the properties were given absolutely to her grandson, U, charged with the performance of the worship of the deities. That no heritable shebaitship was established by the Will, U having been appointed shebait during his lifetime, and that after his death, there being no express provision made for the worship, the necessary duties would have to be performed by the persons properly appointed for that purpose. That the gift in question was in effect a private trust to which the provisions of sec 92 of the Code of Civil Procedure did not apply and consequently a scheme for its administration was inappropriate. A direction given in an administration a suit has the effect of an order binding all parties and determines the construction of the Will to which it gives effect so that after the lapse of time necessary for appeal it becomes final and conclusive. *Pearath v. Marriott*, 22 Ch. Div. 182 at p. 191 (1882), referred to. **GOPAL LAL SETT v. PURNA CHANDRA BASAK**

-----, **Mitakshara—Joint family property—Claim by a member of a share and reference by all to arbitrator for partition,**

HINDU LAW—contd.

if effects severance in interest—Sale by co-
 snarer, if may be attacked by other co-
 snarers on the ground of want of con-
 sideration; It is settled law that in the case
 of a joint Hindu family subject to the law
 of the Mitakshara, a severance of estate is
 effected by an unequivocal declaration on
 the part of one of the joint holders of his
 intention to hold his share separately,
 even though no actual division takes place.
 Where N a member of such a family,
 claimed his half-share of the ancestral
 property, and after discussion all the joint
 holders signed an agreement appointing
 one G to partition the property agreeing to
 accept whatever partition he might make.
Held—That this claim and agreement
 were sufficient to effect a severance in in-
 terest and to prevent the share of N from
 passing by survivorship. That the subse-
 quent division of the property between the
 co-owners which was accepted by all parties
 and was not alleged to be unfair could not
 be disturbed, and a sale by N of his share
 to the Plaintiff could not be set aside
 on the alleged ground of want of considera-
 tion at the instance of joint owners, but
 only (if at all) at that of the vendors re-
 presentatives but that any proceeding for
 that purpose was statute-barred at the date
 of the suit **SYED KASAM v. JORWAR**
SINGH

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Private debutter property, con-
 version of, into secular property by consent
 of family members—Consent of entire
 family interested in the sheba necessary—
 Acts and dealings of shebait whether suffi-
 cient to change the character of the de-
 butter property—Property dedicated to a
 single debata, though sheba of other
 debatas prescribed—Dedication, if abso-
 lute; The consent of all persons interested
 in a private or family debutter which may
 convert the debutter into secular property
 must be distinguished from acts which may
 amount to nothing more than a breach of
 trust. It is not the shebait only who by
 their dealings can give the property a differ-
 ent turn. The persons who by their con-
 sent can convert the debutter property into
 secular property are the members of the
 whole family, male and female, interested
 in the worship of which the shebait is
 merely managers. It is not dealings with
 the property which change the original
 debutter character, but it is the consent of
 the entire family interested in the sheba,
 though dealings subsequent to such con-
 sent may under circumstances be evidence
 of consent. Where property was dedicated
 to a particular debata, and the surplus of
 the profits thereof was also directed to be
 invested in the name of or employed in ac-
 quiring other properties for the same
 debata, the dedication was absolute in
 favour of the debata, although the income
 was to be devoted to the sheba of other
 debatas. **MONMOHAN GHOSH v.**
SIDDHESWAR DUBAY

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Mitakshara—Woman's estate—
 Power of alienation—Legal necessity—Com-
 promise by limited owner, when valid.

HINDU LAW—contd.

The necessity for which a Hindu woman
 in possession of property as a limited owner
 can alienate such property does not mean
 actual compulsion, but the kind of pressure
 which law recognises as serious and suffi-
 cient. A compromise made bona fide for
 the benefit of the estate and not for the per-
 sonal advantage of the limited owner will
 bind the reversioner just as much as a
 decree on contest. **Mohendra Nath Bis-**
was v. Shamsunnessa Khatun, 21 C L J
 157 (1914), approved. **Katama Natchiar v.**
The Rajah of Shivagunga, 9 M L A 539
 (1863). **Tafinees Churn Gangooly v. Watson**
& Co., 12 W R Civ. R 41; (1869) **Khunni**
Lal v. Gobind Krishna Narain, J. R 38
 I A 87 s c 15 C W N 545 (1911) and
Imrit Konwur v. Roop Narain Singh, 6 C.
 L R 76 (1880). referred to **RAMSUM-**
RAN PRASAD v. MUST SHYAM KU-
MARI

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Widow in possession of hus-
 band's estate as limited owner—Sale to
 pay off mortgage debt due by husband—
 Purchaser if bound to see to application of
 purchase money—Speculative purchase not
 necessarily sham—Widow if bound to sell
 property in bits—Valuation, proper
 mode of. A widow of a separated Mitak-
 shara Hindu sold property belonging to her
 husband's estate in her possession as lim-
 ited owner for Rs 5,300 in order to pay
 off Rs 1,588-2-2 due on two mortgages exe-
 cuted by her husband. The balance of
 Rs 711-13-10 was appropriated by the
 widow to reimburse herself for expenses
 previously incurred at the marriage of a
 daughter of the husband's brother. **Held**—
 That the sale was not invalid because a
 portion of the purchase money (Rs 711-13-
 10) was spent on a purpose which did not
 constitute a legal necessity, as the pur-
 chasers were not bound to see how the
 widow applied the purchase money. That
 the fact that the purchaser was able to
 realise a much larger sum by selling the
 property bit by bit to cultivating raiwats
 did not establish that the sale by the widow
 was necessarily improvident, as it was
 not responsible to suggest that the widow
 should have gone about endeavouring to
 find persons who would purchase the prop-
 erty in small quantities. That though
 the purchase by the widow's vendees was
 speculative the sale was a genuine and
 not a sham sale. The price at a private
 sale of a considerable extent of land pur-
 chased in lump would depend not so much
 on the valuation of its component parts,
 calculated on a regular scale as on the
 need of the vendor for money and the
 competition for lands in that locality at
 the time of the sale. **MEHAI DATAVOI**
THIRUMATAYAPPA MUDALIAR v.
NAINAR TAVAN

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Alienation by female owner
 with limited interest for religious purpose.
 how far binds the reversion—Necessary and
 optional religious acts limits within which
 each is binding—Dedication of a small
 fraction of the estate for continuous bene-
 fit of the soul of deceased owner valid
 of. Hindu law recognises the validity of

HINDU LAW—contd.

the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner. The Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased and the periodical performance of obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and, if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case, she can alienate a small portion of the property for the pious or charitable purpose she may have in view. **KUNWAR SARDAR SINGH v. KUNJ BEHARI LAL** 653

Mitakshara—Madras Province—Adult members of joint family incurring liability in connection with business not joint family business—Joint family property belonging to them, if bound—Minor member's liability. In the Madras Presidency, members of a joint Hindu family cannot escape from liability to perform contracts entered into by them on the ground that their contracts were not such as would bind the joint family and that they had no property other than that which was the property of the joint family. Decrees made against such members upon such contracts can be executed against their interests in the joint family property. A contract purporting to have been executed by an adult member of a joint Hindu family as the guardian of a minor member does not bind the minor or his interest in the joint family property, when the business for the purpose of which the contract was entered into was not a business of the joint family. **P. M. SADASIVA MUDALIAR v. A. R. HAJEE FAKHER MAHOMED SAIT & SONS** 677

Conversion to Hinduism, ancient, how far abrogates non-Hindu tribal customs—Survival of such custom, onus of proof as to—Custom of non-adoption—Primogeniture, custom of, prevalence of, if indicative of non-adoption of Hindu social usages and law. In regard to ancient conversions to Hinduism of non-Hindu Indian tribes, the Judicial Committee have admitted the possibility that they might carry with them abrogation of former customs, though some such custom may continue as survivals along with the general Hindu law by which they may come to be governed. On the evidence,

HINDU LAW—contd.

the Judicial Committee agreed with the conclusions of the High Court in this case, that the clan in question, even supposing its origin to be not Hindu, had adopted in general not only Hindu religion and Hindu social usages, but also the Hindu law regulating the succession of landed property, and this though there were still some relics of non-Hinduism. The Judicial Committee also affirmed the finding of the High Court that a custom of non-adoption did not survive the general adoption of Hindu religion, social usages and law which took place about a hundred years ago. The custom of primogeniture is usually found to exist where the estate belongs to a King or independent Chief or even a semi-independent Chief of sufficient importance. The custom in such a case affords no indicia whereby to determine that a family does not follow Hindu law as a whole, merely because in Hindu law an estate only becomes impartible by custom and that custom has in each case to be proved. **SAHDEO NARAIN DEO v. KUSUM KUMARI** 901

One member mortgaging joint family property on representation of his competence, if can afterwards invoke the title of another member in order to defeat the mortgagee or his representatives—Estoppel—Share of another member subsequently inherited by said mortgagor if bound by the mortgage—Burden of proof as to knowledge of true facts, whether on mortgagor or mortgagee—Assignee with notice from person without notice, position of. Two members of a joint Hindu family, for family necessities, mortgaged some of the joint family properties, representing that they were entitled to deal with the whole interest. One of them inherited the shares of the other members, and after the properties were sold in execution of the mortgage decree, he brought a suit for the recovery of the shares of the member who had not joined in the mortgage. **Held**—That having regard to the representation made in that mortgage by the Plaintiff, he must be bound by the estoppel created by the statement and it was not open to him to assert that the share of the member who had not joined in the mortgage was not bound by the mortgage. **Ranga Rau v. Bhavayanni**, I L R 17 Mad. 473 (1894), distinguished. That in view of the representation as to the competence of the mortgagor to deal with the share of a member who was not joining in the mortgage, the burden shifted on the mortgagor and those claiming under him to show the mortgagee's knowledge of the true facts. If the original mortgagee did not know, the mere fact that the person claiming through him may have known, does not prevent the latter getting a good title to the properties and relying on the estoppel which the original mortgagee could have set up against any claim by the Plaintiff in any

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HINDU LAW—contd.		HINDU LAW—contd.	
sut. SARODA PROSAD BANERJEE v. GOSTA BEHARI HAZRA ...	943	to establish the image of an idol, all that is essential is that the religious purpose should be clearly specified and the property intended for the endowment set apart for that object. The designation of property as debutter is not conclusive though valuable evidence of the intentions of the founder. CHANDRA MOHON GANGULI v. JNANENDRA NATH BANERJEE ...	1033
Succession—Disqualification of heir—Onus—Leprosy, when disqualifies. The presumption of Hindu law is against disqualification, and the burden of proof of disqualification lies on a person who seeks to exclude another who would be an heir, should no cause of exclusion be established, and where it is contended that a person is excluded from inheritance by reason of disease, the strictest proof of the disease as will disqualify him at the time the succession opened, will be required. The later Hindu law-books generally lay down that leprosy, to be a ground of exclusion, must be of the sanious or ulcerous, and not of the anaesthetic type. SURENDRA NATH DE v. ASHUTOSH NANDI ...	959	Alienation by document executed over 40 years ago—Recital of legal necessity not challenged by reversioner, value of, as evidence—If alienation can be impeached by a third party—Transfer of Property Act (IV of 1882), sec. 43, where applicable.] Where a Hindu widow sold her right, title and interest by deeds of sale executed over 40 years ago for legal necessities as recited therein and the transaction was not challenged by her then next reversioner during her life-time. Held—(1) That the presumption of there having been legal necessities as recited in the sale deeds stood un rebutted, and (2) that the sale being voidable only by the reversioner himself, any person other than the reversioner could not impeach it. Held further—That sec. 43 of the Transfer of Property Act did not apply to persons who merely signed a sale deed whereby another person who has no title professed to transfer the property as her own. JABEDALI SHEIKH v. PROSANN KUMAR NAG ...	433
Dayabhaga—Mixing up of joint and separate property—Presumption that property acquired out of mixed fund joint property.] The general presumption that arises when members of a joint family who have control over the joint estate blend that estate with property in which they have separate interests is that the properties acquired with such mixed up funds are intended for the benefit of the joint family. There is no difference in this respect between a case where the separate estate is brought into the joint family account as in Suraj Narain v. Ratan Lal, L. R. 44 I. A. 201 a c 21 C. W. N. 1065 (1917), and a case where joint family property is brought into the separate accounts. RAJANI KANTA PAL v. JAGA MOHON PAL ...	997	HUNDI executed by loser of bets on racing in consideration of his name being withdrawn from the R. C. T. C., and preventing his being posted as defaulter if can be sued upon and whether the consideration is legal. See Betting losses ...	442
Madras Presidency—Mitakshara—Succession—Illegitimate son and widow of deceased Sudra, share of.] Held—That the High Court of Madras was right in following in this case, in which the competition was between an illegitimate son and the lawfully wedded wife of a deceased Sudra, the course of decisions in that Court according to which they are to divide the inheritance in equal shares, the illegitimate son being entitled to one-half of what he would have taken had he been legitimate and not one-half of the other participant's share. Gangabai v. Bandu, I. L. R. 40 Bom. 369 (1915), explained. Though the widow is not named in the text it is well-settled that as a preferential heir to the daughter's son she is included among those who share with the illegitimate son. KAMULAMMAL v. T. B. K. VISVANATHASWAMI NAICKER ...	1021	IDENTITY of cause of action, test. See Civil Procedure Code, Or. 2, r. 2 ...	673
Debutter—Planting of sacred grove on consecrated ground, if a religious purpose—Panchabati—Idol, establishment of, if essential—Debutter, description by owner as, effect of.] Planting holy trees on ground consecrated for the purpose is a valid form of dedication for a religious purpose according to Hindu law. Dedication for "Panchabati" upheld in this case as valid debutter. To effect a valid debutter it is not necessary		IDOL, whether may be a subject of gift or devise. See Rights of shebait ...	684
		ILLEGITIMATE SON and widow of deceased sudra, shares of. See Hindu Law ...	1021
		IMPORTANCE of evidence of when and how Will found. See Will, proof of ...	485
		IMPORTANT points in issue to be all decided by Courts below to avoid remand. See Evidence Act ...	749
		INDIAN ARBITRATION ACT (VII of 1918)—Indian Stamp Act (II of 1899), ss. 35, 3, and Sch. I, cl. 5 (c)—Arbitration proceedings—Award made on submission not stamped, whether its validity may be challenged in suit to set aside the award.] Where the Plaintiff and the Defendant submitted their disputes under a contract to arbitration by a document which did not bear any stamp and the arbitrators having made their award in favour of the Defendant, the Plaintiff brought a suit to set aside the same and contended that the award was invalid, inter alia, on the ground that the document containing the submission did not bear any stamp. Held—That the award was valid and its validity could not be challenged on the ground that the document containing the submission did not bear any stamp.	

INDIAN ARBITRATION ACT contd.

Per Sanderson, C J—The submission having been admitted in evidence by the arbitrators, it was not open to either of the parties to call in question such admission in the arbitration proceedings on the ground that the submission had not been duly stamped. The award therefore was a valid award and it was not open to the Plaintiff to rely upon the fact that the submission was not stamped for the purpose of showing that the award was invalid.

Per Richardson, J—Once an instrument is admitted in evidence in any proceeding either under sec 35 or 36 of the Indian Stamp Act it is available in that proceeding for all purposes as if it had been properly stamped at the outset. The proceeding will go through to a valid termination and cannot afterwards be challenged for want of jurisdiction by reason of non-compliance with the Stamp Act. Sec 36 would be entirely nullified if on the conclusion of the proceeding in which the instrument is admitted, the proceeding could be set aside by a separate proceeding initiated by one of the parties on the sole ground that the person having authority to receive evidence had admitted or acted upon an unstamped or insufficiently stamped document. **RUNG LAL KALOORAM v KEDAR NATH KESRIWAL**.

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(IX of 1899), ss. 9 (b), 14 and 15—Agreement by contracting parties to refer dispute to arbitration under terms inconsistent with s. 9 (b)—Arbitration under the section, ultra vires—Award if may be questioned by suit—Enforcement of award in execution, it bars such suit—Consent order to abide by decision of Judicial Committee—Objection to jurisdiction if entertainable upon appeal from order.] By eleven contracts, bearing various dates, Appellants agreed to buy from the Respondents a number of bales of jute of certain specified quality. The contracts were all in a form approved by the Calcutta Baled Jute Association and provided that any disputes shall be referred to arbitration in accordance with the Rules and Bye-Laws endorsed on the contracts, under one of which, where one of the parties to a dispute failed to appoint an arbitrator within the time limited, the Chairman of the Association was to appoint an arbitrator on behalf of the defaulting party. The contracts further provided that both arbitrators and umpire must be persons engaged in the Baled Jute Trade and that their award shall be final, subject only to a right of appeal to the Committee of the Association.

Held—That this agreement was quite inconsistent with sec 9 (b) of the Indian Arbitration Act, under which, on the failure of one party to appoint an arbitrator, the decision is to be by a single arbitrator chosen by the other party only, whereas under the agreement in question in every case of such failure—which includes a failure to appoint a substituted arbitrator on the death or retirement of

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an arbitrator originally appointed—there were always to be two arbitrators, one appointed by the parties and the other by the Chairman on behalf of the other party. Under the agreement, moreover, the decision was to be by a domestic tribunal constituted of men engaged in the trade and the decision was to be subject to an appeal to the Committee of the Association. That an award made by a single arbitrator appointed by the Appellants alone, upon the failure of the Respondents to appoint an arbitrator as required by the terms of the agreement, acting under sec 9 (b) of the Arbitration Act was without jurisdiction. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought to be taken by motion to set aside the award. But where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. The fact that the award has been entered by execution under sec 15 is no bar to a suit to have it declared void and for consequential relief. Where the High Court on appeal having declared the award void, with the consent of parties, ordered the Appellants to repay to the Respondents a sum of money which the Respondents had paid to them in execution of the award upon an undertaking by the Respondents to return the amount if the award should be found valid by the Judicial Committee on appeal.

Quære—Whether any technical objection as to the jurisdiction of the Court to question the award could be maintained before the Judicial Committee having regard to the fact that the order appealed from was to some extent a consent order and contemplated that the question of the validity of the award should be finally determined by the Judicial Committee.

E D SASSOON & CO v RAMDUTT RAM KISSIN DAS.

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, s 10—Power of an umpire to state a special case for opinion of Court, whether compulsory—Interest, if may be awarded after date of award.] Where in a reference to arbitration under the Indian Arbitration Act, one of the parties asked the umpire to state a special case for the opinion of the Court under sec 10 of the said Act on the construction of a certain clause in the contract in question and the umpire refused to do so and made his award.

Held—That it was in the discretion of the umpire to refuse to state a special case for the opinion of the Court and to decide the point of law himself and that his refusal did not amount to misconduct. Sec 7 of the Arbitration Act, 1889, 52 and 53 Vict c 49, and Russell on Award and Arbitration 10th Ed., p 175, referred to. Where the umpire awarded damages as also interest thereon until payment:

Held—That he was not entitled to award interest subsequent to the date of the award and that the award should be remitted to him for reconsideration. **In re: Morphett, 14 L J Q B 259 (1845), fol-**

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 lowed. SEWDUTRAI NARSARIA 494
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.. sec. 15, assignee
 of an award filed in Court, it can execute
 it See Assignee of an award, etc. 660

INDIAN CONTRACT ACT (IX of 1872), sec.
 20, ignorance of notice published by Cal-
 cutta Improvement Trust affecting premises
 sold, whether amounts to "mistake as to a
 matter of fact essential to the agreement" 639
 See Calcutta Improvement Trust Act

.. sec. 25, agree-
 ment between pleader and client for fees
 for professional service, it can be treated
 as within the scope of See Legal Practi-
 tioners Act 769

.. s. 73—Measure of
 damages—Contract to deliver, breach of—
 Goods not shown to have been intended for
 a particular customer—Measure of dam-
 ages, if difference between contract and
 market rates or between contract rate
 and rate expected from customer; .
 Where the contract was that the De-
 fendant would deliver a certain quantity
 of coal to the Plaintiff at a certain price
 out of the Plaintiff's stock, and it did not
 appear that this coal, if delivered, was in-
 tended by the Plaintiff to be supplied
 and that the Plaintiff was bound to supply
 it exclusively to a particular customer,
 and the coal not having been delivered
 the Plaintiff sued for damages Held—
 That there being nothing in the case
 to prevent the Plaintiff from selling
 the coal, if delivered, in open market, the
 measure of damages was the difference
 between the contract price and the market
 price and not between the former and the
 price which the Plaintiff might have got
 by selling the same to that particular
 customer Quære—Whether the law in
 sec. 73 of the Indian Contract Act is differ-
 ent from that laid down in *Horne v Mid-
 land Railway Co.*, L. R. 8 C P 131 138,
 140 141 (1873) *KESHAVALI BROS. &
 CO v. DIWANCHAND & CO* 974

.. s. 74—Penalty,
 provision in the nature of—Loss or damage
 not proved—Right to relief—Failure of pur-
 chaser to complete contract within stipu-
 lated time by reason of vendor's default—
 Purchaser if liable; Where an intending
 purchaser of property failed to complete
 the purchase within the stipulated period
 by reason of the vendor not having taken
 steps to make out, as he had undertaken
 to do, a marketable title in respect of the
 property, the latter was not entitled to ask
 for the enforcement of a provision in the
 nature of penalty which the purchaser
 was to incur in case of such failure
 The vendor having failed to prove that
 he had suffered any loss in consequence:
 Held—That even if he had not been in
 default, the vendor was not (in view of
 sec. 74 of the Contract Act) entitled to any
 relief on account of the purchaser's de-
 fault. *BANKU BEHARI v. J. C. GALS-
 TAUN*

.. ss. 99, 101, 102,
 104, 106 and 107—Stoppage in transitu by

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unpaid vendor—Assignment of document
 of title by buyer—Onus of proof of good
 faith and of payment of consideration by
 assignee, whether on the vendor or assignee
 —Unpaid vendor's right of stoppage in
 transitu, whether a merely equitable right—
 General Clauses Act (X of 1897), s. 3, cl.
 (20)—Good faith, definition of, if applica-
 ble to Indian Contract Act (IX of 1872);
 Where a vendor who has not received
 the price of his goods stops them while in
 transitu to the buyer on the buyer becoming
 insolvent under sec. 99 of the Indian Con-
 tract Act, and, in the meantime, the
 buyer has assigned the document show-
 ing title to the goods to a third person
 Held—That it lies upon the assignee to
 prove that when the document of title to
 the goods was assigned to him he was
 acting in good faith and that he gave valu-
 able consideration for the goods Quære.
 Whether the unpaid vendor's right of
 stoppage in transitu is a merely equitable
 right Per Richardson, J.—Even before
 the right was recognised in England by the
 Sale of Goods Act, the better view seems to
 have been that it was a common law right
 derived from the law merchant and both
 in England and in India it is now not only
 a legal but a statutory right The defini-
 tion of "good faith" in sec. 3, cl (20) of
 the General Clauses Act (X of 1897) does
 not apply to the Indian Contract Act which
 was enacted in 1872 *RASH BEHARI
 KARURI v. NARAIN DAS DORITAL* 231

.. sees 151, 152,
 162, care to be taken by bailee See
 Indian Railways Act 1017

.. sec. 238,
 liability of principal for criminal mis-
 appropriation by agent See Principal and
 agent 18

INDIAN EVIDENCE ACT (I of 1872), s. 68,
 imperative character of—Exceptions other
 than those laid down by ss. 69, 70 and 71,
 if admissible—Evidence admitted without
 objection in the trial Court, when can be
 challenged in appeal; Where two mort-
 gage bonds were in the Court of first in-
 stance proved in the ordinary way and
 admitted in evidence without any objec-
 tion from the Opposite Party although the
 provisions of sec. 68 of the Indian Evidence
 Act were not complied with and no proof
 was given that no attesting witness to the
 documents was alive or available
 Held—That sec. 68 of the Indian Evi-
 dence Act is imperative and does not on
 the face of it admit of any relaxation ex-
 cept in the cases provided by sees 69 70
 and 71 of the Act and that the mortgage
 bonds were improperly admitted
 Taylor on Evidence, 11th Ed p 1290
 see 1843 and *Manners v Postan*, [1803] 4
 Esp 239, 3 Bos & P 343 referred to
Tofaluddi Peada v Mahar Ali, I L R 26
 Cal 78 (1898), distinguished *Shamu
 Patter v Abdul Kadir* I L R 31 Mad 215
 (1898), referred to The contention that
 the strict mode of proof prescribed in sec
 68 of the Indian Evidence Act applied only
 to cases where the document is attested

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to be enforced to prove the legal right or relation it creates and not in cases where such document is sought to be proved for a collateral purpose is not sound. **Held, further**—That where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment, does not apply. **Harak Chaud 3 Shnu Chandra, 3 C W N 101 (1903), 1, cited to SHIB CHANDRA SINGH v. GOUL CH PAL.**

INDIAN INCOME TAX ACT (VII of 1918),

s 9 (2) (iii). Company managing Railway on behalf of Secretary of State—Surplus profits of Company only liable to tax—Guaranteed interest and interest paid on borrowed capital, if to be included in computing the taxable income. The Bengal Nagpur Railway Co. was assessed to income tax on an income made up of (1) the Company's surplus profits and (2) the guaranteed interest, the item No. (2) being made up of (a) the interest debitable to the undertaking of the Secretary of State's open line capital, (b) the payment to the Secretary of State of the amount of the guaranteed interest payable by him to the Company in England on the share capital of the Company which the Company by agreement had made over absolutely to the Secretary of State and (c) the amount payable on account of interest on debenture stock and debentures. **Held**—That the matter could not be tried as a case of a Company owning in the ordinary way a Railway, as a private venture. The liability to tax must be determined with reference to the special agreement between the two parties and the nature of their relation to one another. From this point of view the Secretary of State is the owner of the Bengal Nagpur Railway which has been constructed and is managed for him by the Company. This is their business on the income of which tax is leviable. The principle applicable is that the Company should pay tax on what they get. In that view the Company are liable to income-tax in respect only of item No. (1) representing their share of surplus profits which they get in return for their services in the management of the Railway. The Company are not liable in respect of sum (2) (a). Though this capital has been the means where by profits have been earned in which the Company share this is not the Company's property. All receipts earned by the use of these sums are paid to the Government account and the interest is deducted before the profits in which the Company are entitled to share can be ascertained. Nor are the Company liable in respect of sum (2) (b). This in effect represents monies which the Secretary of State pays in London to the Company and which he recoups himself in this country out of the earnings of the Railway and which has to be deducted before the surplus

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profits can be ascertained. As regards sum (c) it was conceded that it was not liable to tax as it represented interest on borrowed capital. **THE BENGAL NAGPUR RAILWAY COMPANY LTD v THE SECRETARY OF STATE FOR INDIA IN COUNCIL.**

INDIAN SOLDIERS (LITIGATION) ACT (IX

of 1918), sec 10—Indian soldier serving under war conditions, application by to set aside decree in partition suit upon petition of compromise not signed by all his attorneys to whom joint power was given—Decree set aside—Civil Procedure Code (Act V of 1908), Or 47, r. 1—Review. Where an Indian soldier serving under war conditions, before his departure from India, executed a power of attorney in favour of his four brothers, and in a partition suit a decree was passed against him during his absence upon a petition of compromise signed on his behalf by three of his brothers and the attorney of his fourth brother, and on his return, upon an application being made by him the Court set aside the decree. **Held**—That in the circumstances of the case the Court was justified in setting aside the decree either under the latter part of sec 10 of the Indian Soldiers Litigation Act or under the general powers of review contained in Or 47 r 1 of the Civil Procedure Code, a joint power having been given to the four brothers there was no power given to them to act separately and the signing of the petition of compromise by the attorney of the fourth brother did not bind the applicant. **SM. HATMARATY DEBI v PRAN KRISHNA RANDEPP.**

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INDIAN SUCCESSION ACT (X of 1865) sec. 89, idol of residuary legatee, when residue left by Will for the maintenance and worship of idol. See Probate and Administration Act s 21.

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INFANT, lease on behalf of—Alteration of terms so as to make it reasonable in order to bind minor, if permissible—Incomplete tender—Liability to pay interest—Rate of interest, what is reasonable in India? A lease which taken as a whole was an unfair and inequitable transaction could not be altered and reduced into a proper and reasonable form in order to make it binding on an infant on whose behalf it was executed when the objectionable features of the lease did not admit of separation from its general structure as an independent bargain between lessor and lessee. A tender of payment accompanied by a condition which prevented it from being a perfect and complete tender does not relieve the payee of the obligation to pay interest. Award of interest at 12 per cent. per annum was upheld as such a rate though considered high in England, may be a very proper and reasonable rate to impose in the local conditions of India. **NARAIN DAS v. ABINASH CHANDRA.**

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INFERENCE from facts not disputed, whether a question of law in second appeal. See Indian Railways Act.

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INTEREST at unusual and exorbitant rate under a kabulyat executed before the passing of the Bengal Tenancy Act, if allowable—Exorbitant interest, if one of the ordinary incidents of tenancy: In a kabulyat executed by a raiyat in 1882 before the passing of the Bengal Tenancy Act, there was a stipulation for payment of interest at the rate of 75 per cent. per annum on overdue instalments of rent. The holding was sold for arrears of rent but the sale proclamation did not specify the interest payable on rents in arrears. Held—That the kabulyat having been executed before the passing of the Bengal Tenancy Act, the provisions of sec. 67 are not applicable to the case and, as a purchaser at the rent sale, the Defendant purchased it with the ordinary incidents of a tenancy. But a stipulation for payment of interest at an unusual and exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent. <i>Kali Nath Sen v. Trilakhya Nath Ray</i> , 1 L. R. 26 Cal 315 s. c. 3 C. W. N. 194 (1899) and <i>Deendayal Pramanick v. Juggeshur Roy</i> , 1 Marsh 252. 2 Hay 21 (1863), and several other cases referred to. <i>ANANDA-MOYI DEBI v. SAUDAMINI DEBYA</i> ...	502	"JAMAKAMEL," if imports fixity of rate of rent in perpetuity. See Bengal Tenancy Act	328
on award after date of award, if may be allowed by arbitrators—Ex parte award, when may be set aside by Court, on the ground that no special notice of intention to proceed ex parte, if party failed to appear, given—Prejudice: There is no inflexible rule of law that arbitrators have no authority to allow interest on the amount awarded after the date of the award. <i>Sewdutra Narsaria v. Tata Sons, Ltd.</i> , 27 C. W. N. 494 (1921), dissented from. <i>Uttamchand Saligram v. Mahmood Jawa Mamooji</i> , 23 C. W. N. 704 (1919), referred to. In re <i>Morphett</i> , 2 D & L 967, 69 R. R. 888 14 L. J. Q. B. 259 (1845), distinguished. In re <i>Badger</i> , 2 B. & A. 691; 21 R. R. 455 (1819), referred to. The failure of the arbitrators to give special notice to a party that they intended to proceed ex parte if he did not appear, is no ground for setting aside the award which they made in his absence where it appears that he would not have appeared in spite of such warning—the true test of the validity of such ex parte awards being whether the party complaining was prejudiced by the omission of the arbitrators to serve special notice on him. <i>Udatchand v. Debibux</i> , 1 L. R. 47 Cal. 951 (1920), referred to. <i>BHOWANIDAS RAMGOBIND v. HARSUKHDAS BAL-KISHENDAS</i> ...	933	"JEYT RAIYAT," meaning of See Thakbast Maps	925
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		JUDGMENTS as evidence. See <i>Halai Memon</i>	774
		JUDGMENT ON ADMISSION, when can be claimed. See Civil Procedure Code	763
		JURISDICTION of High Court to summon witness for examination under sec. 36 of the Presidency Towns Insolvency Act, from long distances. See Presidency Towns Insolvency Act	370
		"JUSTICE, equity and good conscience," decision according to the principles of, significance of. See Suit for cancellation of ex parte decree	587
		KHANKAHS, what are—Sajjadanashin, his rights—Right of succession to the office—Right to surplus income, if exclusive of other heirs—Dedication, proof, though word wakf not used, from user. On the death of a sajjadanashin of a khankah, his eldest son, if qualified, is the natural successor of his father. Ordinarily speaking, the sajjadanashin has a larger right in the surplus income than a mutwali, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the mahant of a Hindu math, has full power of disposition over it. <i>Vidya Varuthi Thirtha v. Balusami, Ayyar</i> , 1 L. R. 48 I. A. 302, 322. s. c. 26 C. W. N. 537 (1921), referred to. But this does not mean that in every case the whole income from a khankah is at the disposal of the sajjadanashin and it was plain from the authorities as well as from the evidence in this suit that at certain shrines the members of the founder's family other than the sajjadanashin are treated as entitled to share in surplus offerings which remain after payment of expenses (including a reasonable remuneration to the sajjadanashin). Dedication may be inferred although the word wakf is not shown to have been used. The nature and origin of khankahs described. <i>KHAWAJA MUHAMAD HAMMIL v. MIAN MAHMUD</i>	701
		KNOWLEDGE of co-sharer landlord, of sale in execution of rent decree obtained by another co-sharer landlord, and acquiescence therein, if amounts to waiver of notice. See Bengal Tenancy Act	765

LAND ACQUISITION ACT (1 of 1894), sec.

18—Circumstances under which reference to the Improvement Tribunal not to be stayed by High Court; The Land Acquisition Collector having directed the whole of the compensation money in respect of a certain property to be paid to K S applied for a reference under sec 18 of the Land Acquisition Act and subsequently brought a suit along with two other Plaintiffs against K on the Original Side of the High Court for the recovery of possession of the said property and other reliefs S having applied for stay of the reference in the Court of the Calcutta Improvement Tribunal and failed, applied on the Original Side of the High Court for revision of the Tribunal's order refusing stay or in the alternative for an injunction restraining K from proceeding with the reference or in the alternative, for a transfer of the reference to the High Court for determination along with the suit Held —That S, having made a reference under sec 18 of the Land Acquisition Act had chosen her forum and her application to the Tribunal for stay having failed, she must abide by its decision. Saibesh Chandra Sarkar v Sir Bejoy Chand Mahatap Bahadur, 26 C. W. N 506 (1921) and Bhandi, 29 C. W. Madhira, 10 C. W. N 991 (1905) referred to SM SOSHI MUKHI DEBYA v. KESNAB LAL MUKERJEE

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LANDLORD AND TENANT—Origin of tenancy not known—Evidence necessary to prove the nature of tenancy—Circumstances under which permanency of tenure may be presumed—Estoppel and acquiescence—Pucca structures built by tenant, without objection by landlord When the origin of a tenancy is unknown, the evidence and the mode of dealing with the demised land and the acts and conduct of the party constitute the best if not the only, evidence for the purpose of proving the nature of the tenancy. **Ismail Khan Mahamad v Jaigun Bibi**, 1 L R. 27 Cal 570 (1900), referred to. Permanency has been presumed in various cases where there was a series of successions and a series of recognitions by the landlord, the rent being allowed to continue at a uniform rate for a long series of years, but this presumption cannot be drawn from the mere fact that there have been two or three transfers and that again within recent years. In order that the tenant might avail himself of the plea of estoppel or acquiescence against the landlord, it is necessary for the tenant to show that in spending money for the erection of buildings of a permanent character he was acting in an honest belief that he had a permanent right in the land and that the landlord knowing that he was acting in that belief stood by and allowed him to go on with the construction. Mere knowledge of the landlord or his agent is not enough. **Beni Ram v. Kundan Lal**, L. R. 26 I A. 58 s. c 3 C. W. N 502 (1899) and **Ramsden v. Dyson**, L R 1 Eng & Ir App 129 (1866) referred.

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ed to SYED ALI KAZEMINI MAT-
WALI v MANIK CHANDRA PRAMANIK 969

LEASE of wakf property for ten years by
mutwahi, with a covenant for perpetual

of perpetual tenancy at a fixed rent to the holder of waki estate—Adverse possession—A religious endowment—Ten-

- LEASE—concl'd.**
and so the lessee did not acquire the status of a permanent lessee by adverse possession for twelve years from the date of the lease. *Vidya Varuthi v Valusami*, L. R. 48 I. A 302: s c 1 L. R. 44 Mad 831, 26 C W N 537 (1921), followed *Magdalen College v. Attorney-General*, 6 H. L. C. 62; 108 R. R 62 (1857), and other cases referred to *GAJENDRA NATH DEY v. MOULVI ASHRAF HOSSAIN* 159
- LEAVE**, if necessary for sale of properties of which a Receiver has been appointed but of which he has not taken possession See *Transfer of Property Act*, sec 99 38
- LEGAL PRACTITIONERS ACT (XVIII of 1879), s. 13 (f)**—"Any other reasonable cause," if extends to other than professional misconduct—Pleader, inciting people not to pay unpopular tax, and bound over to keep the peace under s. 107, *Criminal Procedure Code (Act V of 1898)*—Court, if has jurisdiction to deal with pleader under s. 13 (i) of the Legal Practitioners Act—Discretion of Court—Privy Council—Special leave application against order made within jurisdiction but in exercise of Court's discretion, if lies } Sec 13, sub-sec (f) of the Legal Practitioners Act is not confined to acts done in a professional capacity. When a pleader, in the course of an agitation against a local tax, did not confine himself to protests, however vehement, against the tax or against its injustice but urged an organised resistance to payment and attempted to establish a system which would have impeded and might have defeated its recovery with grave danger to public peace, and was bound over to keep the peace and later on dealt with by the High Court under the Legal Practitioners Act with the result that his *sanad of practice* was cancelled "until such time as he satisfied the Court by his conduct that he was fit for re-admission." Held (without expressing either approval or disapproval of the order)—That the circumstances were sufficient to found jurisdiction under sub-sec (f) to sec. 13 of the Act, and as it was entirely a matter for the discretion of the Court that made the order, no leave to appeal against it should be granted by the Judicial Committee *SANKAR GANESH DABIR v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL* 313
- Pleader—Application for renewal of certificate after lapse of years—Discharge from Government service if a ground for refusal to renew the certificate—Suppression of facts relating to the discharge, how far should interfere with the renewal.** A pleader, on getting Government service, applied to the High Court and obtained an order of suspension for the period of his employment under Government. After a number of years, being discharged from the service, he applied for renewal of his certificate, but in the application the facts relating to his discharge were not mentioned. On enquiry by the High Court it was elicited that the applicant had been discharged for his reprehensible conduct, e.g., untruthfulness, in connection with a criminal case. Held—That the conduct of the applicant in relation to the criminal case, though open to serious comment, was not such as would justify the refusal of his application for renewal of certificate. That it was incumbent on him to make in his application a full and complete disclosure of the facts which had led to his removal from Government service and as such his conduct was not calculated to inspire absolute confidence. Therefore, although he was not excluded from practising his profession for all time the High Court ordered that the certificate should not be renewed at once, but after six months. *In re Abiruddin Ahmed*, J L R. 38 Cal 309 s c 15 C W N 357, 12 C L J 625 (1910), referred to **IN THE MATTER OF MUKUNDA LAL DHAR** 129
- s. 28, suit by pleader on adjusted account for money due under agreement for fees for professional service, maintainability of—Indian Contract Act (IX of 1872), s. 25, such an agreement if can be treated as within the scope of.** It was agreed between a pleader and certain clients of his that he should receive certain specified fees for certain specified professional works. On adjustment of accounts a sum was found due to the pleader and the pleader sued on that adjusted account though no agreement had been filed in Court. Held—That it may be conceded that where there is no agreement between the pleader and his client, the pleader is entitled to maintain an action for recovery of reasonable remuneration for services rendered. But where there is a contract between the parties, such contract to be enforceable must be deposited in Court within 15 days from the day on which it is executed. The agreement in the present case not having been so filed was not enforceable under sec 28 of the Legal Practitioners Act, *Kamini Debi v Khetter Mohun*, 15 C L J 660 s c 27 C W. N. 45 (1911); 15 C L J 690 s c 15 C W. N. 681 (1910), *Ishan Chandra Kar v Ram Charan Pal*, 20 C L J. 445 (1914) and several other cases referred to and followed. The suit on the basis of the adjusted account was in essence a suit to enforce an agreement which did not comply with the requirements of sec 28 and was therefore not maintainable. *Krishnasami v Kesava*, J L R. 14 Mad 63 (1890), *Anantayya v Padmayya*, J L R. 16 Mad 278 (1892) and other cases discussed and relied on. Held further—That the case could not be treated as one within the scope of sec 25 of the Indian Contract Act, as the services rendered by the pleader were not voluntary but were rendered on request in pursuance of an agreement to pay a certain remuneration *KALIPADA DAS v. DURGADAS ROY* 769
- LEPROSY** when disqualification in succession in Hindu law. See *Hindu Law* 959
- LESSEE** under Defendant in a successful suit for possession, if may be added as a party

LESSEE—concl.
after mesne profits finally assessed See
Civil Procedure Code, Or 22, r. 10 and
sec. 47 29

—, if entitled to suspend rent for un-
authorized interruption by another lessee
See Transfer of Property Act, sec. 108 (c) 71

LETTERS PATENT, cl 12—"Suit for land"—

High Court's jurisdiction to entertain suit
for specific performance of a contract to
purchase a tea estate in Assam—Appointment
of Receiver, discretion of Judge—Con-
struction of statute. A, carrying on the
business of tea planters, owned a tea estate
in Assam. B entered into an agreement
with A in Calcutta to purchase the estate
for a certain sum, but subsequently failed
to do so, and A brought a suit on the
Original Side of the Calcutta High Court
for specific performance or in the alterna-
tive, for damages. On an application by

the Plaintiff the Judge appointed a Receiver,
against which order the Defendant ap-
pealed, urging that the suit being a "suit
for land" the High Court on its Original
Side had no jurisdiction to try the suit
in view of the terms of cl 12 of the Letters
Patent and hence had no jurisdiction to
appoint a Receiver. Held per Sanderson,

C J.—That if the word "suits for land"
are given their natural meaning, the suit
does not come within the meaning of those
words. *Sudamdih Coal Co., Ltd. v*
Empire Coal Co., Ltd., 1 L R 42 Cal
942 (1915), distinguished. *Land Mortgage*
Bank v Sudurudeen Ahmed, 1 L R 19
Cal 358 (1892), relied on. In construing
a statute it is necessary for the Court to
give the natural meaning to the words
which are used, and if it is thought ad-
visable to include cases which are not
covered by the words of the statute in
their natural meaning, it is not for the
Court to strain the language of the statute
so as to include them, but it is the func-
tion of the Legislature to amend the statute
and the same principle applies to the con-
struction of the Charter. Having regard
to the fact that the agreement, which it
is sought to enforce, was made in Calcutta,
the Court had jurisdiction to entertain
the suit. The appointment of a Receiver
is a matter for the discretion of
the Judge—a discretion which must
be exercised judicially and upon
well recognised principles. *Gibbs v.*

David, L R 20 Eq Cas 373 (1875),
referred to. Per Richardson, J.—That
this is not a suit for land either within
the natural meaning of those words or
within the meaning which had been given
to them in previous decisions of this
Court. Nothing can be decided in this
suit between vendor and purchaser which
directly affects the land or binds third
parties who may have or may claim rights
therein. That being so, the suit does
not appear to be a suit brought for the pur-
pose of establishing title to or acquiring
possession of or control over land. The
agreement having been made in Calcutta,
and the suit being not a suit for land,
leave was properly given to institute it

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on the Original Side. *Sreenath Roy v.*
Cally Das Ghose, 1 L R 5 Cal 82 (1879),
Land Mortgage Bank v Sudurudeen, 1 L
R 19 Cal 358 (1892) and *Sudamdih Coal*
Co., Ltd. v Empire Coal Co., Ltd., 1 L
R 42 Cal 942 (1915), referred to. The
learned Judge having seisin of the suit,
it was open to him in the exercise of his
discretion to appoint a Receiver. *NAGEN-*
DRA NATH CHAUDHURY v. ERALI-
GOOL CO LD. 65

LETTERS OF ADMINISTRATION, who is
entitled to, *shebait or priest*. See
Probate and Administration Act, s 21 .. 411

LIABILITY of Railway administration for
loss of goods. See Indian Railways Act .. 1017

LIMITATION, fresh start given to auction-
purchaser given symbolical possession.
See Civil Procedure Code, Or 21 r 95 .. 24

—, time from which runs when
agreement discovered to be void. See
Oudh Estates Act 949

—, for a suit for possession of un-
cultivated land over which both parties
alleged exercise of definite acts of owner-
ship. See Limitation Act .. 340

— Act (IX of 1908), sec 12—Judg-
ment of Judge on Original Side, appeal
from—Delay on the part of Appellant in
having the order drawn up—Whether en-
tire time taken in obtaining the order to
be deducted—Practice, not amounting to a
Rule of Court. In determining what is
the requisite time referred to in sec 12
of the Limitation Act, the conduct of the
Appellant must be considered. No period
can be regarded as requisite under the
Act which need not have elapsed if the
Appellant had taken reasonable and proper
steps to obtain the order appealed
against. The decision in *Bani Madhub*
Mitter v Matungini Dassi, 1 L R 13 Cal
104 (F R) (1886), does not support the
proposition that in determining what
period is to be deducted in any case, the
time actually consumed in obtaining the
decree is to be regarded. On the ques-
tion whether this was the practice, the
Judicial Committee on being referred to a
well-known book on practice observed that
it did not appear to be laid down in terms
to plan and not hesitating that their Lord-
ships could rely upon it for the purpose
of saying that it had become established
as the equivalent of a Rule of Court.
PRAMATHA NATH ROY v. THE HON.
WILLIAM ARTHUR LEE 156

— Art. 12, limi-
tation for a suit for setting aside sale
when unauthorised decree-holder pur-
chased in *benami* of another. See Civil
Procedure Code .. 294

— Sch. I, Art. 31
and Art 115—Suit by a consignor against
a common carrier for non-delivery of goods,
whether governed by Art. 31 or 151. A
suit against a common carrier by the con-
signor for damages for non-delivery of
goods sent through such carrier is govern-
ed by Art. 31 of the Indian Limitation
Act, 1908, Sch I, and not by Art. 115, the

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words of Art. 31 being wide enough to include suits by the consignor as well as by the consignee <i>The India General Navigation Co., Ltd. v. Nanda Lal Banik</i> , 13 C. W. N. 851 (1909). <i>Haji Ajam Goolam Hossein v. Bombay and Persia Steam Navigation Co., I. L. R. 26 Bom. 562</i> (1902). and <i>Mutsaddi Lal v. The Bombay Baroda and Central India Railway Co., I. L. R. 42 All 390</i> (1920), followed. <i>Radhasham Basak v. The Secretary of State for India in Council</i> , 20 C. W. N. 790 (1916), distinguished. <i>VALIY MD HAJI GUNNY v. NEDERLAND STEAM NAVIGATION CO</i> 806		<i>VENKATA PERUMAL RAJU BAHADUR VARU</i>, Art. 132, limitation for recovery of money due under an instalment mortgage bond providing for recovery of whole amount on default of any instalment—Acceptance of overdue instalments, if amounts to waiver.] An instalment mortgage bond provided for payment in twelve yearly instalments, the first falling due in Pous 1308 B. S. It was further provided that on default in payment of any one instalment the whole would be recoverable with interest. The instalments for 1309 to 1311 B. S. were paid out of time and accepted. The mortgagee sued for the subsequent instalments. Held—That the article applicable to the suit was Art. 132 of the Limitation Act. That though Art. 132 does not provide for cases of waiver, and there is no case directly deciding that the principle of waiver would apply to mortgage bonds payable by instalments having regard to the weight of authority in connection with cases under Art. 7. and instalment decrees, it may be held that the payment and acceptance of overdue instalments in the present case constituted a waiver, and that the mortgagee was entitled to recover the subsequent instalments. <i>Hurronath Roy v. Maheroola Moolah</i> , 7 W. R. 21 (F. B.) (1867). <i>Hemp v. Garland</i> , 4 Q. B. 519 (1843) and <i>Mon Mohon Roy v. Durga Charan Goodee</i> , I. L. R. 15 Cal. 502, (505) (1888), followed. <i>Mohesh Chandra Banerjee v. Prosanna Lal Singh</i> , 1 L. R. 31 Cal. 83 (87). s. c. 8 C. W. N. 66 (1903), distinguished. <i>Jagat Mohini Dassee v. Monohar Koonwar</i> , 25 W. R. 278 (1876). <i>Sitab Chandra Nahar v. Hyder Molla</i> , 1 L. R. 24 Cal. 281 (1896), and other cases referred to. <i>SURENDRA NATH alias KARTICK CHANDRA GHOSE v. RAJA RESHEE</i> CASE LAW 893	408
89—Joint Hindu family—Partition—Dealing with moneys by a separated member on behalf of self and others—Suit for accounts—Limitation. [When members of a joint Hindu family after separation continued to maintain intimate relations, so that moneys were received and dealt with by the members of one of the separated branches on behalf of themselves and members of the other branch. <i>Semble</i> —A suit for accounts brought by the latter against the former is governed by Art. 89 of the Limitation Act and not by Art. 62. <i>MERLA VENKANNA v. MERLA AGASTHIAH</i> 725		Arts. 123, 124—Succession certificate taken out by one heir—Suit by other heirs to recover shares of moneys collected by former—Limitation—Suit whether for accounts. [A suit by some of the heirs of a deceased person to realise their share of moneys collected by another heir on the strength of a succession certificate taken out by the latter is governed by Art. 62 and not by Art. 120 or Art. 123 of the Limitation Act. <i>Abdul Ghaffar v. Nur Jhan</i> , 1 I. R. 37 All 434 (1915), relied on. <i>SM ABIDUN-NESSA BIBI v. ISUF ALI KHAN</i> 941	
applicability of, to suit for refund of purchase money, where immovable property sold without title by registered conveyance. See <i>Sale of immovable property</i> 1025		Arts. 123, 124—Their applicability—Symbolical possession, operation of, against stranger and against judgment-debtor—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, if applicable when landlord had nothing to do with dispossession—Art. 142, application of, against Defendant whose possession commenced within 12 years, though Plaintiff out of possession for over 12 years. —Independent trespassers, limitation against. [Where in a mortgage suit, immovable property was sold in execution of the decree and the purchaser was given, not actual but symbolical, possession and his suit for recovery of possession was brought within twelve years from the date on which he obtained symbolical possession. Held, (a) As against the Defendant who was not a party to the mortgage suit or to the proceedings in execution of the decree, that neither Art. 138 nor Art. 142 of the Limitation Act of 1908 applied, that the only article on which the Defendant could rely was Art. 144 which threw on him the onus of showing that he had been in possession of the property adversely to the Plaintiff for twelve years before suit and that he	893
103 104, 116, limitation for suit for dower debt by wife's heirs. See <i>Suit for dower debt</i> 230		Art. 113—Contract for sale of land—Intending purchaser if beneficial owner or has a charge on the property—Right to sue for possession without claiming specific performance—Transfer of Property Act (IV of 1882), sec. 54.] Under a contract of sale of land, no charge is created in favour of the intending purchaser, who does not by reason of such contract alone become entitled to sue for possession, absolutely or conditionally on his fulfilling his part of the stipulations in the contract. A suit to enforce his rights under the contract with reference to the property is essentially one for the specific performance of a contract to which Art. 113 of the Limitation Act applies. <i>E. SUBBARAYA PILLAI v. RAJA KUMAR</i>	

LIMITATION ACT—contd

having failed to discharge the onus the plea of limitation failed, and, (b) as against the Defendant who claimed the property through the judgment-debtor in the mortgage suit, that much as the Plaintiff was entitled as against him to treat the delivery of symbolical possession as equivalent to the delivery of actual possession, Art 142 was applicable and that therefore the suit was not barred. **Jagabandhu Mukherji v. Ram Chandra Bysack**, 1 L. R. 5 Cal 584 (F. B.) (1880). **Jagabandhu Mitter v. Purnanand Goswami**, 1 L. R. 16 Cal 530 (1884) and **Thakur Sri Sri Radha Krishna Chanderjee v. Ram Bahadur**, 22 C. W. N. 330 (P. C.) (1917) referred to. **Mohadev Sahbaram Parkar v. Janu Mawji Hath**, 1 L. R. 36 Bom 373 (F. B.) (1912) and **Sridhar Mudlavrao Dhopakar v. Ganpati Panja Gode**, 1 L. R. 43 Bom 559 (1916), distinguished. **Bengal Tenancy Act, Sec 111, Art 3**, has no application in a suit between two tenants unless the dispossession of the Plaintiff tenant can be attributed to the agency of the landlord. **Haran Chandra Barai v. Madan Mohan Barai**, 25 C. W. N. 102 (1920), referred to. **Semble**—One trespasser cannot add to his own possession the previous independent possession of another trespasser, and when possession passes from one trespasser to another, there is a constructive, even if a momentary, restoration of the true title to possession. In view of this principle, even in a case to which Art 142 applies, the Plaintiff is in time if he can show that the Defendant's possession commenced within twelve years of the suit. **JANAKI NATH SAHA v. BAIKANTA NATH GHATAK**

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—, Art. 142, limitation for a suit for possession of uncultivated land over which both parties alleged exercise of definite acts of ownership—Resort to presumption in such cases, is warrantable. Where, according to both parties, definite acts of ownership were exercised over the land which though not cultivated was not incapable of possession, the Court must decide the case upon the evidence adduced by the parties without resorting to any presumption based on title. **Sheikh Sohnur Ali v. J. Huttman**, 1 C. W. N. 277 (1896). **Jones v. Chapman**, 2 Exch Rep 103 (1849) and **Ram Bandhu v. Kusu Bhattu**, 5 C. L. R. 481, 483 (1870) referred to and discussed. **BEHARI LAL NANDI v. NRITYANANDA GHOSH**

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—, Art. 132—Application for time to cite witnesses, if a step in aid of execution. The question whether an application is or is not a step in aid of execution must depend upon the circumstances of each case. Although an application to issue summons or to do some other act necessary for proceeding with the execution case or for removing a bar to the execution proceedings would be a step in aid of execution, an application for time to cite witnesses irrespective of

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whether the decree-holder does so or not is not a step in aid of execution. **RAJENDRA LAL SAHA v. ABDUL KARIM ABU AHMED GHUZZNAVI CHOUDHURY**

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MADRAS ESTATES LAND ACT (1 of 1908), sec 77, suit under—Decree for one year, if res judicata in suits for subsequent years—Ss 27, 28, reference to past years. See **Civil Procedure Code**, secs 109, 110

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MAHOMEDAN LAW—Wakf—Property settled in perpetuity for aggrandisement of family under colour of charity—Wakf, illusory—Remote gift to the poor, if validates wakf—Wakf Validating Act (VI of 1913), not retrospective—Suit to set aside wakf as invalid—Compromise—Agreement confirming the wakf and stipulating for payment by mutwali of allowances to members of the family out of the income of settled properties, how far binding—Contract for valuable consideration creating charge on property, not accompanied by delivery, validity of. Held—That two deeds of 1816 and 1868 which purported to create by gift a perpetual succession of interests for the aggrandisement of the family of the donors were invalid by the Mahomedan law and were not validated by the use of the term wakf or by the mention of a remote trust to the poor. That the Mussulman Wakf Validating Act, 1913, cannot be construed as validating deeds executed before its date. A suit brought in 1860 to set aside the deeds as invalid was compromised in 1881 by two agreements made and concluded between the members of the family on the one hand and the then mutwali on the other which whilst purporting to confirm the wakfnamas provided for the payment by the mutwali of fixed allowances to living and named members of the family out of the income of the settled properties, in consideration of which stipulation the mutwali was confirmed in his possession of those properties. The allowances were made payable to the persons named immediately and were to be continued to their heirs. Held—That the purpose of the agreements was quite different from that of the wakfs and the agreements were enforceable though the wakfs were invalid. The allowances payable under the former were intended to take effect as immediate and heritable charges on the income of the properties, taking priority of all the limitations contained in the settlements. That the direction in the agreements to pay the allowances "out of the income" of the settled properties showed an intention to create a charge and this intention was not frustrated by the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlements. That the agreements were not gifts but being contracts for valuable consideration were not required to be accompanied by delivery, and the charges on land created by them could be enforced like other charges by the Courts. That the fiduciary character of the mutwali's possession and the conditions on which it was given could not be repudiated by his heirs and the

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MAHOMEDAN LAW—concl'd.		MORTGAGE SUIT—concl'd.	
latter allowed to keep the properties in their own hands free from all charges. That the provision in the agreements that the distribution of an annuity among the heirs of the annuitant should be in proportions to be determined by the family panchayet (if it was intended to do more than to authorise the panchayet to settle disputes as to heirship) was inoperative and could be disregarded. KHAJEH SOLEHMAN QUADIR v. NAWAB SIR SALIMULLAH BAHADUR	101	The mortgagors themselves after entering into the arrangement could not have claimed that the mortgagees were bound to give credit for the amount in satisfaction of the mortgage-debt which they themselves asked the mortgagees to appropriate in satisfaction of some other debt. THE KUSTHA LOAN OFFICE LD. v. ANANDA CHARAN CHAKRABARTY	763
Dower—Widow's lien over husband's estate—Possession must have been taken with consent of husband or other heirs—Stare decisis—Obiter dictum. The widow of a deceased Mahomedan is not entitled to retain possession of her husband's estate for the satisfaction of her claim for dower unless she obtained such possession lawfully with the express or implied consent of the husband or his other heirs. The statement of the law to that effect by the Judicial Committee in Hamira Bibi v. Zubaida Bibi 1 L. R. 38 All 581 S. C. 21 C. W. N. 1 (P. C.) (1916), is not obiter dictum. Becju Bee v. Moorthiya Sahib 1 L. R. 43 Mad. 214 (F. B.) (1919), followed. A case is only an authority for the ratio decidendi. SAHU BIBI v. ISMAIL SHAIKH	1013	MORTGAGE illegally effected, if may support subsequent sale as for "antecedent debt." See Hindu Law	150
MEASURE OF DAMAGES , if difference between contract and market rate or between contract rate and rate expected from custom. See Indian Contract Act	974	— of ancestral property, when binds descendants in absence of necessity and consent. See Hindu Law	150
MEMORANDUM declaring that parties cease to be joint and providing for execution of a partition deed if must be registered. See Registration Act	561	MORTGAGOR if may deny title to property which he professes to mortgage. See Estoppel	607
"METHODS and points of view of business men," how far to be looked into in interpreting business contracts. See Sale of future goods	878	NECESSARY and optional religious acts of Hindu female owner, limits within which each is binding. See Hindu Law	653
"MIRASHIORTTO" in tenancy, if imports permanency and heritability. See Construction of lease	1037	NON-PAYMENT of rent, continuous if creates rent-free title when land held in thika. See Thakbust Maps	923
MORTGAGE SUIT Application of compensation money for mortgaged properties compulsorily acquired in payment of unsecured debts according to mortgagee's suggestion—Purchaser of equity of redemption, if can question it. Where before the Defendants, purchasers of the equity of redemption, had acquired any interest in the mortgaged properties, the mortgagees applied, according to the suggestion of the mortgagors, a part of the compensation money received on account of some of the mortgaged properties under the Land Acquisition Act in satisfaction of certain unsecured debts due from the mortgagors to the mortgagees and applied the balance in reduction of the mortgage-debt. Held—That the purchasers of the equity of redemption had no right to demand that the mortgagees should give credit for the entire amount of the compensation money in reduction of the mortgage-debt, as they did not acquire any interest in the mortgaged properties at the time of the arrangement.		NOTICE without requiring tenant to remedy misuse when same is capable of remedy. validity of. See Bengal Tenancy Act, s. 155	144
		OBJECTION to appointment of common manager to portion of estate or tenure, if tenable, when no such objection taken to the appointment of his predecessor to the same properties. See Bengal Tenancy Act	1040
		ONUS of proof question of, how far material when the entire evidence is before the Court. See Bengal Tenancy Act	328
		OPINION , mere expression of, by Judge no bar to his passing a different order finally. See Compromise, etc.	792
		ORDER under sec. 278, Civil Procedure Code of 1882, bar to suit after it has become final, even though wrong. See Civil Procedure Code, sec. 278	275
		OUDH TALUQDAR , primogeniture sanad to—Construction—"Successor," if includes transferee by Will or deed—Sunni, Mahomedan law—Document whether deed or Will—Test—Inartistic drafting in India—Gift inter vivos, conditions of—Delivery of possession, actually or constructively, sufficient—Gift of immoveable property reserving usufruct in part—Delivery of actual possession of the other part, sufficient as delivery constructively of the whole. Held, on a construction of a primogeniture sanad granted to an Oudh Taluqdar, that the word "successors" in it meant those designated persons who would succeed in the event of an intestacy and not persons who took by sale, gift or bequest. That the grantee's widow to whom the Taluqdar left the Taluqdari property by Will, when by right of inheritance under the sanad it should have gone to the elder of the two surviving brothers, was not competent to alienate the property under the terms of the sanad as a "successor" of the grantee, but could do so subject to the provisions of the Sunni Mahomedan law, the personal law by which she was governed.	

OUDH TALUQDAR—contd.

In Mahomedan law the broad distinction between a gift (*hiba*) and a bequest (*wasiat*) is that in the case of a gift the immediate right of property in the subject of the gift is conferred and in the case of a bequest the vesting of the right of property is postponed. Held, on a construction of the document in question in this case (after adverting to the difficulty of construing Indian documents owing to the absence of a uniform and accurate system of conveyancing and to the fact that deeds and Wills are as a rule most artistically drawn frequently by persons not possessed of legal knowledge), that it was intended to be an irrevocable disposition by the donor of all her moveable and immovable property and all her zamindari and *lainbardari* estate mentioned in the deed and in the schedules thereto, subject to the reservation for her own use during her life-time of the usufruct of some of the immovable properties. The reservation of the usufruct does not by itself make the gift of such property by a Sunni Mahomedan void under Mahomedan law. *Nawab Umjad Ally Khan v. Mussummat Mohummed Begum*, 11 M. L. A. 517; 10 W. R. P. C. 25 (1867), followed. For a valid gift *inter vivos* under the Sunni Mahomedan law, the three conditions which are necessary are, (a) manifestation of the wish to give on the part of the donor, (b) the acceptance of the donee, either impliedly or expressly and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively. The old and admittedly authoritative texts of Mahomedan law relating to gifts could not have been intended to lay down for all time what should alone be the evidence that title to lands had passed. The object of the Mahomedan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass, from the donor to the donee and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift. Where by the same act, the donor gave the whole of her zamindari property to the donee, but a part of it being given subject to the reservation of the usufruct in the donor, actual physical possession was taken by the donee of the rest only. Held—That the taking possession by the donee of a part only amounted to taking possession constructively of the whole zamindari including the part of which physical possession was not taken even though the donee did not apply for mutation of names in respect of the latter property. *KHAN BAHADUR MAHAMMAD ABDUL GHANI KHAN v. MUST. FAKHAR JAHAN BEGUM*

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(OUDH) ACT XXII of 1886, as amended by Act IV of 1901—Suit by Taluqdar to assess *guzara* land with rent—*Guzara* land given

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by former Taluqdar to wife for life rent-free by Will—Proprietor claiming taluq under same Will, if can repudiate legacy to wife—Construction of Will—"Sirat makbuza," meaning of—"Sir," popular sense of, includes "*guzara*" lands as well as home-farm lands—Paper-book in Privy Council appeal—Courts duty in India to control inclusion of irrelevant documents.) R. Taluqdar of Mahewa in District Kheri in Oudh, by Will bequeathed all his moveable and immovable properties to a nephew J, subject to certain legacies of which that to his wife was in these terms. "To my wife for life five hundred rupees per mensem besides *sirat makbuza* (which means '*sir* land in possession') will be given from the estate." Held—That R. by his Will intended to bequeath to his wife an absolute estate for her life as a proprietor and without liability to have the same assessed to rent in the "*sir* land in her possession." That the expression "*sir* land in her possession" covered *manza Chhauch* which had been given to her for her maintenance by R. in his life-time and was not confined to the home-farm lands the special meaning assigned to the term "*sir*" by Act XXII of 1886, the word "*sir*" being generally used in Oudh to cover both classes of lands. That J who took taluqa Mahewa under the Will could not repudiate the condition of the Will that *manza Chhauch* should be held by R's widow for her life rent-free. That under the terms of the Will J would not be the "proprietor" of *manza Chhauch* so long as R's wife continued to be the proprietor for life, and Act XXII of 1886, as amended by Act IV of 1901, consequently did not apply. *Parbati Kunwar v. The Deputy Commissioner of Kheri*, J. R. 45 J. A. 111; s. c. I. L. R. 40 All. 511, 23 C. W. N. 125 (1918), distinguished. A duty lies upon the Courts in India to exercise control upon the wholesale inclusion, in the records transmitted to England of irrelevant documents by the parties to an appeal to the Judicial Committee which is a scandal and a hindrance to the proper administration of justice. *JAI INDRA BAHADUR SINGH v. VIJAY RAJ KUNWAR*

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OUDH ESTATES ACT (I of 1869), s. 23—Succession to taluqdari estate in list 4—"Ordinary law," if includes sanad—Crown Grants Act (XV of 1895), s. 3—Family custom, proof of, antecedent to sanad, if admissible—Instance of subsequent date, value of | The "ordinary law" by which, under sec 23 of the Oudh Estates Act, the succession on intestacy to a taluqdari estate entered in List 4 is to be regulated is the law which would govern the parties apart from the statute and includes any sanad giving title to the property in dispute. *Narendra Bahadur Singh v. Achal Ram*, L. R. 20 I. A. 77; s. c. I. L. R. 20 Cal. 612, 654 (1893). *Debi Bakhsh Singh v. Chandrabhan Singh*, L. R. 37 I. A. 168; s. c. 14 C. W. N. 1010 (1910), and *Sitla Bakh Singh v. Sital Singh*, L. R. 48 I. A.

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228: s. c. 25 C. W. N 721 (1921), relied on. **Brij Indar Bahadur Singh v. Ranees Janki Koer**, L. R. 5 I. A. 1 at p. 13 (1877) and **Parbati Kuer v Chandrapal Kuar**, L. R. 36 I. A. 125. s. c. I L. R. 31 All. 457 at p. 474, 13 C. W. N 1073 (1909), explained instances of succession in the family which occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in a sanad of 1863 cannot be used to set up a rule of succession directly contrary to the terms of the sanad, and a single instance, unexplained, of a subsequent date which occurred in one branch of the family was wholly insufficient to establish a custom binding on another branch. **Thakur Shoo Singh v. Rani Raghubans Kunwar**, L. P. 32 I. A. 203 s. c. 9 C. W. N. 1009 (1905), referred to **BADRI NARAIN SINGH v. THAKURAIN HARNAM KUAR**

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estate of Hindu Talukdar included in, succession to—Transfer by reversionary heir during life—Time of widow whether governed by Hindu law—Interest, an expectancy and not transferable—Decree in his favour against widow, declaring him entitled to succeed after her death, if confers vested interest in estate—Transfer of spes successionis for consideration—Suit to recover consideration, if lies—Contract Act (IX of 1872), s. 65—Agreement void from inception if within section—Limitation—Time from which limitation runs, when agreement discovered to be void—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97—Pleadings, defective—Relief given upon materials on record } Under the Ouddh Estates Act, the succession to collaterals opens on the death of the widow just as under Hindu law. Under the ordinary Hindu law, transfer by such a collateral of his expectancy to succeed to the estate on the death of the widow of the last male owner is inoperative. The widows of the last male owner of an estate in Ouddh entered in List II attached to the Ouddh Estates Act. I of 1869, having set up a Will of the deceased husband, empowering them to adopt the then next reversionary heir expectant sued the widows and obtained against them a declaration that the Will was void and invalid and that he was entitled to succeed to the estate on the death of the last surviving widow. Held—That the decree was binding only on the widows and the Court of Wards which had taken over the estate and did not create in the Plaintiff an interest in the estate that did not otherwise exist. Held therefore—That a purchaser of the estate from the Plaintiff in the suit, in the life-time of the widows, was not entitled to recover possession on the strength of his purchase. That the purchaser was entitled to recover the consideration money which he paid, under sec 65 of the Indian Contract Act, limitation for such a suit running from the date when he discovered that the sale was void. Sec. 65 of the Contract Act deals with (a) contracts which become void and (b) agreements not enforceable as contracts

List II,

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and therefore void from their inception. An agreement discovered to be void, within the meaning of the section, is therefore one discovered to be not enforceable by law from its inception as distinct from a contract which becomes void. There being materials on the records justifying the Court in holding that there was a misapprehension on the part of the purchaser as to the rights of his vendor in the estate he professed to transfer and that the true nature of those rights was not discovered by him until his demand for possession was resisted, and that this date was well within the period of limitation, the Judicial Committee gave him a decree for recovery of the consideration money in accordance with the provisions of sec 65 of the Contract Act, although the case, as bearing on the provisions of this section had not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts. **THAKURAIN HARNATH KUAR v. THAKUR INDAR BAHADUR SINGH**

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 OUSTER by title paramount and abatement of rent. See abatement of rent 381
 OWNER when bound by adverse entries in thak register. See thakbust maps 925
 PANCHABATI, establishment of idol if essential for declaration for. See Hindu Law 1033
 PAPER BOOK in Privy Council appeal, Court's duty in India. See (Ouddh) Act XXII of 1866 221
 PARTY at whose instance Commissioner appointed, how far liable to indemnify Commissioner. See Commissioner pleader 430
 —, if competent to prove that he had committed a fraud. See Evidence Act, s 92 496
 —, if can be permitted to establish a case which is contrary to his pleadings. See Evidence Act, s 92 496
 PECUNIARY TEST, for Privy Council appeal, if satisfied when decree indirectly affects title to property of the statutory value but which was not subject of the suit or the appeal. See Civil Procedure Code 204
 PENALTY, provision in contract in the nature of. See Indian Contract Act 77
 "PERMANENT SETTLEMENT" whether exclusively means the Settlement of 1793. See Bengal Tenancy Act 647
 PERMANENCY of tenure, circumstances under which, may be presumed. See Landlord and Tenant 969
 PERMANENT LEASE, executed by guardian during ward's infancy, how far binding on the ward—Conveyance of property by guardian as his own—What passes—Refund of premium paid as consideration for the lease—[Ratification.] A Hindu widow, during her son's infancy, granted a permanent lease in respect of a holding, without expressly reciting that she was dealing with the property on behalf of her son, and the son after attaining majority, went on receiving rent from the lessee, but eventually sued for khas possession. Held—That the lady having had no property to deal with as her own, the grant did not create any valid title in the lessee. The lease was accordingly not

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PERMANENT LEASE <i>concl.</i> binding on the son. The son must, how- ever, refund the premium paid to the mother as consideration for the lease <i>Watson v Shamlat</i> , 1 L R 111 A 178 s. c 1 L R 15 Cal 8 (1857), <i>Hanooman Pershad Panday v Munraj</i> , <i>Koonwaree</i> , 6 M. 1 A. 333 (1856), <i>Hemantakumari Debi v Brojendrakrishna Roy Chowdhury</i> , 1 L R 17 1 A 65 s. c 1 L R 17 Cal. 8/5 (1890) and <i>Gopeemohon Takroo v. Radhanath</i> , 2 Knapp P. C. 20, distin- guished. Where a document appears as one executed by the guardian in his own right, it is not possible to apply the principle that where there may be a doubt as to whether the guardian is act- ing for himself or for his ward, the exe- cution may be deemed to have acted law- fully within the scope and in exercise of his authority. In this view no question of ratification arose, for there was no unauthorised act done by the mother on behalf of the infant which could be ratified. <i>Janardan v Anant</i> , 1 L R 32 Bom 386 (1908), and <i>Narain v Mohendra</i> , 15 C L J 332 (1912), referred to.		POLICY OF INSURANCE <i>concl.</i> in a suit. Two policies of Insurance contained a condition to the following effect—"If the claim be made and re- jected and an action or suit be not com- menced within three months after such rejection all benefit under this policy shall be forfeited." The Plaintiff firm's suit for the recovery of their claim under the policies was instituted after the expiry of three months from the date of the rejection of their claim by the Insurance Company. Held—That the Plaintiff firm by reason of their failure to commence the suit within three months of the rejection of their claim by the Defen- dant Company had forfeited under the provisions of the said condition all benefit under the said policies and that the suit was not maintainable. <i>Baroda Spinning and Weaving Company, Ltd. v. Satyanara- yan Marine and Fire Insurance Company, Ltd</i> , 1 L R 33 Bom 311 (1913), followed. <i>Home Insurance Company of New York v. Victoria-Montreal Fire Insurance Com- pany</i> , 1 L R 11907 A. C. 59 at p. 61, re- ferred to. Held also—That the condition in the policies does not offend against the provisions of sec. 28 of Indian Contract Act and is not therefore an infringement of sec. 23 of the Act. <i>Hyrabhai v Manu- facturers Life Insurance Company</i> , 14 Bom L R 711 (1912), referred to. <i>Quero</i> — Whether the Chief Justice can appoint a Bench for the purpose of trying an issue or issues only and not the whole suit. <i>GIRIDHARILAL HANUMANBUX v EAGLE STAR AND BRITISH DOMI- NIONS INSURANCE CO. LD</i> 955	
PERPETUIT GRANT, transferability of, See <i>Sanad</i>	961	POWER of execution. Court, to enlarge or alter the decree by consent of parties. See <i>Civil Procedure Code</i> , s. 47	280
PETITION of compromise on which a decree is based if requires registration, when the petition operates as a lease. See <i>Registration Act</i>	897	"PREFERENCE over other creditors," assign- ment to a creditor by an insolvent, when considered as. See <i>Presidency Towns In- solventcy Act</i>	611
"PIOUS OBLIGATION" to pay, if arises in father's life-time. See <i>Hindu Law</i>	150	PRELIMINARY DECREES, more than one, if may be passed. See <i>Civil Procedure Code</i>	989
PLAINT, amendment at a time when new suit would be time-barred. See <i>Broker's Commission</i>	1007	PRESIDENCY SMALL CAUSE COURTS ACT (XV of 1882), secs. 38, 69—Reference if can be made on an application under sec. 69— Reference made by one of the two Judges constituting the Court, if proper—"State- ment of facts"—Its meaning—"Statement of facts," if to be signed—Requirements of a valid reference under sec. 69—Meaning of the term "suit"—Sec. 6 of 38 and 39 Vict, c. 50.] The Chief Judge and the Sixth Judge of the Small Cause Court, Calcutta, who heard an application for new trial under sec. 38 of the Presidency Small Cause Courts Act, differed in their opinion and delivered separate judgments. The Chief Judge in his judgment narrat- ed the history of the case, gave an ex- position of his view of the law and con- cluded with the expression of opinion that the suit should have been decreed and formulated two questions which he refer- red to the High Court under sec. 69 of the Presidency Small Cause Courts Act. The judgment of the Sixth Judge similarly	
PLANTING of sacred grove on consecrated ground, if a religious purpose. See <i>Hindu Law</i>	1033		
— trees and erecting brick-built building, grant of right of, how far deter- mines the nature of the tenancy. See <i>Construction of Lease</i>	1037		
PLEADER duty of, to client, and Court. See <i>Legal Practitioners Act</i> , s. 13 (c) (f)	88		
— inciting people not to pay un- popular tax and bound down under sec. 107, Cr. P. C., if can be dealt with under sec. 13 (f) of the <i>Legal Practitioners Act</i> . See <i>Legal Practitioners Act</i>	343		
PLEADER'S certificate renewal of, discharge from Government service if a ground for refusal of. See <i>Legal Practitioners Act</i>	328		
— responsibility in regard to com- promise by purdanashin lady. See <i>Pur- danaschin lady</i>	629		
— authority to compromise suit. See <i>Purdanaschin lady</i>	629		
POLICY OF INSURANCE—Condition that if no suit is brought within three months of rejection of claim by Insurance Com- pany, benefit under the policy shall be forfeited—Such condition, if illegal— <i>Indian Contract Act</i> (IX of 1872), secs. 23 and 28— <i>Indian Limitation Act</i> (IX of 1908), Sch. 1, Art. 86—Practice—Chief Justice, whether may appoint Bench to try an issue or issues only			

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contained a statement of facts, an exposition of the law and an expression of opinion that the suit had been rightly dismissed by him. On the hearing of the Reference two questions were raised, viz, (a) whether a Reference under sec 69 is permissible on an application under sec. 38, (b) whether the Court has drawn up a "statement of facts" within the meaning of sec. 69. **Held**—That the application under sec. 38 is an application in the suit and attracts the operation of sec 69 and that the Small Cause Court is competent to make a Reference under sec. 69 upon such an application. **Nusserwanjee v Pursutam**, 1 L. R. 11 Cal. 298 (1885), **Okhoy Kumar v Koylash Chundra**, 1 L. R. 17 Cal 387 (1890) and **Rajendra Malik v. Nandalal**, 1 L. R. 31 Cal 1001 (1904), referred to. **Held also**—That the Reference was not in proper form. Sec 69 contemplates that a statement of facts should be drawn up by the Court, that is, two or more Judges where the case is heard by more than one Judge and should be signed by them. They must then formulate the point on which there is a difference of opinion. This statement of facts and of the point on which there is a difference of opinion is to be accompanied by statement of reasons assigned by each Judge in support of his view. **Ramasami v Madras Times Printing and Publishing Co.**, 30 Mad L. J. 207 (1915) [1915] Mad. W. N. 785 **Jardine Skinner & Co. v Money**, 14 W. R. 312 (1870), **Binode Lal v River Steam Navigation Co.**, 1 C W N 143 (1897) **R v Dudley**, 14 Q B D. 273 (1884) and **R v Commissioners of Sewers for Essex**, 14 Q B D. 561 (1885) referred to. The meaning of the term "suit" in sec. 69 considered. **Gagan Chand v Caspersz**, 4 C W N 44 (1897), **Batasu v Jaiti**, 3 C. W N 131 (1899), **Nainappa v. Chidambaram**, 1 L. R. 21 Mad 18 (1897), **Shyama Charan v Debdendranath**, 1 L. R. 27 Cal 484, s. c. 4 C. W. N. 269 (1900), **Venkata Chandrappa v Venkata Rama**, 1 L. R. 22 Mad 256 (1898) **Achha Mian Chowdhury v Durga Charan Law**, 1 L. R. 25 Cal 146 s. c. 2 C W N 137 (1897) and **Samed Sheikh v Naba Nepal**, 19 C. L. J. 310 (1914) referred to. **Held further**—That a Full Bench of the Presidency Small Cause Court sitting under sec. 38 has no jurisdiction to decide questions of fact, whether they are raised generally or in consequence of its finding on another question of fact or law. **Sasoon v. Haridas**, 1 L. R. 24 Cal. 455 (1896) and **Johan Smidt v. Ramprasad**, 1 L. R. 38 Cal 425 (1911), referred to. **M. L. CHAKRABARTY v. OLOP BORIN**

PRESIDENCY TOWNS INSOLVENCY ACT (11) of 1909 s. 30 (2)—Application by a creditor against guarantor under a composition scheme if lies under s. 30 (2)—Court's jurisdiction to vacate an order. On the 31st August 1910 B. R. and B. were adjudicated insolvents. On the 10th December 1910 a deed of composition was entered into between the insol-

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vents and several creditors whereby G guaranteed payment as guarantor for the amounts which the insolvents were to pay and he assumed the position of a trustee for the purpose of collecting the assets and the effects of the insolvents. On the 11th September 1911 the composition was approved by the Court and adjudication was annulled. On the 29th July 1922 J. S. & Co. made an application under sec. 30 (2) of the Presidency Towns Insolvency Act, for (i) an order that the debtors and the trustee G do pay the sum due to them under the composition deed, and that in default they be committed for contempt and (ii) an order that the debtors be re-adjudged insolvents. On the 31st August 1922 the Court directed G to pay as guarantor and so far as the debtors were concerned, the said application was allowed to stand over. G failed to pay and on the 21st November 1922 the debtors B. R. and B. were re-adjudged insolvents and it was further ordered that that order be not drawn up or completed for a period of a fortnight in order to enable G or the insolvents to pay. The fortnight expired, and G and the debtors did not pay. The order was settled but it was not drawn up. On the 6th February 1923, on the application of J. S. & Co. the order dated the 21st November 1922 was vacated and on the 7th February 1923 the Court directed a writ of attachment to be issued against G inasmuch as he had failed to comply with the order of payment made on the 31st August 1922. G appealed from the orders. **Held**—That on the 21st November 1922 when the debtors were re-adjudged insolvents there was an end of the composition and the Appellant G's liability under the covenant came to an end. **Held also**—That G was a guarantor in the real sense of the word *Quære*—Whether the learned Judge had jurisdiction under sec 30 (2) of the Presidency Towns Insolvency Act to deal with the personal liability of the Appellant as a mere guarantor of the amounts which the debtors had covenanted to pay. **Ex parte Mirabita: In re Dale**, L. R. 20 Eq 772 (1875). **Held, further**—That in view of the long period which had elapsed before J. S. & Co. applied to enforce the covenant and the fact that the order of the 31st November 1922 which had the effect of discharging G from liability under the covenant was made at their instance, the order should not have been vacated, assuming that the Judge had jurisdiction to vacate it. **Seemle**—If the application was to be regarded as an application by a creditor against the trustee under the composition deed as such transferee, then the learned Judge had jurisdiction under sec 30 (2) of the Presidency Towns Insolvency Act to deal with the application. The reasoning laid down in **Ex parte Mirabita: In re Dale**, L. R. 20 Eq 772 (1875), was applicable to the construction of sec. 30 (2) of the Presidency Towns Insolvency Act. **GORIND DAS PITY v. JARDINE SKINNER & CO**

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ss. 36, 90 (1)—Examination of witnesses under s. 36—Jurisdiction of High Court to summon witnesses residing outside Calcutta and more than 200 miles away—Civil Procedure Code (Act V of 1908), Or. 16, r. 19.] Under sec 36 of the Presidency Towns Insolvency Act, the Registrar in Insolvency ordered two persons to attend before him for their examination. On their application to set aside that order on the ground that the order should not have been made as they resided more than 200 miles from Calcutta. Held—That the High Court has power under sec 36 to summon before it persons who reside at a greater distance than 200 miles. Proper travelling and other expenses should, however, be paid and so far as possible the convenience or persons required to attend should be considered. RE DINARAM SOMANI 370

ss. 36 and 56—Assignment to a creditor by an insolvent before adjudication, when to be considered as "preference over the other creditors," s. 56 sub-s (a)—Assignment by creditor to another, onus on whom to prove consideration and good faith, s. 56 sub-s. (A)—Examination of insolvent and of creditor or of creditor's assignee under s. 36, whether and when admissible in proceeding under s. 56—Whether Court has jurisdiction to deal with application under s. 56 | Where proprietors of a firm, unable to pay their debts, on being pressed for payment by X, one of their creditors, who was aware of their inability to pay, assigned debts due to them to X, and were, within two weeks thereof adjudicated insolvent, and where X assigned the debts so assigned to him to M R., a firm, and where after the examination of one of the insolvents, of X and of some of the proprietors of the firm of M R. before the Registrar in Insolvency under sec. 36 of the Presidency Towns Insolvency Act, the Official Assignee applied to the Court in its insolvency jurisdiction for setting aside the two assignments as being fraudulent and void as against him. Held per Curiam—That the Court had jurisdiction to entertain the application under sec 56 of the Presidency Towns Insolvency Act and that the deposition of X and of the proprietors of the firm of M R. taken under sec. 36 of the Presidency Towns Insolvency Act were admissible against themselves for the purpose of showing the circumstances in which they took their respective assignments. Quere—Whether the deposition of the insolvent taken under sec 36 of the Presidency Towns Insolvency Act is admissible in a proceeding under sec. 56 of the Act. Per Sanderson, C J.—If the Official Assignee has to apply for the purpose of setting aside an assignment on the ground that it was fraudulent and void within the meaning of sec 56 of the Presidency Towns Insolvency Act and he intends to rely upon depositions which have been made by parties before the Registrar in Insolvency he should give notice

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of his intention to do so and such notice should specify the depositions on which he intends to rely. Per Curiam—Repeated demands for payment or threats of legal proceedings by a creditor who knows that the debtor is unable to pay do not constitute bona fide pressure and do not prevent a transfer by the debtor to the creditor from being an undue preference over other creditors within the meaning of sec 56 of the Presidency Towns Insolvency Act. Ex parte Hall, L. R. 19 Ch Div. 580 at p 585 (1876) referred to. Per Sanderson, C J.—After it has been established that the assignment by the insolvents to X was fraudulent and void as against the Official Assignee, the onus lay upon M R., if they desired to bring themselves within the provisions of sec 56, sub-sec (2) of the Presidency Towns Insolvency Act, to show that not only did they give consideration for the assignment but also that they acted in good faith. MADHORAM RAGHUMULL v THE OFFICIAL ASSIGNEE 611

adjudication of insolvency after a previous adjudication on the same facts and materials had been annulled, legality of.] An insolvent was adjudicated on his own petition but having failed to apply for his discharge within the time provided by the Act, his adjudication was annulled. Subsequently on his own application, on the same facts and materials, his second adjudication took place, and a creditor applied to annul the adjudication. Held—That the presentation of the second insolvency petition by the debtors was an abuse of the process of the Court, and the second adjudication order founded upon it must be annulled. *Mal Chand v. Gopal Chandra Ghosal*, 21 C W N 298 (1916), followed. *Chhatrapat Singh Dugar v Kharag Singh Lachmiram*, 21 C W N 497 (1916), distinguished. RE BALLAV CHAND SEROWGEE 739

s 41, jurisdiction of the Registrar in the Insolvency to annul an adjudication under r. 142B of the Calcutta Insolvency Rules—S. 8, Court, if can review order passed by the Registrar.] Where the Registrar in Insolvency annulled an adjudication order under the provisions of sec. 41 of the Presidency Towns Insolvency Act as the insolvent had not applied for his discharge within the time fixed by r 142A of the Insolvency Rules. Held—That the Registrar had jurisdiction to make the order annulling the adjudication. Sec 6 of the Act authorises delegation to an officer of the matters set out in sub-cl. (2), which includes matters to be dealt with in chambers and applications for annulment can be heard and determined in chambers. Held further—That under sec 8 of the Act the Court can review its orders, but as the order was passed by the Registrar he was the person to whom the application for review must be made (see Or. 47, C. P. C.) RE: MEGHRAJ PUROHIT 918

PRESUMPTION, resort to, if warrantable,

- PRESUMPTION—concl.**
 when both parties alleged exercise of definite acts of ownership over uncultivated land See Limitation Act ... 940
 of correctness of entry in record-of-rights, if can be rebutted by road cess returns and quinquennial registers prepared under Reg. 48 of 1793. See Bengal Tenancy Act, sec. 106 ... 349
 as to property acquired out of mixed up joint and separate property See Hindu Law ... 997
 under sec. 50, Bengal Tenancy Act, if applies to produce rent See Bengal Tenancy Act ... 115
- PRESENTATION** for registration by attorney. See Registration Act ... 437
 for registration by clerk of District Judge of mortgage bond in favour of Judge to secure performance of decree, if legal See Registration Act ... 533
- PREVIOUS** suit between the parties whether bars suit for omitted causes under Or. 2, r. 2, C. P. Code. See Suit for cesses 521
- PRINCIPAL AND AGENT—Authority—Liability of principal for fraud by agent—Criminal misappropriation by agent—Liability of principal—Indian Contract Act (X of 1872), s. 236.** A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. Where certain goods consigned were misappropriated by the agents while carrying them in the boat in the course of their business for their principal. *Held*, in a suit by the consignor for damages—That the principal was also liable for the misappropriation committed by his agents. There is nothing in sec. 238 of the Indian Contract Act to shew that in order to render the principal liable the fraud must be committed for the benefit of the principal. *Lloyd v. Grace, Smith & Co., L. R. [1912] A. C. 716, Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259 (1867) and Houldsworth v. City of Glasgow Bank, L. R. 5 A. C. (House of Lords) 317 (1890), referred to. Gopal Chandra Bhattacharya v. Secretary of State for India in Council, 13 C. W. N. 619 (1909), explained. DINA BANDHU SAHA v. ABDUL LATIF MOLLA ... 18*
- PRIVY COUNCIL, appeal to—Interlocutory order of High Court, pending appeal—Temporary injunction upon application for stay of execution pending appeal and order directing security to be furnished by Respondent.** Case in which the Judicial Committee entertained an appeal against and modified an interlocutory order passed by the High Court in a pending appeal and cross-appeal imposing conditions as regards the Defendant's dealing with properties which had been decreed in his favour pending the disposal of the appeal and directing him to give security for the due performance of such decree as might be ultimately made in the suit. *SWETA PRASAD SINGH v. RANI PRAYAG KUMARI DEBI* ... 1004
- PRIZE COURT PROCEEDINGS—Turkish born Greek naturalised before war as a Persian subject, but commercially domiciled as a Turk, ship owned by—Condemnation—Onus.** The claimant was a member of the Orthodox Greek Church and was born in Constantinople a Turkish subject. About 3 years before the war he had been naturalised as a Persian subject, but he continued to carry on his business in Constantinople as before, when the "Kara Deniz" which he had purchased on 16th August 1914 was, after declaration of war, between Great Britain and Turkey, seized and captured as an enemy vessel on 13th November 1914. *Held*—That under the circumstances the burden of proof was upon him to satisfy the Judge that the commercial Turkish domicile which he had retained up to the time when the war broke out had been altered. He might have stated that it was his intention definitely to give it up and not to resume business in Constantinople at all. But the statements he made in Court did not suffice to discharge the burden of proof and the ship was properly condemned. *SOCRATES ATYCHIDES v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL* ... 557
- PROBATE AND ADMINISTRATION ACT (V of 1881), s. 17, withdrawal of renunciation of executorship, how far allowable—Date of grant, which is.** One of several executors appointed under a Will applied for probate on issue of notice to the other executors named in the Will, one of whom stated that he was willing to be an executor but finally attacked the Will and refused to be an executor. Thereupon probate was granted to the applicant and about two months after the date of grant the executor who had renounced made an application for withdrawing his renunciation and for being appointed one of the executors. *Held*—That at the time when the application for withdrawal of the renunciation of executorship was made, the grant of probate had already been made and therefore the application came too late. The date of grant of probate is the date on which the order granting the probate is passed and not the subsequent date on which an order is passed that probate should issue. *In re Golap Sundari Dassi, 5 C. W. N. 417 (1901), distinguished. HARE RAM SINGH CHOUDHURY v. RAM RAM SINGH CHOUDHURY* ... 285
- s. 21—Indian Succession Act (X of 1885), s. 89—Hindu Wills Act (XXI of 1870) s. 2—Residue left by Will for the maintenance and worship of idol—Idol, if residuary legatee—Letters of administration, who is entitled to, shabait or priest.** Where a testatrix, a Hindu widow by her Will, after providing for expenditure on the occasion of her obsequious ceremonies and payment of certain legacies directed that the residue of her estate should be devoted to the maintenance and worship of the idol established by her husband's ancestors, and the executor named in the Will did not take out probate. *Held*—

- PROB. & ADMINISTRATION ACT—contd.**
That the idol was the residuary legatee within the meaning of sec. 89 of the Indian Succession Act, which is applicable to Hindus, and that the person entitled to letters of administration under sec. 21 of the Probate and Administration Act was the shebait of the idol. **Held, further**—That the appointment of a priest (*purohit*) to conduct the worship of the idol by the shebait does not transfer the management of the debutter estate from the shebait to the priest, and that the priest is not entitled to the grant of letters of administration as residuary legatee or otherwise. **Maharaj Indurjeet Koor v Chundemun Misser**, 16 W R 99 (1871) and **Nafar Chandra v Kailash Chandra**, 25 C W N 201 (1920) referred to. It is well-settled that when the worship of an idol has been founded, the shebaitship is vested in the founder and his heirs, unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. **KAILASH KRISHNA RAY v. MAKHANLAL MUKERJEE** 411
- PROFESSIONAL MISCONDUCT**, unfounded imputation against impartiality of living Court by pleader, if amounts to See Legal Practitioners Act, sec 13 (c), (f) 88
- "PROSECUTION"**, what it means in 'Sanction for prosecution' See Unsuccessful application for sanction to prosecute 387
- PROVINCIAL INSOLVENCY ACT (III of 1907), s. 37—"Creditors,"** if includes secured creditors. A secured creditor is not a "creditor" within the contemplation of the term as used in sec. 37 of Act III of 1907, so that a purchaser by a secured creditor within three months of the petition for insolvency presented by the insolvent cannot be avoided in a proceeding under sec. 37 on the ground that it was effected with a view to giving the purchaser a preference over the other creditors. **JADU NATH HAIDAR v MANINDRA NATH CHANDRA** 815
- PROVINCIAL SMALL CAUSE COURTS ACT (IX of 1887), Sch II, Art 35 (ii)**—Suit for compensation for removal of trees, if exempted from jurisdiction of Small Cause Court—Suit of a nature cognisable by Court of Small Causes—Civil Procedure Code (Act V of 1908), s. 102—Second appeal. Where the Plaintiffs sued the Defendants in the Civil Court for recovery of money on account of the price of trees alleged to have been wrongfully cut and misappropriated by the Defendants from land claimed to be Plaintiffs' property and in their possession, and it was found that the Defendants had right to some portion of the trees, and the suit was partly decreed and the Defendants preferred a second appeal. **Held**—That the suit did not come within Art 35 (ii) of the Second Schedule of the Small Cause Courts Act, and it was one of a nature cognisable by a Small Cause Court, and that the value of the suit being not over Rs. 500, the second appeal lay under the provisions
- PROV S C C ACT—contd.**
of sec. 102 of the Code of Civil Procedure. **MIRZA DILBAR HOSSAIN v. SADARUD-DIN CHOWDHURY** 469
- jurisdiction of Small Cause Court to try a suit upon a contract to pay a certain sum as compensation for things misappropriated—Construction of plaint—Discretion to award interest. Defendant in collusion with certain Railway Officers took some coal belonging to Plaintiff and misappropriated it. The Plaintiff and the Defendant discussed the matter and the Defendant executed a chit promising to pay a particular sum made up in a particular way. Plaintiff brought a suit in the Small Cause Court alleging in the plaint the aforesaid collusion and misappropriation and the execution of the chit agreeing to pay the money. In deciding the suit the Small Cause Court Judge awarded interest at 21 per cent per annum on the ground of Defendant's conduct. **Held**—That the plaint properly read is a plaint upon the chit and is not a suit for damages either for theft of coal or for the conversion of the coal in any sense. As there was nothing in the plaint to show that the transaction was represented as two alternative causes of action, there was no objection in law to the case being tried in a Small Cause Court. Although in the absence of evidence of custom 21 per cent. per annum is a high rate, the Court had jurisdiction to grant it. **RAKHAI CHANDRA CHATTERJEE v. MOHINI KUMAR CHATTERJEE** 549
- PUBLIC DEMANDS RECOVERY ACT (III, B C, of 1913)**—Sale held in 1907 for imaginary arrears of revenue, if a nullity—Suit to set aside such sale, if barred by s. 36. When the revenue authorities on the 2nd September 1907 proceeded to sell a property for an imaginary arrear, there was usurpation of jurisdiction on their part and the sale was a nullity. Thereupon a right accrued to the Plaintiff under the law as it then stood to institute a suit to recover the property within 12 years from the date of dispossession, and his right cannot be affected by the retrospective operation of sec. 36 of the Public Demands Recovery Act of 1913. **Balkissen v Simpson**, L R 25 I. A 151 s c I L R 25 Cal 833, 2 C W N 513 (1898) and **Colonial Sugar Refining Co v Irving**, [1905] A C 368, referred to. **DHORENDRA KRISHNA MUKERJEE v. MOHENDRA NATH MUKHERJEE** 386
- PUNJAB COURTS ACT (XIII of 1888), s. 6**—Winding-up of Company incorporated under Act VI of 1882—Assignment of matter by District to Additional District Judge—Additional District Judge's jurisdiction—Costs before the Privy Council. Where the District Judge of Delhi had assigned to the Additional District Judge of the place all the functions of supervising the liquidation of a Company, the latter acquired under sec. 6 of the Punjab Courts Act, 1888, jurisdiction to pass orders in the matter of the winding-up of

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| PUNJAB COURTS ACT—concl'd. | | PURDANASHIN LADY—concl'd. | |
| the Company. The successful Appellant was, in the special circumstances of the case, ordered to bear his own costs of the appeal. <i>BEHARI LAL BULAKI v. KUNDAN LAL</i> | 509 | same to be accepted and ratified as acts done by her, does not give the vakil authority to compromise the suit <i>SRIMATI SARLAT KUMARI DASI v. AMULYADHAN KUNDU</i> | 629 |
| PURCHASER, it liable for failure to complete contract within stipulated time by reason of vendor's default. See Indian Contract Act, sec. 74 | 77 | PUTNI REGULATION (VIII of 1819, B. C.), creation of one putni over the head of a previous putni, if legal—Assignment of the right of the zemindar to receive rent from the previous putnidar, if can be treated as a putni lease as contemplated by the Regulation—Sale under the Regulation of the interest of such assignee, if legal and if it passes any interest—S. 14, persons entitled to question such a sale—Creation of a fresh putni co-ordinate with a putni already in existence, if gives any legal right over the previous putnidar—Relationship of landlord and tenant between the new and old putnidars: A, a zamindar, granted a putni lease of the entire 16 as. of the property to D. Subsequently B having acquired an interest in one anna share of the zamindari created a putni in respect of this one anna share in favour of F, but later on sold the interest of F under Reg VIII of 1819 and it was purchased by P, who thereafter sued D for rent of the putni to the extent of one anna share. Held—That the idea of a putni being created over another putni is absolutely foreign to the scheme of the Putni Regulation. The putnidar is therein described as a taluqdar of the first degree and it is difficult to imagine that a tenure can be created over a taluqdar of the first degree. <i>Raj Coomar v. Probhat</i> , 9 C W N. 656 (1904), distinguished. That assuming that F's interest was superior to that of D, then it could not be sold by the Collector under Reg VIII of 1819, and P acquired no interest by such sale. The whole scheme of the Putni Regulation is that the putnidar is the only person whose interest can be sold under the Regulation and not the interest of a person in the position of F by whatever name it may be called. The mere giving of the name of putni to the interest of F would not make it a putni as contemplated by the Regulation so as to bring into play all the provisions of the law. That there can be no objection to the assignment of the right of the zemindar to receive rent from the putnidar which he is entitled to get under the putni settlement and the assignee would be entitled to recover rent from the putnidar by virtue of the assignment. <i>Madhusudan v. Debendra</i> , 34 F. L. J. 76 (1908) and other cases referred to <i>Jaharmull v. Jatindra</i> , 34 C. L. J. 79 (1921), distinguished. But if, ignoring the interest of D, the old putnidar, the interest created in favour of F was made not superior to but co-ordinate to that of D then F did not acquire any lawful interests as against D. Under the provisions of sec 14 of the Regulation, a sale under the Regulation can only be questioned by a person affected by it, but in the present case the sale not having been held with jurisdiction, it could be questioned by D who was not | |
| PURCHASE by mortgagor without permission of Court, void or voidable. See Civil Procedure Code, sec 66 | 208 | | |
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| PURDANASHIN LADY, compromise on behalf of, alleged to have been made without authority—Onus to prove consent and knowledge—Consent if proved, because witnesses who denied it found unreliable—Circumstantial evidence—Pleader's responsibility in regard to compromises by purdanashin lady—Pleader's authority to compromise suit. The principle that those who rely upon deeds and powers executed by purdanashin ladies should satisfy the Court that they had been explained to and were understood by them applies to agreements to compromise litigation, though it may be sufficient in such a case to show that the general result of the compromise, as distinct from the details and legal technicalities involved, was understood by her and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it. <i>Tacoorden Tewarry v. Nawab Syed Ali Hossein Khan</i> , 1 L. R. 1 I. A. 192 at p. 206, 13 B. L. R. 127, 21 W. R. 340 (1874), <i>Shambati Koeri v. Jago Bibi</i> , L. R. 29 I. A. 131, s. c. 6 C. W. N. 682 (1902) and <i>Sunitabala Deb v. Dhara Sundari Deb Chowdhurani</i> , L. R. 46 I. A. 272 s. c. I. L. R. 47 Cal 195, 24 C. W. N. 297 (1919), relied on. Where in a suit by a purdanashin lady to set aside a compromise entered into on her behalf, as having been made without her authority, no evidence was given of the affirmative proposition that the compromise was made and entered into with the knowledge and consent of the lady, and it was denied by the lady and her witnesses, but the High Court upheld the compromise because the depositions of the lady and her witnesses were in its opinion unreliable. Held—That an affirmative proposition is not established by showing that the evidence of witnesses who depose to a contradictory negative proposition is not reliable. Duty of a pleader acting for a purdanashin lady, when a compromise is proposed to be made on her behalf, indicated. A vakalatnama authorising a vakil to argue the case, to inspect the records, execute documents and deposit and withdraw monies and do all such other acts, the | | | |

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QUESTION of onus of proof, when the entire evidence is before the Court, how far material See <i>Bengal Tenancy Act</i>	328	RI-ASSESSMENT of revenue and rent after expiry of settlement of temporary settled estate— <i>Island chur—Regulation VII of 1822</i> , s. 9, settlement under—Collector, if may enhance rent payable by tenants— Proper procedure for enhancement— <i>Bengal Tenancy Act (VIII of 1885)</i> , Chap. X, Part II—Act IX of 1847, if applies to tem- porarily settled estates? Where after the expiry of the settlement of an island chur, proceedings being taken under Reg. VII of 1822 the revenue was re-assessed, and the estate was settled with the Plaintiff (the previous settlement-holder) and he brought a rent suit against the tenants at a rent settled by the revenue authorities (which was higher than the previous rent) Held—That the Plaintiff was not en- titled to recover the rent as settled by the revenue authorities. Sec 9 of Reg. VII of 1822 does not appear to do more than en- able the Collector to ascertain and record the rents actually payable at the time when a settlement or re-settlement is made. If it was desired to enhance the rents of the tenants, proceedings should have been taken by the revenue authorities under Part II of Chap. X of the <i>Bengal Tenancy Act</i> or by the Plaintiff himself under sec 52 or some other appropriate provisions of that Act. <i>Semble</i> :—In a case of a tempo- rarily settled estate, it would be always open to the revenue authorities to re-assess the revenue and re-settle the estate with effect from the expiry of a previous term of settlement Act IX of 1847 not applying to the case. <i>ASHUTOSH CHUCKERBUTTY v. DWARIKA NATH MITRA</i>	121
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—, of immoveable property, without title by registered conveyance—Suit for refund of purchase-money—Indian Limitation Act (IX of 1908), Arts. 62 and 116, applicability of—Transfer of Property Act (IV of 1882), s. 55, cl (2)—Covenant of title when implied.] The Plaintiff brought a suit for the recovery of possession of certain property by right of purchase under a conveyance, and in the alternative claimed a refund of purchase money on the footing that at the date of sale the Defendant No. 1 had no title to convey inasmuch as the property had passed to other Defendants by a previous sale. The trial Court dismissed the suit against the other Defendants but gave a decree against Defendant No. 1 for refund of purchase money with interest. On appeal by Defendant No. 1 to the District Court the point was taken for the first time that the suit was barred under Art. 62 of the Limitation Act. The District Court remanded the case to the trial Court for a finding on the point after taking additional evidence. No additional evidence was offered by either party, and the trial Court held that the suit was barred under Art. 62 and that decree was affirmed by the District Court. **Held**—That the order of remand was bad in law. The Code makes no provision for a remand where the issue had been settled and the case had been fully tried. That if no covenant of title was expressed in the conveyance, the conveyance itself imported such a covenant under sec. 55, cl (2) of the Transfer of Property Act and a suit for refund of purchase-money might be regarded as a suit for damages for breach of this covenant. The conveyance being registered Art. 116 of the Limitation Act applied to the suit. **Basaraddi Sheikh v. Enajaddi Maleah**, I L R 25 Cal 298 (1897) and **Arunachala Aiyer v. Ramasami Aiyer**, I L R 38 Mad 1471 (1914), referred to. If "a contract" in the sense of Art. 116 is in writing the writing represents the implied as well as the express covenants, a breach of either of which would bring the case within the article. **INJAD ALI v. MOHINI CHANDRA ADHIKARI** 1025

SANAD—Tank—Document more than thirty years old, presumption as to—Evidence Act (I of 1872), s. 90—Proof of execution—Rent-free grant of land for excavation of tank, by lessee and officer of landlord—Question as to requisite authority of the executants—Burden of proof, if lies on landlord or grantee—Excavation of tank by grantee—Possession from generation to generation—Acquiescence by landlord—Inference from surrounding circumstances that persons making the grants on behalf of landlord had requisite authority—Putra-poutradikrame, meaning of—Perpetual grant, transferability of.] In a suit brought by the landlord in 1918 to recover possession of a tank with its banks,

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the Defendants claimed to have acquired title by purchase in 1906 from persons who under two rent-free grants made in favour of their predecessors, in 1836 and 1849 by an ijaradar and a superintendent respectively of the Plaintiff's predecessor had excavated the tank and remained in possession of the same from generation to generation. The first document recited that the ijaradar was directed by the landlord, to make the grant for excavation of a tank. The second document purported to have been granted by the landlord through the pen of a person who described himself as his superintendent and it recited the previous grant and stated that on measurement the tank had been found to extend over a larger area and so a supplementary grant was necessary. The grants stated that the grantee was to hold putra-poutradikrame (from generation to generation). The Plaintiff contended that the burden lay upon the Defendants to establish that in respect of the first document the ijaradar, and in respect of the second document the superintendent, had the requisite authority to make a grant which would be operative against the landlord, and that the vendors of the Defendants had no transferable right. **Held**—That the application of sec. 90 of the Evidence Act does not justify the inference that the documents which are established to be genuine were in fact executed by persons possessed of the requisite authority. It does not, however, follow that it is necessary for the grantee of the document or his successor in interest to establish by direct evidence that the executant had the requisite authority. When a grant has been in operation for a long series of years, as in this case it may be impossible to adduce direct evidence of authority. In such a contingency the Court may draw an inference from all the surrounding circumstances. In the present case, the grantee and his successors in interest from generation to generation had been in possession, if the grants were unauthorised the landlord might have been expected to take steps long before this to eject the grantees. **Ubilack v. Dallial**, I L R 3 Cal 557 (1878). **Uggra Kanta Chowdhury v. Harro Chandra Shickdar**, I L R 6 Cal 209 (1880). **Maharaj Chhapraji v. Telamuddin Khan**, 15 C L J 220 (1911). **Airey v. Stapleton**, [1897] 1 Ch. 164 and **Naina Pillai v. Ramanathan Chettiar**, 33 Mad L. J. 84 (1916), referred to. The burden thus shifted upon the landlord to prove how he came to acquiesce in the long possession of the grantee and his successors. Besides, it was the landlord who should be aware of the scope and extent of the authority conferred by him upon his lessee, or upon the superintendent of his estate. No evidence being forthcoming from his side, it was open to the Courts below to draw an inference that the grants must have been made by persons who possessed the requisite authority, and the Plaintiff could not now urge that the

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SANAD—concl'd.		SHEBATS, acts, and dealings of, whether sufficient to change character of debutter property See Hindu Law	218		
grantee and his successors had held for so long a time without a lawful origin of their title and possession. <i>Suduman Jamadar v. Behari Mahton</i> , 15 C. W. N. 953 (1911), referred to Held further—		—, not being founder, if can impose restrictions on the powers of subsequent Shebats See Rights of Shebat	684		
That having regard to the terms of the grants and the expression <i>putra-poutradikrame</i> used in the documents, the grants were made in perpetuity, and as they were perpetual grants the interest of the grantees was transferable <i>Ram Narayan Singh v. Ramsaran Lal</i> , I L R 46 Cal. 683, s c 23 C. W. N. 866 (P C) (1918) and <i>Ramsaran Lal v. Ram Narayan Singh</i> , I L R 42 Cal. 305 (1916) referred to		—, death of, during pendency of appeal, if affects claims of his personal estate for indemnity from the trust estate See Civil Procedure Code	989		
According to Hindu religious notions, a grant of land for digging tank is supremely meritorious, and it is inconceivable that the grant could have been of a temporary character or that the landlord could have intended to resume the grant <i>Birendra Krishna v. Akram Ali</i> , I L R 39 Cal. 439 s c 16 C. W. N. 304, 15 C. L. J. 194 (1912), referred to		SOLICITOR AND CLIENT—Solicitor paying fees to counsel under express verbal authority of the client—Fees not allowed on taxation as between solicitor and client—Solicitor, if entitled to retain client's money—Rr. 6, 9, 32, 72, Chap XXXVI of the Rules and Orders of the High Court, Original Side The Plaintiff instituted the suit to recover a sum of Rs. 4,082 from the Defendant, a solicitor of this Court, who had acted for the Plaintiffs in another suit and had been paid by them various sums of money for the purpose of prosecuting that suit The Defendant admitted liability for a sum of Rs. 1,724-2-3 which he put into Court At the trial the dispute was about the sum of Rs. 1,700 The Defendant pleaded that the same was unrecoverable as having been paid by him to counsel engaged in the other suit under instructions from the Plaintiffs, and that he was entitled to retain this sum although the same was in excess of the scale of fees laid down in r 32, Chap XXXVI of the Rules and Orders of the High Court, Original Side and although the whole of it had been disallowed by the Taxing Officer Held—That the solicitor having failed to apply successfully to a Judge in Chambers for review of the order of the Taxing Officer under and within the time specified in r 72, Chap XXXVI of the Rules and Orders of the High Court, the order of the Taxing Officer became final and conclusive. Held also—That a solicitor is entitled to retain only such moneys of his client as, in accordance with the rule of Court, he being an officer of the Court is entitled to claim against him <i>Sailendra Mohan Dutt v. Dhārani Mohan Roy</i> , I L R 49 Cal. 618 s c 26 C. W. N. 870 (1921) referred to	961	JADAB CHANDRA MITTER v. ROMESH CHANDRA BOSE	531
SECONDARY evidence of deed, admissibility—Evidence of loss given by person, in whose custody it should be, when to be disbelieved—Deed of sale, if may be nullified by simple surrender—Right of purchaser of one mortgaged property to redeem all properties mortgaged—Dealings with equity of redemption by mortgagor after sale thereof, if admissible in evidence against purchaser in favour of vendor's representatives, and if evidence of adverse possession, when mortgaged property in possession of mortgagee If a witness in whose custody a deed should be deposes to its loss, unless there is some motive suggested for his being untruthful, his evidence should ordinarily be accepted as sufficient to let in secondary evidence of the deed When a deed of sale has once been executed and registered, it can only be avoided by a subsequent registered transfer A purchaser of one only of several properties given in mortgage cannot divide the liability for it between the properties He can redeem the one property on payment of the charge upon the whole and is entitled to do so Where a mortgagor of a usufructuary mortgage after having sold the equity of redemption went on dealing with it as if it still subsisted Held—That these subsequent dealings, if regarded as declarations in his own favour, could not be received in evidence on behalf of persons claiming under him Nor could such dealings be regarded as acts of ownership so as to prove adverse possession, the possession remaining in the mortgagee <i>M. ENTISHAM ALI v. JAMNA PRASAD</i>		SPECIAL LEAVE, application for, to appeal to Privy Council against order made within jurisdiction but in exercise of Court's discretion, if lies. See Legal Practitioners Act	343		
SECOND APPEAL, dismissal of in preliminary hearing, if open to review on the ground of discovery of new and important evidence See Civil Procedure Code	918	SPECIFIC RELIEF ACT (I of 1877), s 16—Contract to sell two plots of land—One found to belong to vendor's wife—Vendee, if may enforce contract as to other plot at abated price—Contract, whether divisible or not—Time, if of the essence of the contract, where agreement was for "completion of sale within 14 days," but parties delayed completion of the preliminaries beyond specified time By an agreement, dated 15th September, G agreed to sell to K two plots of land viz., A and B and to deliver to K's solicitor the title deeds within two days			
"SELLING BUILDING," if imports selling building with the land See Construction of lease	1037				

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thereof, and K agreed to send in his requisitions within 5 days from the date of the delivery of title deeds. The requisitions were to be answered within 5 days thereafter, and K was to complete the purchase within 14 days from the date of the delivery of the title deeds. More than a fortnight was spent in the preliminaries, e.g., delivery of title deeds, answering requisitions, etc. for which G was primarily responsible. It was found that plot B belonged to G's wife. At the end of the fortnight G rescinded the contract on the ground that K had failed to complete the purchase within the specified time. Held That time was not of the essence of the contract, and as the plots contracted to be sold were two distinct and independent lots, performance of the contract, so far as it related to plot A which belonged to G, was both practicable and proper though performance of the contract, so far as it related to plot B which belonged to G's wife who was not a party to the agreement was both impracticable and improper. The present case came within the purview of sec. 16 of the Specific Relief Act, under which specific performance of so much of the contract as related to plot A should be enforced with an abatement in the price agreed upon. *Rutherford v. Adams*, [1915] A. C. 866 and *Mortlock v. Buller*, 10 Ves. 315 (1804), discussed and followed. *Jones v. Evans*, 17 L. J. Ch. 469 (1848). *Barnes v. Wood*, L. R. 8 Eq. 424 (1869) and *Hooper v. Smart*, L. R. 11 Eq. 683 (1874), referred to. The question whether a contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract. *KRISHNA CHANDRA DEY v. W. GRAHAM*

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s. 42—Denial of title—Cause of action—Suit for declaration—Previous decree between third parties—Plaintiff not a party—Suit to declare decree and the sale thereunder fraudulent and not binding on Plaintiff, if maintainable without prayer for consequential relief—Injunction—Defect of party. N obtained an ex parte decree for rent against B, and at the sale in execution of that decree S purchased the tenancy. Plaintiff who was no party to the said proceedings instituted the present suit for a declaration that the aforesaid decree and sale were fraudulent, and not binding on him who held the tenancy in question and was in possession of the same under certain persons holding under N. Both the Courts below held that the decree and the sale were fraudulent. The suit was decreed by the Court of first instance. The Court of Appeal below held that the suit was barred under sec. 42 of the Specific Relief Act, and dismissed the suit. Held That the suit was maintainable under sec. 42 of the Specific Relief Act, and that a prayer for an injunction to protect the Plaintiff's possession was unnecessary. The Plaintiff was not bound to wait till he was dispossessed by the

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auction-purchaser. As soon as his title was denied he was entitled to bring the suit. *Shiv Ram v. Jivu*, I. L. R. 13 Bom. 34 (1888). *Gendia Pedda Naganna v. Shivanappa*, I. L. R. 38 Mad. 1162 (1914). *Harendra Lal Roy Chowdhury v. Nawab Salimulla Bahadur*, 12 C. L. J. 336 (1914) and *Gobinda Prosad Tewari v. Udai Chand*, 6 B. L. R. 320 (1970), relied on. Held also—That upon the facts found the absence of the representatives of B could not entitle N to defeat the Plaintiff's suit. *MOHESH CHANDRA MISSRA v. SM NISTARINI DASSYA*

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see 56 (e), jurisdiction of Court to restrain criminal proceedings for breach of a Municipal requisition. See *Calcutta Municipal Act*. 787

STOPPAGE in Transition by unpaid vendor, right of. See *Indian Contract Act*. 231

SUCCESSION CERTIFICATE ACT (VII of 1889), ss. 10 (1), 19, 26 (2). Order refusing extension of certificate, if appealable. An order made under Sec. 10 (1) of Act VII of 1889 refusing an application to extend the certificate to any debt or debts not originally specified therein is appealable under sec. 19 of the Act. *Venkateswarulu v. Brahmavatu Raja Kristnaji*, I. L. R. 25 Mad. 634 (1901), distinguished. *RADHA RAMAN KUNDU v. GOPAL CHANDER SINHA*

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"SUCCESSION," if includes transferee by Will or deed. See *Oudh Taluqdar*

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SUIT FOR DOWER DEBT by wife's heirs—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 103, 104, 116—Registered instrument, Art. 116 applies to suits for recovery of dower debt when there is a registered dower deed. Arts. 103 and 104 would apply when there is no such registered instrument. *Tricomdas v. Gopinath*, L. R. 44 I. A. 65 s. c. I. L. R. 44 Cal. 759, 21 C. W. N. 577 (1916) referred to. *Asiatulla v. Danish Mahammad*, 36 C. L. J. 379 (1922), approved. *MAHAMMAD MAZAHARIAL AHAD v. MAHAMMAD AZIMUDDIN BHUCAN*

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FOR PARTITION—Disputes referred to arbitration—Award made directing sale of property and certain payments out of sale-proceeds—Property sold by the Registrar under order of Court, whether such sale is in execution of a decree and may be set aside under Or. 21, r. 89 of Civil Procedure Code (Act V of 1908). In a suit for partition instituted in the High Court, matters in dispute between the parties were referred to arbitration by an order of Court. The arbitrators made their award directing the sale of one of the properties, subject-matter of the suit, and the payment out of the sale-proceeds of the ancestral debts as well as of certain sums to the Plaintiff. A decree was passed on the award and the property was sold by the Registrar under an order of Court. The Defendants then applied, with the consent of the Plaintiff, for setting aside the sale under Or. 21, r. 89 of the Civil Procedure Code. Held—That

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the property was sold in execution of a decree and that Or. 21, r. 89 of the Civil Procedure Code was applicable. *Vijibun Dass v Bissesswar Lai*, 1 L R. 48 Cal 69, s c 24 C W N 1032 (1920), referred to. *NIRODE NATH BANERJEE v. AMULYA DHONE BANERJEE* 466

— FOR CESSSES—Heir of reversioner of a

Hindu widow joining her in granting a lease, but predeceasing her, if a necessary party—Suit, if maintainable against some of the heirs of the original tenants—Whether such suit is one for rent or for damages—Previous rent suit between the parties, whether bars suit for omitted cesses under Or. 2, r 2, Civil Procedure Code (Act V of 1908).—Where a Hindu widow granted a lease of her property in which her presumptive reversioners joined and one of them predeceased her Held—That the deceased had merely a contingent interest and as he predeceased the widow, he had no right at the time of his death, which could devolve upon his heir, and the suit was properly instituted by the surviving reversioner on whom the property devolved after her death. Where a suit for cesses was instituted against the heirs of the original lessees some of whom were not properly served Held—That so far as the original lessees were concerned their liability for rent was, in the absence of a contract to the contrary, joint and several, having regard to the provisions of sec 43 of the Contract Act and any one of them could be sued for the entire rent. *Jogendra Nath Roy v. Jogendra Narain Nandi*, 11 C W N 1026 (1907), *Rameswar Singh v. Jaidev Jha*, 12 C L J. 591 (1910), *Krishnadas Roy v. Kalitara Chaudhurani*, 22 C W N 289 (1917) and *Beradar Singh v. Bacha Mahto*, 5 P L J. 32 (1919), followed. *Kasi Kinkar Sen v. Satyendra Nath Bhadra*, 15 C W N 191 s c 12 C L J 642 (1910), distinguished. Quære.—Whether upon the death of the original contracting party a suit can be maintained against some only of the heirs. *Kasi Kinkar Sen v. Satyendra Nath Bhadra*, 15 C W N 191 s c 12 C L J. 642 (1910), *Sheikh Sahad v. Krishna Mohan Basak*, 24 C L J 371 (1916), *Siba Krishna v. Jagat Chandra*, 45 Ind Cas. 732 (1918), *Lalit Mohan Singh Roy v. Haran Chandra Khamrui*, 36 Ind Cas 243 (1916), *Subashi Dass v. Raj Krishna Roy*, 23 C W N xxvii (1918), *Meajan Mandal v. Jogendra Nath De*, 63 Ind Cas. 949 (1920) and *Chamatkarini Das v. Triguna Nath Sardar*, 17 C W N 833 (1913), reviewed. Held further—That a suit for cesses was maintainable against all the heirs of one of the original lessees, although the heirs of the other original lessees were not properly made parties. Where the lessees agreed to pay all cesses but failed to pay, and the same was realised from the lessor, and in a previous suit for rent between the parties the claim for cesses was not included and subsequently a suit for recovery of cesses was brought against the lessees Held—That

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the lessor was entitled to claim cesses as damages and the suit was not barred under Or. 2, r. 2, C P C. *MAHENDRA NATH BOSE v. ABINASH CHANDRA BOSU*

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— FOR RENT—Cause of action—Jurisdiction—Sale—Civil Procedure Code (Act V of 1908), ss. 20, 21, Or. 21, r. 3—Bengal Tenancy Act (VIII of 1885) s. 144—rent suit may be instituted in Court where Defendant resides—Sale to be held in Court where tenure or holding is situate—Jurisdiction.—A suit for rent may be instituted in a Court where the Defendant resides, but the sale in execution of the rent decree, must be held in the Court where the tenure or holding is situate. (a) and (b) of sec 20 of the Civil Procedure Code allow a landlord to institute a suit for rent where the tenant resides. *Chintaman Narayan v. Madhavray Venkatesh*, 6 Bom H. C R (A C J) 23 (1899) relied on. Sec 144 of the Bengal Tenancy Act merely defines the expression "cause of action" as applied to suits between landlord and tenant for the purposes of the Code of Civil Procedure. *Fazlur Rahaman Abu Ahmed v. Dwarka Nath Choudhury*, 1 L R 30 Cal 453 s c 7 C W N 402 (1903), referred to. A Court which has no jurisdiction over a property is not competent to bring it to sale, and the effect of such a sale is a nullity. It is an elementary principle of law that if a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities and may not only be set aside at any time by the Court in which they are rendered but may be declared void by every Court in which they are presented. These principles apply not only to original Courts but also to Courts of appeal. Jurisdiction cannot be conferred upon a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction. *Rajlakshmi Das v. Katyani Das*, 1 L R 38 Cal 639 at p 668 (1910), *Ledgard v. Bull*, 1 L R 13 I A 134 s c 1 L R 9 All 191 (1836), *Minakshi Naidu v. Subrahmanya Sastri*, 1 L R 14 I A 160 s c 1 L R 11 Mad 26 (1887) and *Gurdeo Singh v. Chandrika Singh*, 1 L R 36 Cal 193 (1907), referred to. Sec 21 of the Civil Procedure Code which is an exception to the above rule cannot be so interpreted as to have a wider application than what is justified by its terms. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process although they may constitute the Judge their arbitrator and be bound by his decision on the merits when these are submitted to him. This however can be accomplished only when the parties have expressly consented to such a procedure. *KUNIA MOHAN CHAKRAVARTY v. MANINDRA CHANDRA ROY CHOWDHURY*

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— FOR CANCELLATION of ex parte decree and consequent execution sale, on

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the ground of fraud on the part of the decree-holder—Suppression of notices in the suit and in the execution proceedings—*Bona fide* auction-purchaser for value without notice of the fraud, if necessarily protected—Civil Procedure Code (Act V of 1908), Or. 21, r. 90, cancellation of execution sale on the ground of irregularity or fraud in publishing it—Decision according to the principles of “justice, equity and good conscience,” significance of—Burden of proving good faith on the purchaser.] The *mourashi mokarari* right of a tenant was sold in 1907 in *ex parte* execution of an *ex parte* decree of 1904 for arrears of rent. The purchaser, however, never obtained possession through Court and never paid rent to the landlord who again sued for rent got an *ex parte* decree in 1914 and got the tenancy again sold in 1916 in execution thereof supplying all notices, etc. The *mourashi mokarari* tenant on being dispossessed in 1917, sued for cancellation of the *ex parte* decrees and consequent execution sales on the ground of fraud on the part of the decree-holders. Held—Per Moonje, J.—That an execution sale, which has been brought about by fraud of the decree-holder, is liable to be set aside on that ground even though it is not established that the auction-purchaser has participated in or has been cognisant of the fraud. *Kaherode Sundari v. Jnanendra Nath*, 6 C. W. N. 233 (1901), *Nimai Choud v. Dina Nath*, 2 C. W. N. 691 (1893) and other cases discussed. The above principle has received legislative approval in Or. 21, r. 90 of the Civil Procedure Code, where provision is made for cancellation of an execution sale on the ground of material irregularity or fraud in publishing it, provided the applicant has sustained substantial injury thereby. The Code does not exclude specifically the application of r. 90 in cases where the purchaser is a *bona fide* purchaser for value without notice of the irregularity or the fraud and the Court may set aside the sale even in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice. *Parashnath v. Hari Charan*, 1 I. L. R. 38 Cal. 622 (1911), referred to. In the absence of specific statutory directions, the Courts are to act according to justice, equity and good conscience, and this has generally been taken to mean so much of the English law and usage as seem reasonably applicable in this country. The doctrine of *bona fide* purchase is not a rule of property. It does not determine the question of title between the parties. It is in most cases available only by way of defence. *Abdul Hai v. Nawab Raj*, 9 W. R. 196 B. I. R. F. B. 911 (1867), *Jungee Lal v. Sham Lal*, 20 W. R. 120 (1873), *Chitambar v. Krishnappa*, I. L. R. 26 Bom. 513 (1901), *Lala Bungsl-dhar v. Bindhoshree*, 10 M. I. A. 454 (1886) and other cases discussed. The rule in the elastic form enunciated in *Abdul Hai v. Nawab Raj*, 9 W. R. 196 B. I. R. F. B. 911 (1867), approved. In the application

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of that rule to a concrete case, it may be usefully borne in mind that a *bona fide* purchaser for value without notice has always been a favourite with Courts of equity. But to crystallise the rule further would only be to impair its utility. Per Rankin, J.—Judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice. *Chitambar v. Krishnappa*, I. L. R. 26 Bom. 513 (1902), referred to. The burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. This is an essential feature of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity, where it can will favour those who show that in innocence they have given value. In *Re Nisbet and Pott's contract*, [1905] 1 Ch. 391, referred to. *BIRSEWAR CHOSE v. PANCHKOURI CHOSE* 537
— for possession by a purchaser from co-sharer—Co-sharer's possession, if and when may be adverse.] Where for 15 years before suit A, a co-sharer, ceased to live in the holding and for these 15 years B, the other co-sharer, kept the holding in her name paying rents and taxes and was in sole or exclusive possession thereof openly and to the knowledge of the first co-sharer. Held—That B's possession being in assertion of a clear intention to terminate the co-tenancy and in open assertion of a hostile title to the knowledge of A, a suit for possession by the purchaser from A was rightly dismissed. *Ayenenussa Bibi v. Sheikh Isuf*, 16 C. W. N. 819 (1912) and *Narendra Bhusan v. Jogendra Nath*, 20 C. W. N. 1758 (1916), referred to. *CHATTANYA KRISHNA MANDAL v. SANDHYAMANI DAS* 624

— BY TRANSFER OF CONTRACT, if maintainable when notice of assignment does not state the address of the transferee—Transfer of Property Act (IV of 1882), s. 130, exception to the proviso in, when comes into operation—S. 131, provisions of, whether mandatory or may be waived—Statement of the address of the transferee's solicitor, if sufficient compliance with s. 131.] A having entered into certain contracts with B assigned them by a deed of assignment to C. The notice of assignment which was sent to B did not state C's (the transferee's) address. B refused to deal with C under the contracts and settled the same with A. C thereupon brought this suit against B for damages for breaches of the contracts. Held—That in order that the exception mentioned in the proviso to sec. 130 of the Transfer of Property Act may be operative, there must be a strict compliance with the requirements of sec. 131 of the Act. That the notice of assignment not having stated the transferee's address did not comply with the provisions of sec. 131 of the Act; and the suit must therefore fail. *Hunsraj v. Nathoo*, 9 Bom. L. R. 838 (1907),

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- and *Basant Singh v. Burmah Railway Co.*, 8 Burmah L. T. 266, 8 L. B. R. 288, followed *Mulraj v. Viswanath*, L. R. 40 I. A. 24 s. c. 17 C. W. N. 209 (1912), referred to *Held also*—That a statement of the address of the transferee's solicitor, was not a sufficient compliance with the provisions of sec 131 of the Transfer of Property Act. *Quære*—Whether the provisions of sec 131, Transfer of Property Act, may be waived. *Per Mookerjee, J.*—If the object of the legislature is to protect or benefit an individual litigant, it is open to him to waive the provisions of the statute. On the other hand if the provision has been enacted from reasons of public policy, he cannot be permitted to waive it. The provisions of sec 131 fall, in my judgment, within the latter category, but I am not prepared to maintain as an abstract proposition of law that under no conceivable circumstance can the provisions of sec 131 be waived by the debtor. *Venkata v. Subba*, 15 Mad. L. T. 533 (1915). [1915] Mad. W. N. 822 referred to. *Per Rankin, J.*—At common law a chose in action was not assignable, in equity it was freely assignable upon certain principles as to notice. The Indian legislature has composed a new scheme which has some of the features of both and, as I read sec 130, it says that the law, while regarding the transfer of an actionable claim as valid if effected in, a certain manner, will not undertake to enforce against a debtor the assignment, except upon the terms that the debtor may arrange with his original creditor, unless and until he has received a particular kind of notice. If, therefore, the Plaintiffs' claim is entirely on the basis of an assignment and if the claim is wholly without any other juristic basis, it seems to me that the section which enacts certain conditions must be rigidly complied with. *MESSRS SADASOOK RAMPROTAP v. HOARE MILLER & CO.* 733
- “— for land”—High Court's jurisdiction to entertain suit for specific performance of contract to purchase tea estate in Assam. See Letters Patent, cl 12 65
- for ejectment and compensation, where notice did not require tenant to remedy the misuse complained of, maintainability of. See Bengal Tenancy Act, s 155 . . . 144
- for vacating fraudulent decree obtained in one district and transferred to another district for execution, if maintainable in latter Court. See Civil Procedure Code . . . 359
- to declare previous decree and sale thereunder fraudulent and not binding, if maintainable without prayer for consequential relief. See Specific Relief Act, sec 42 . . . 449
- by judgment-debtor for declaration of satisfaction of decree and for injunction restraining execution of decree, if maintainable. See Civil Procedure Code . . . 575
- to recover consideration for transfer of snes successions, if lies. See Oudh Estates Act . . . 949

- SURVEY and Settlement Register, value as evidence. See Trust Property . . . 317
- SURPLUS profits of Railway Co., only liable to income tax. See Indian Income Tax Act . . . 34
- SUSPENSION of rent for dispossession from a portion of holding. See Bengal Tenancy Act . . . 982
- SYMBOLICAL possession, operation of, against stranger and against judgment-debtor. See Limitation Act, Art 138, etc . . . 259
- TAXABLE income, guaranteed interest and interest paid on borrowed capital, if to be included in. See Indian Income Tax Act, sec 9 (2) (iii) . . . 34
- TENANT holding over under a covenant for renewal but without actual renewal of lease when in the same position as if the lease had been renewed. See Lease of Waste Property, etc . . . 159
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failure of the thikadar to collect the rent from any individual tenant would not create adverse possession against the proprietor. Besides mere non-payment of rent or discontinuance of payment of rent has not, by itself, been held in India to create adverse possession. **Prasanna Kumar Mookerjee v Srikanta Rout**, 1 L. R. 40 Cal 173 s.c. 17 C W N 137 (1912), approved. A "jaith rayat" may be either a head rayat or a tenure-holder. *Where in an appeal before the Board it was objected that the High Court had no jurisdiction to set aside on second appeal a decision of the District Judge on questions of fact, the Judicial Committee, in view of the fact that the decision depended on inferences derivable from documents produced in the case, preferred to decide the appeal on the merits. **JAGDEO NARAIN SINGH v. BALDEO SINGH**

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sec. 99—Civil Procedure Code (Act V of 1908), Or. 34, r. 14—Sale in contravention of these provisions, if a nullity—Purchase by mortgagee of mortgagor's equity of redemption at an execution sale in another suit, if the mortgagee holds such property as trustee for the mortgagor—Sale of properties of which a receiver has been appointed without leave of the Court, appointing him, if absolutely void or voidable—Leave, if necessary for attachment and sale of properties of which a receiver has been appointed but of which he has not taken possession. A and B, who had executed three mortgages in favour of C, sold their equity of redemption in the mortgaged properties to D, after the same had been purchased (benami) by C at a sale held in execution of a decree which C had obtained against A and B on a claim quite independent of the mortgage. The mortgagors' application to set aside the sale to C was dismissed by the Appellate Court and the sale confirmed. In the mortgage suit which C instituted against A and B was allowed to appear and it was contended on his behalf that C held the properties which he had purchased as a trustee for the mortgagors and that D, as purchaser of the equity of redemption, was entitled to redeem on accounts being taken as between a trustee and a beneficiary. Held—That the mortgagors' application to set aside the sale to C having been dismissed and the sale confirmed, the equity of redemption passed to C and no right was left in the mortgagors which they could transfer to D, and that in

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the circumstances, the latter could not contend that C held the property as a trustee for the mortgagors. Held, also—That Or. 34, r. 14 of the Civil Procedure Code of 1908 is confined to claims arising under the mortgage and does not apply to a case where the sale takes place in execution of a decree for money upon a claim not arising under the mortgage. **Kamini Debi v Ram Lochan Sarkar**, 5 B L R 450 (1870) and **Khairajmal v Diam**, 1 L R 32 I A 23 s.c. I L R 32 Cal 296, 9 C W N 201 (1904), considered. Where in a mortgage suit an order was made appointing a receiver, but before the receiver took possession, the properties were sold in execution of a decree in another suit, the leave of the Court which appointed the receiver not having been previously obtained. Held—That the rule that possession of a receiver may not be disturbed without leave, does not apply, so far as third parties are concerned, until a receiver has been actually appointed and is in actual possession. Held also—That a sale of properties of which a receiver has been appointed, without leave of the Court which appointed him, is not void, but only voidable, liable to be set aside by appropriate proceeding. **Livania Ashton v Madhab Moni Das**, 11 C L J 489, 494 (1910) and **Kanai Lal Jafar v Manoo Bibi**, 29 C L J 424 (1919), referred to. Held also—That in the present case, the mortgagors who had applied to set aside the sale on the ground, among others, that the sale was held without taking the permission of the Court which appointed the receiver, having subsequently abandoned that ground, D, their assignee, could not urge it again by way of defence to a suit. **RAJA JAGADISH CHANDRA DEO v. BHUBANESWAR MITRA**

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sec 108 (c), lessee if entitled to suspend payment of rent on account of unauthorized and unlawful interruption by another lessee of the same lessor—"Without interruption," what it signifies—Lessee if protected against tortious acts of other lessees or strangers—"Person claiming under the lessor," significance of. P leased out two contiguous mines to D, and M. Subsequently M joined his mine to D's mine by galleries encroaching upon the latter's coal land, as a result of which a portion of D's mine was flooded and submerged. The said act of M was unauthorized by the terms of his lease. In a suit by P against D for royalty and other dues, D pleaded that his possession having been interrupted by a lessee of P the entire rent was suspended. Held—That M's act was, as between him and his landlord entirely unauthorized by the terms of his lease and must be regarded as unlawful. In the absence of a contract or local usage to the contrary, sec. 108 (c) of the Transfer of Property Act secures for the lessee the benefit of an unqualified covenant for quiet enjoyment,

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which protects the lessee against interruption by the lessor, his heirs and assigns or by any other person or persons whatsoever (including the superior landlord or other person claiming by title paramount, exercising a power of re-entry or otherwise dispossessing the lessee). But even such a covenant does not include a case of disturbance by persons having no lawful title or right of entry for against such tortious acts the lessee has his proper remedy against the wrong-doers and does not require a covenant nor can he on account of being evicted by such persons, be relieved of his liability to pay rent. Hayes v Bickerstaff , [1669] Vaughan 118 and Vithilinga v Vithilinga , 1 L. R. 15 Mad 111 121 (1891), discussed and followed. Under such a covenant, the lessee is protected against all disturbance by the lessor whether lawful or not, save under a right of re-entry but as against other persons it protects the lessee only against lawful disturbance. Tayama v Gurshidappa , 1 L. R. 25 Bom 269 (1900). Wotton v Hele , [1670] 2 Wms Sand 178 (b), Dudby v Folliot , [1790] 3 T. R. 581, 1 R. R. 772 Srinivasa v Rangiswami , 1 Mad. L. W. 858 (1914) and several other cases referred to. Held —That the wrongful interference by M could not be treated as an interruption by 'a person claiming under the lessor,' as the latter expression means a person claiming under the lessor the right to do the particular act complained of. Harrison v Muncaster , [1894] 2 Q. B. 680 Sanderson v Berwick , 13 Q. B. D. 517 (1884). Ludwell v Newmans , [1795] 6 T. R. 658 3 R. R. 231 Kali Prasanna v Mathuranath , 1 L. R. 31 Cal 191 (1907) and other cases referred to. NOWRANG SINGH v JANARDAN KISHORLAL SINGH	71	ment registers are important but not conclusive evidence of ownership being, of legal documents made after minute inspection and enquiries on the spot, though they do not commit parties to the statements recorded therein as admissions or affirmations. The position of a Dharmakartha is not that of a shebait of a religious institution or of the mohant or head of a mutt . These functionaries have a much higher right with larger power of disposal and administration and they have a personal interest of a beneficial character. But a Dharmakartha is literally and no more than the manager of a charity, and his rights apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee. A trustee who set up unfounded assertions of personal title in endowed properties and strenuously supported them by even concocting accounts cannot be continued in the office in the interest of the trust and should be removed by the Court. T. P. SRINIVASA CHARARIAR v C. N. EVALAPPA MUDALIAR	317
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- UNSUCCESSFUL APPLICATION** *concord*
to prosecute can prove the basis of an action for damages for malicious prosecution. The maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure. The application for sanction was a preliminary or initial stage in a criminal prosecution and it is immaterial that this was done in a Civil and not a Criminal Court. The Plaintiff therefore had a cause of action and should be given an opportunity to prove his case. *Crowdy v. Reilly*, 17 C W N 554 (1912). *De Rozario v. Golab Chand*, 1 L R 37 Cal 358 (1910). *Golap Jan v. Bholanath*, 1 L R 33 Cal 880 s c 15 C W N 917 (1911) and *Bishun v. Phulman Singh*, 20 C L J 518 (1914), referred to. **NARENDRA NATH DEY v. JYOTISH CHANDRA PAL** 367
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- WILL** in English language by a Parsi—Construction—Construction approved in English cases, if applicable—"My heirs," meaning of—Exclusion of widow of son from inheritance in case son died childless, whether limited to son, predeceasing the testator—Act XXI of 1865, secs 5 and 6: The 'testator' P, a Parsi by his Will, which was written in the English language provided inter alia that his son J should have a right of maintenance during the life-time of his wife should she survive him, and that after her death his executors should hold the residue upon trust to pay the net income thereof to his son J for and during his life-time and after his death upon trust for his widow and children absolutely in certain shares but that in the event of J dying without leaving issue, the executors should pay out of the residue a sum of Rs 10,000 absolutely to J's widow and appropriate a moiety of the balance to certain charitable objects and divide the other moiety amongst P's "heirs according to the law of intestate among Parsis but excluding
- WILL, contd.**
the widow of J from getting any share in such distribution." The testator's wife predeceased him and J, who survived him, died childless and leaving a widow D. Held—That the words "excluding the widow of J from getting a share in such distribution" would apply to funds coming to D as representative of J in the event of J being included in the class of heirs to the testator. That the testator did not intend to include J as one of his "heirs" as the term was used in the above clause of the Will. That according to the natural meaning of the terms "excluding the widow of J from getting any share in such distribution," such exclusion was not limited to the event of J dying in the life-time of the testator leaving his widow surviving him the clause in question appearing to contemplate conditions which would arise after the death of the testator. In a Will written in English the word "heirs" would naturally include heirs at the date of the testator's death, subject always to a contrary intention being declared in a particular Will. *Hood v. Murray*, 1 L R 11 A C 124 (1889), referred to. But in determining whether in this case the natural meaning of the term had been displaced by the context, the rule of construction which have been applied in English cases would be of no assistance. *Bhagebati Bramanya v. Kali Charan Singh*, 1 L R 38 I A 54 s c 1 L R 38 Cal 468, 15 C W N 399 (1911), and *Narendra Nath Sircar v. Kamalbasini Dasi*, 1 L R 23 I A 18 26 s c 1 L R 23 Cal 563 (1896) referred to. **DINBAI v. K. B. NUSSEERWANJI RUSTOMJI** 199
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Will contd.

if it was kept back when it should have been produced why it was so kept back, is of the most material importance for the purpose of determining its validity. **KAM GOPAL LAL v MUSAMMAT AIPNA KUNWAR** 185

Proof—Evidence Act (1901 1872), sec 154—Witness, cross-examined though not considered and declared hostile by Judge—Credibility of witnesses—matter for trial Court—Proper judgment when rejecting a probate petition; Where the Judge allowed a witness to be virtually cross-examined by the party who called him, though he did not in fact think he had turned hostile. **Held—That there were no grounds for adverse comments on the conduct of the trial passed by the High Court to the effect that the cross-examination of the witness was improperly disallowed. See also of the Evidence Act says nothing as to declaring a witness hostile but says that the**

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Will contd

Court may in its discretion permit a person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The decision of the High Court reversing on facts the finding of the Subordinate Judge that the Will propounded was genuine and a forgery was overruled this being held to be erroneously so where the value of the property depended upon an appreciation by the trial Judge of the credibility of witnesses. **Held however**—That the subordinate Judge had gone beyond what the law requires in holding that the Will was a forgery. The burden of proving a Will is on the person who sets it up, and it was enough for the purpose of the case to find that the alleged Will was not proved. **KUNTHA NATH CHATTOPADHYAY v DEVA SANNAMOY DEBYA**

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in which the Magistrate had materials before him sufficient, under sec. 90, Criminal Procedure Code, to justify the issue of a warrant and to which he applied his judicial discretion and in which the warrant was good and valid on the face of it and stated the reason upon which the Magistrate relied, the warrant was not invalid merely by reason of the fact that the Magistrate omitted to record in writing otherwise than in the warrant the reasons which actuated him in issuing the warrant. Per Sanderson, C. J. (Buckland and Panton, JJ., concurring).—The words, in sec 90 of the Criminal Procedure Code requiring a Magistrate to record his reasons for issuing a warrant in the place of a summons for the appearance of a witness are not imperative but directory. Per Sanderson, C. J. (Panton J., concurring).—Sec 537 of the Criminal Procedure Code deals with the form of the warrant itself and nothing more and does not absolve the Magistrate from complying with the provisions of sec 90. It is the duty of the Magistrates to record their reasons specifically as required by sec 90 before issuing a warrant and they should not be satisfied with merely signing their names to warrants in the form given in the schedule. Per Chatterjee, J.—The mere signing by the Magistrate of a warrant in form No 7 of Sch V of the Criminal Procedure Code which states that the Court has reason to believe that the witness will not attend unless compelled to do so is not sufficient compliance with the requirement of sec 90 of the Code. The mere statement that the Court "has good and sufficient reason to believe" is not stating what these reasons are, and the words in sec 90 "after recording its reasons in writing" show that it must be done before issuing the warrant. The recording of his reasons by the Magistrate is a preliminary condition to the issuing of a warrant under sec 90 of the Code, and a warrant issued under the section without recording these reasons in writing has no legal force and effect, the requirement that the reasons should be recorded being mandatory and not directory only. Per Chatterjee and Buckland, JJ.—Sec. 537 of the Code had no application to the case. Per Richardson, J.—Where a warrant is issued in the statutory form, the omission of the Magistrate to record his reasons (apart from the statement in the warrant) does not go to the Magistrate's jurisdiction to the extent of making the warrant null and void in the hands of the police officer or deprive him of the authority to execute it. Per	

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Richardson and Buckland, JJ. If a warrant is an invalid warrant issued without jurisdiction, the act of the police officer in attempting to make the arrest would be a wholly unauthorised act, and the question whether the act was or was 'not strictly justifiable' within the meaning of sec. 99 of the Penal Code would not arise. Tests for determining whether a provision of a statute is mandatory or directory discussed. **Sukheswar Phukhan v. Emperor**, 1 L. R. 38 Cal 789 S. C. 15 C. W. N. 1001 (1911), considered. **THE GOVERNMENT OF ASSAM v. SAHEBULLA** 857

s. 137, order of Magistrate under, if can be declared illegal by his successor in office—S. 140 (2), Magistrate's discretion—Power to order clearing of tank or filling it up; An order for removing certain nuisance from a tank was made absolute under sec. 137, Cr. P. C., by a Sub-Divisional Magistrate. The order was not obeyed and the Petitioner applied to his superior office to enforce that order. That application was refused on the ground that the order passed under sec. 137, Cr. P. C. was an illegal order. **Held**—That the Magistrate was not justified in going behind the order of his predecessor and coming to a decision as to its illegality. That the direction of the Magistrate under sec. 110 (2) must be a judicial discretion and no Magistrate has judicial discretion to sit as a Court of appeal and decide whether an order passed by a Magistrate of concurrent jurisdiction was a proper order or not. The previous Magistrate had jurisdiction to pass the order under sec. 134 and make it absolute under sec. 137, Cr. P. C., for the removal of certain nuisance from a tank either by re-excavating or clearing it or by filling it up. **Bistoo Chunder Chuckerbutty**, Re. 10 W. R. Cr. 27 (1868) and **Indra Nath Banerjee v. Queen-Empress**, 1 L. R. 25 Cal 425 (1897) followed. **KIRAN v. CHANDRA CHOUDHURY v. RAMESH CHANDRA CHOUDHURY** 459

sec. 145, order in favour of one party in proceedings under, it can be interfered with by subsequent proceedings, before the order is set aside by a Civil Court—Magistrate's jurisdiction to attach the subject-matter of the previous order on the ground of a bona fide dispute as to its possession—Government of India Act, sec. 107—High Court's jurisdiction to revise the attachment order in the second proceeding—Temporary change of character of the subject-matter of the previous order, if can nullify the effect of the said order! In a certain proceeding under sec. 145 Cr. P. C., the Magistrate passed an order in favour of the first party. A subsequent assignee of the interest of the second party, however began to disturb the possession of the first party with respect to a portion of the lands and in a subsequent proceeding instituted at his instance the Magistrate held that there was evidence

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of a bona fide dispute as to actual possession at that time. He therefore attached the lands under sec. 145 (4) and drew up proceedings under sec. 110 to maintain peace. **Held**—That it was clearly the duty of the Magistrate to see that the possession of the first party adjudged under the previous order was not disturbed. That order was binding on the parties and the unsuccessful party could not be allowed to disregard it. It was not proper for the Magistrate to initiate fresh proceedings under sec. 115 for maintaining the peace. Another effect of the fresh proceedings would be to give the unsuccessful party a fresh start or limitation in order to bring a suit for recovery of possession. The result of allowing such fresh proceedings would be that the binding effect of an order under sec. 115 would be disregarded and any number of proceedings may be initiated by any disappointed party. A temporary change in the character of the land cannot nullify the effect of the previous order passed with regard to it. When legal proceedings are taken under the Criminal Procedure Code which amounts to an abuse of process of the Court the High Court has ample jurisdiction to interfere and ought to interfere under sec. 107 of the Government of India Act. **ARAN SARDAR v. HARA SUNDAR MAJUMDAR** 171

sec. 145, Magistrate in declaring possession, can question validity of a Civil Court decree—Symbolical possession, value of, in such proceeding; B obtained a decree against A in a Civil Court and got symbolical possession of certain land in execution of the decree. In a subsequent proceeding between the parties under sec. 145, Criminal Procedure Code, the Magistrate declared possession with A thinking that the Civil Court decree could be ignored as the said Civil Court had no jurisdiction over the land and because the delivery of possession was symbolical. **Held**—That in a proceeding under sec. 145 Cr. P. C. the Magistrate could not go behind the decision of the Civil Court in the matter and could not ignore the decree though the Court passing the decree had no jurisdiction over the land. Also when the decree was *inter partes*, it was immaterial that the delivery of possession was symbolical only. **ABHOY MANDAL v. BASU ROY** 267

sec. 193 (2)—Sec. 110, case under—Reference under sec. 123, by the Sub-Divisional Magistrate to the Sessions Judge—Transfer of the Reference to the Additional Sessions Judge—Power of Sessions Judge to transfer; Where on failure of the accused to furnish security to be of good behaviour the Sub-Divisional Magistrate referred the case to the Sessions Judge under the provisions of sec. 123, Cr. P. C. and the latter by an order transferred the Reference to the 1st Additional Sessions Judge

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for disposal **Held**—That the Sessions Judge had jurisdiction to transfer such case to the Additional Sessions Judge for disposal **Bengal Government Notification, dated the 19th June 1916**, referred to **BENODE BEHARY NATH v. THE KING-EMPEROR** 996

sec. 202—Notice upon an accused person to show cause why process should not issue against him, propriety and legality of—*Locus standi* of accused to appear or be represented by a lawyer before the issue of process against him. Where the Magistrate caused notice to be served upon a person named as an accused in a petition of complaint and directed him to show cause why process should not issue against him, and on such cause being shown by a pleader on his behalf, dismissed the complaint against him **Held** That the procedure adopted was improper and was not in accordance with the provisions of the Code of Criminal Procedure as laid down in secs 202 and 203. An accused person has no *locus standi* to appear or to be represented by a lawyer before the issue of process against him **Balaial v. Pasupati**, 21 C W N 127 (1916) referred to and followed **CHANDI CHARAN MITRA v. MANINDRA CHANDRA ROY CHOUDHURY** 996

sec. 203, dismissal of complaint after giving accused opportunity of being heard—Sec. 437, Sessions Judge's order for further enquiry without giving accused opportunity of being heard, propriety of. A complaint was dismissed under sec 203, Cr P C, after giving the accused an opportunity of being heard. The Sessions Judge set aside the order of dismissal and directed a further enquiry without giving the accused an opportunity of being heard **Held**—That in the circumstances of the case, the accused should have been given an opportunity of being heard before the learned Sessions Judge at the hearing of the application under sec 437 Cr P C, he having been allowed to be present from the very commencement of the proceedings at the instance of the complainant **Haridas Sanyal v. Saritullah**, 1 L R 15 Cal 608 (F B) (1888) distinguished **JOGESHI CHANDRA SEN v. NIKUNJA BEHARI CHOUDHURY** 552

secs. 204 and 369—Magistrate ordering issue of process under sec 204, and then on a counter complaint rescinding that order and ordering enquiry under sec. 202, legality of—Order under sec 204, if a judgment. On a complaint being made, the Magistrate ordered issue of process under sec 204. Subsequently on that date a cross complaint being laid, the Magistrate rescinded the order and sent both the cases to a Subordinate Magistrate for local enquiry and report **Held**—That the order passed by the Magistrate under sec 204 was not a judgment to which the provisions of sec 369, Cr P C, would be

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applicable. There is nothing in the Code which forbids a Magistrate to reconsider an order of this kind on sufficient grounds. The order passed by the Magistrate was a right and proper order and it was not made without jurisdiction **LALIT MOHON BHATTACHARJEE v. NONI LAL SARKAR** 651

sec. 235, joint trial for charges under secs 218 and 477A, Indian Penal Code (Act XLV of 1860), for framing incorrect records and falsification of accounts, legality of—Question put to the Judge by the jury not in open Court but in chamber, how far an illegality and vitiates trial—Criminal Procedure Code (Act V of 1898), sec 303, duty of Judge to question jury to ascertain verdict on each charge. A prostitute, who by a registered deed of gift, had given most of her properties to a certain person, died and a Sub-Inspector of Police took charge of the properties. The Sub-Inspector misappropriated some ornaments and changed the entries he had made in the Police General Diary regarding the said properties and inserted fresh pages showing that the property was never taken to the Thana. He was accordingly tried for criminal misappropriation, for criminal breach of trust under sec 409, for framing incorrect records under sec 218, and for falsification of accounts under sec 477A I P C, and he was convicted of offences punishable under secs 218 and 477A **Held**—That all the charges being in relation to acts which were so connected together as to form one transaction, they could be legally joined and tried at one trial. The facts constituting the falsification of records fell under two separate definitions of the law and the accused could be jointly charged and tried at one trial for these offences under sec 235, Cr P C. Where the jury after retiring to consider their verdict saw the Judge in his chamber for direction on certain points of law and asked him one question on a point of law, and the Judge with the jury went into the Court room, where, in the presence of the pleaders, certain questions were put by the jury and the answers given by the Judge were recorded **Held**—That the fact that one question was put to the Judge not in open Court was no more than an irregularity and did not vitiate the trial. Where the verdict was "not guilty" under secs 109 and 403, but "guilty" under secs 218 and 477A **Held**—That that was a sufficiently clear verdict. The jury were rightly taken by the Judge to mean that they acquitted the accused on all charges under sec 109 and the charge under sec 403 I P C, and there was no necessity for any question to ascertain what their verdict was **BIJAS CHANDRA BANERJEE v. THE KING-EMPEROR** 626

sec 237, conviction for attempting to cheat, when evidence insufficient to prove cheating. See Indian Penal Code 821

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262, 263--Trial of a warrant case as a summons case, effect of--Plea of accused--Warrant case--Summary trial--Procedure--Framing of charge.] Where a Magistrate in trying a warrant case in a summary way did not adopt the course prescribed by sec 252 of the Criminal Procedure Code, but convicted the accused on his own admission without taking evidence and without framing a formal charge, and passed an appealable sentence. Held--That the conviction was illegal, and the case was directed to be retried according to law. See 263 of the Criminal Procedure Code applies to cases in which no appeal lies and exempts the Magistrate from framing a formal charge in such cases. But there is no exemption in a case tried summarily in which, as in the present case, the sentence passed is appealable. One of the distinguishing points between a summons and a warrant case is that in a warrant case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called on to plead. NATABAR KHAN v THE KING-EMPEROR. 923

sec 342, mandatory--Stage at which the Magistrate should examine accused.] Where the accused was questioned by the Magistrate before all the witnesses for the prosecution had been examined, cross-examined and re-examined, the conviction was set aside and the case remanded to the lower Court for a fresh trial. KASHI PRAMANIK v. DAMU PRAMANIK. 28

sec. 342 (1)--Examination of the accused after the close of the prosecution case, it imperative--Failure to comply with this provision, it vitiates trial--"After the witnesses for the prosecution have been examined," meaning of--Practice of taking depositions in one case and having them copied and used in a connected case, propriety of--Examination of several witnesses by one Magistrate and completion of the trial by another Magistrate, propriety of.] In certain connected criminal cases the prosecution witnesses were examined and some of them cross-examined before the District Magistrate, and the accused was examined once before all the prosecution witnesses had been examined and again after all the prosecution witnesses had been examined but before all of them had been cross-examined. The cases were then made over to another Magistrate before whom the remaining prosecution witnesses were cross-examined and who convicted the accused. The depositions were taken in one of the cases and they were copied and used in the other cases. Held--That sec. 342 (1) of the Criminal Procedure Code requires that the Magistrate shall question the accused generally on the case after the witnesses for the prosecution have been examined, cross-examined, and re-examined, if necessary. The pro-

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vision is mandatory, and not having been complied with, the conviction was illegal. That it was improper to take depositions in one case and have them copied out and used in another case, and such a course should not be adopted in trials of criminal cases. Held, further--That a Magistrate who undertakes the trial of a criminal case and who also hears the witnesses give their evidence should, if possible, finish the examination of some witnesses by one Magistrate and completion of the trial by another Magistrate is an undesirable proceeding. MAZAHUR ALI v KING-EMPEROR. 99

sec 342--Examination of the accused at the close of the prosecution case, if mandatory--Non-compliance with the section if vitiates the trial--Intention of the Legislature in making this provision about the examination of the accused.] In a case under sec 500, I. P. C., the accused were called upon to plead on the 14th March 1922 and at that time they stated that they pleaded not guilty and also that they would both file written statements. The examination, cross-examination and re-examination of the prosecution witnesses were completed on the 12th April 1922 on which date the case was adjourned until the 25th for the purpose of the accused entering on their defence. On the 12th or the 25th no further examination of the accused took place. Held--That there was no compliance with the provisions of sec. 342 of the Criminal Procedure Code. The duty of the Magistrate under sec 342 arises when the witnesses for the prosecution have been examined, cross-examined and re-examined. The promise to file written statements made at the time of the plea in no way exonerated or exempted the Court from examining the accused at a later stage as required by sec 342. In this country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives, and shall call upon an individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating. It is important also to have regard to the time at which this examination should take place. To ask an accused for his defence before he has the whole of the prosecution evidence in front of him, is not a compliance with the section. And to ask the accused not at the beginning of his defence but later on when his statements may be subject to heavy discount owing to the evidence given in his hearing by his own witnesses in the meantime, is not to be assumed to be a substantial compliance with the requirements of the

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section. In this country an accused is not allowed to give evidence on his own behalf and in view of this sec 312 is of cardinal importance. There is all the difference in the world between a written statement, presumably prepared, almost certainly revised, by the lawyers appearing for the defence and a statement made by the accused himself so that the Magistrate can observe his demeanour and his manner while he makes it and come to his conclusions as to the value of his evidence. The trial became illegal from the moment when, without compliance with sec 312, the Magistrate called upon the accused to enter on their defence. **PRO-MOTHO NATH MUKHOPADHYA v. KING-EMPEROR**

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s 342—Accused if may be examined after examination-in-chief of prosecution witness but before cross-examination—"Examination," meaning of—"Called on for his defence," meaning of; Held per Curiam (Cunning, J., contra)—That the provisions of sec 342 of the Criminal Procedure Code are not sufficiently complied with by examining the accused person after the prosecution witnesses have been examined-in-chief but before they have been cross-examined. In all cases, whether additional witnesses are called after a charge has been framed or not the obligatory examination of the accused under sec 342 of the Code should take place after all the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence. **Per Rankin J**—The phrase "called on for his defence" in sec. 342, means the same thing as the phrase "called on to enter on his defence" or similar expressions in secs 256 and 289 of the Code. **DEBA KANTA CHATTERJI v. GOUR GOPAL MUKERJI**

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s 403, conviction for possession of some stolen property, if legal, when the accused had previously been tried in respect of some other articles found in his possession on the same date and acquitted. Several articles of stolen property having been found in the possession of the Petitioner, he was charged in respect of some of them under sec 411 and acquitted. He was subsequently tried and convicted in respect of the other properties found in his possession on the same date. Held—That in the absence of evidence that the different articles which were the subject of the charges in the two trials were received at different times, the second trial was illegal under the provisions of sec 403, Cr P C. **Ishan Muchi v. Queen-Empress, I L R 15 Cal 511 (1888)** and **Queen-Empress v. Makhan I L R 15 All 317 (1899)**, followed. **GONESH SAHA v. THE EMPEROR**

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s 403, legality of subsequent trial for criminal breach of trust in respect of a particular item, after previous trial and withdrawal of charge for criminal breach of trust for a

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gross sum misappropriated within a period covering the date of the subject of the subsequent charge. A certain person was tried for criminal breach of trust under sec 409, Cr P C, in respect of a gross sum misappropriated within a specified period. The charge was withdrawn with the leave of the Court as no evidence was offered. He was subsequently prosecuted for criminal breach of trust under sec 408, Cr P C, in respect of a particular sum misappropriated on a date within the period covered by the previous charge under sec 409. Held—That the essence of the offence is the misappropriation and not the time within which it took place and that if the subject of the subsequent charge was not included in the gross sum, the offence subsequently charged is not the same as that in respect of which he was previously acquitted. Therefore the previous acquittal is no bar to the subsequent trial. **Emperor v. Kashinath, 12 Bom L R 296 (1910)** approved and followed. **Appadurai Ayyar In re, 17 Cr L J 30 (1916)**, referred to. **NAGENDRA NATH ROSE v. THE EMPEROR**

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s 423, Appellate Court's power to convict under a different section while maintaining the conviction by the trial Court. Where the trial Court convicted the accused under sec 143, I P C, but acquitted them of the offence under sec 379, I P C, and the Appellate Court, while upholding the conviction under sec 143, I P C and the sentence, set aside the acquittal under sec 379. Held—That the Appellate Court had no jurisdiction to set aside the acquittal of the Petitioner when he upheld the conviction under sec 143, I P C. It was not a case of altering the conviction which was within his powers under sec 423 Cr P C. **PRASANNA CHANDRA MAJUMDAR v. UPENDRA NATH SHAW**

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s. 423—Appellate Court—Power to dismiss appeal for non-appearance of Appellant. When after the presentation of an appeal the records are called for and the date of hearing is fixed the Court of Appeal cannot dismiss the appeal merely for the non-appearance of the Appellant's pleader without complying with the provisions of sec 423, Cr P C. **BANSI MIRDHA v. BROJESWAR DUTT**

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ss. 454 and 451 (2), European British subject's right in a warrant case to claim trial by jury any time before he is called on to enter upon his defence—Previous waiver of the right, if irrevocable. In a warrant case the accused, a European British subject, said at an early stage that he did not want to be tried by a jury. After the framing of the charge, the accused claimed to be tried by a jury. Held—That sec 454 read with sec 451 (2) Cr P C, gives an accused European British subject the right to claim trial by jury any time before he is called on to enter upon his defence, and he is

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not clearly worded, was capable of the meaning placed upon it by the prosecution, viz., as alleging one general conspiracy to commit an offence or offences under sec. 420 of the Penal Code, the three transactions mentioned constituting overt acts, from which the conspiracy might be inferred, and as it appeared that the accused also understood the charge in the same sense, the objection was not fatal. That the fact that the three transactions were independent and occurred on different dates and that between those dates intervened many other transactions between the accused and the Government of India which were not proved to be fraudulent or dishonest was not inconsistent with the existence of one general conspiracy. A second charge against the accused was that they had between the 26th August 1918 and 10th December 1918 cheated the Government of India by dishonestly inducing them to deliver a cheque for Rs. 59,265, the property of the Government of India, in payment of five fraudulent bills for linseed oil and thereby committed an offence punishable under sec. 420 of the Penal Code. Held—That the charge should have contained an allegation of the person or persons deceived, and induced to issue the cheque, but the omission was not a fatal defect in the charge when it did not mislead the accused and there was no failure of justice by reason of it. That the fact that the five bills were presented at different dates did not make them matters for five separate offences, inasmuch as an offence under sec. 420 of the Penal Code in relation to any of them would not be complete until the cheque was issued, and one cheque having been obtained through the inducement of the said five fraudulent bills there was one offence only and not five offences of cheating. Held further—That though the prosecution had failed to prove inter alia that any official of the Government of India was deceived by reason of the fraudulent representations contained in the bills, and therefore an offence under sec. 420 of the Penal Code was not established, the evidence produced in support of the charge was sufficient to support a charge of an attempt or attempts on the part of the accused to commit the said offence. The offence of attempt to cheat was complete as soon as each of the bills was presented, and, under sec. 237 of the Criminal Procedure Code, the accused could be convicted of the attempt though not charged therewith. Held further—That the evidence in respect of the charge was, in any event, material on the question of conspiracy alleged in the first charge. The presentation of the said fraudulent bills was not the less dishonest because the accused expected them to be checked by the Government before being passed and the fact that they were checked and passed would not make the representation innocent. The interruption in the trial due

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to the Magistrate having been deputed during the course of the hearing to other work and delays for which the accused were not wholly responsible, commented upon. The strain, anxiety and mental suffering to which the accused must in consequence have been subjected during an unusually protracted trial were matters to be legitimately taken into consideration in passing sentence. P. E. BILLINGHURST v. H. P. BLACKBURN .. 821

, sec. 186, conviction under—Warrant signed by sheristadar "by order," validity of—Resistance to warrant—Evidence Act (I of 1872), sec. 114 (e), presumption.] Petitioners who resisted the execution of a warrant for attachment of moveables, which purported to be signed by the sheristadar of the Court "by order," were convicted under sec. 186 of the Penal Code. Held—That the presumption under sec. 114 (e) of the Evidence Act applied to the case and the Petitioners were rightly convicted. Deputy Legal Remembrancer v. Mr Sarwar Jan, 6 C. W. N. 845 (1902), distinguished. HARISH CHANDRA CHOUDHURY v. GIRIDHAR SARKAR .. 1042

, sec. 363, kidnapping—Minor Mahomedan girl, lawful guardian of—Husband, if such guardian, when mother dead but mother's mother living.] The maternal uncle of a minor Mahomedan girl of 8 or 9 carried her away from her husband's house by force and was convicted under sec. 363, I. P. C., for kidnapping from lawful guardianship. Held—That the husband of a Mahomedan girl who has not attained puberty is not the lawful guardian of her person under the Mahomedan law, nor was the husband in the present case proved to have been lawfully entrusted with the care or custody of the minor so as to make the explanation to sec. 361, I. P. C., applicable. The lawful guardian of such a girl is ordinarily her mother and, when the mother is dead, the mother's mother. The maternal uncle therefore could not be convicted under sec. 363, I. P. C. DERAJUDDIN AKANDA v. THE EMPEROR .. 591

, sec. 415—Paying cheques knowing that they would be dishonoured and thereby inducing a race book-maker to allow bets on credit, if constitutes cheating—Allowing racing bets on credit, whether is an act which causes loss or damage to the book-maker.] A licensed book-maker of the Royal Calcutta Turf Club, on the assurance of the Opposite Party that he would pay up his losses, if any, punctually on the settling day, allowed the latter to take bets on credit. The Opposite Party failed to pay his debts and on different dates paid cheques to the Petitioner and induced him to accept further bets on credit. Held—That although it is clear that the Petitioner was deceived and thereby induced to take bets on credit from the Opposite Party, it cannot be said that the act which the Petitioner was induced to do

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by reason of such deception had caused or was likely to cause damage or harm to him in body, mind, reputation or property. It did not follow that if the Petitioner had refused to take bets on credit, the Opposite Party would of a certainty have had to offer bets by paying cash. The Opposite Party might not have offered any bets at all. Therefore the offence of cheating cannot be said to have been committed. **H. K. BHEDWAR v RAO SAHAT C S R RAO**

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sec 503, service of notice on a person by a self-constituted Arbitration Court that an ex parte decree would be passed against him, if he did not attend the Court and answer the claim, whether amounts to criminal intimidation—Incompetency to execute the threat, material—Sec 44, "injury," meaning of. A certain President of a self-constituted Arbitration Court caused a notice to be issued over his signature to a certain person requesting the latter to be present on a given date and arrange for amicable settlement of a certain claim. The notice concluded with the statement that if the Defendant did not give an answer (or file written statement) on that date, the suit would be decreed ex parte. **Held, per Buckland, J.**—That a threat of a decree is a threat of harm to an individual in his person, reputation or property. That the tribunal is incompetent to execute its decree is immaterial. Sec 503, I P C, says nothing about the capacity of the person making the threat to carry it into execution. Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial. Under sec 44, I P C, injury denotes harm illegally caused. By no legal process or means could this tribunal make or give effect to such a decree as it was the intention of the notice to cause the complainant to believe would be made if he failed to comply with it. Therefore in that the notice threatened the complainant with such a decree it threatened the complainant with harm to be caused illegally. The Petitioner therefore committed the offence of criminal intimidation. **PRIYANATH GUPTA v. JAL JHI CHOWKIDAR**

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"INJURY," in sec 44, Indian Penal Code, meaning of. See Indian Penal Code, sec. 503

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JURISDICTION, of Magistrate, to attach the subject-matter of a previous order under sec 145, Cr P C on the ground of a bona fide dispute as to its possession. See Criminal Procedure Code, sec 145

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LEGAL PRACTITIONERS ACT (XVIII of 1879), s 13, cls (c) and (f)—S. 14—Unfounded and gratuitous imputation against impartiality of trying Court by pleader, if professional misconduct—Duty of pleader to client and Court—Independence of Bar—

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Additional District Magistrate, it may refer to High Court misconduct of pleader in Deputy Magistrate's Court—High Court, if may adopt report fairly made by Court not competent. **Mr G.**, who was appointed Additional District Magistrate at Dacca with all the powers of a District Magistrate under the Criminal Procedure Code and was in charge of the criminal work of the District, hearing criminal appeals and reporting the progress of criminal work to the High Court, called for a report of an incident which took place during the trial of a criminal case in the Court of a Deputy Magistrate at Dacca and upon receiving such report framed charges under sec 13 (b) and (c) of the Legal Practitioners Act against three pleaders and a mukhtar. The latter having showed cause, **Mr G.** reported against them under sec 14 of the Act through the Sessions Judge who having heard counsel on their behalf upon the matter of the report forwarded it with his own opinion thereon to the High Court. They were both of opinion that one of them, **Mr M.**, on retiring from the case in which he was appearing for the accused, had made gratuitous imputations against the fairness and impartiality of the trying Deputy Magistrate. **Held**—That the Additional District Magistrate was a Court subordinate to the High Court within the meaning of sec 14 of the Act and was competent to draw up the charge and report the matter to the High Court. That he followed the correct procedure as laid down in sec. 14 (c) in forwarding his report through the Sessions Judge. That even if he was incompetent the High Court would adopt the enquiry and report when it appeared that the charge was framed with particularity and precision and there was a full inquiry in which the legal practitioners in question showed cause and appeared by counsel or pleaders. The High Court is competent and ought in a proper case, to take action even without the intervention of a subordinate Court. **Rasik Lal Nag, I L R 44 Cal 639 at p 647 s c. 20 C W N. 1284 (1916).** referred to. A pleader making gratuitous and unfounded imputations in open Court against the fairness and impartiality of the tribunal in the trial of the case in which the pleader is appearing is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of sec. 13 (b) of the Legal Practitioners Act and also of such misconduct as would come under sec 13 (f) of that Act. Pleaders have a duty not only towards their clients but also towards the Court of which they are pleaders, and it is part of their duty to co-operate with the Court in the orderly and pure administration of justice. The independence of the Bar can and ought to be maintained without making gratuitous and unfounded imputations upon the fairness and impartiality of the tribunal. **Per Richardson.**—The in-

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PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT CAVE.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

1922.

Heard, 9, 10 and
13, February.
Judgment,
14, March.

RADHAKRISHNA
Ayyar and anr.,
Appellants,

v.

SUNDARASWAMIER,
substituted for
Swaminutha Ayyar,
Respondent.

Civil Procedure Code (Act V of 1908), secs. 109, 110—Appealable value—Determination as to value by Court granting or refusing leave, if conclusive—Amount sued for, not sole criterion—Madras Estates Land Act (I of 1908, Mad), sec. 77, suit under—Decree for one year, if res judicata in suits for subsequent years—Proper use of such decree—Secs. 27, 28—Past practice, reference to, for what purposes justified—Past practice, if derogates from statutory rights and obligations—Penal provision, construction of—Strict construction, if justifies departure from true construction

Since the repeal of the Order of Council of 10th April 1838 by a subsequent Order in Council, dated 9th February 1920, the value of the subject-matter of an appeal to His Majesty in Council is not concluded by the certificate of the Court admitting the appeal. Nevertheless, the Judicial Committee will always naturally and very greatly defer, on a subject of this nature, to the certificate given by the High Court.

The sum of money actually at stake may not represent the true value. The proceeding may, in many cases such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the

other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit.

BANARSI PARSHAD v. KASHI KRISHNA NARAIN (2) referred to.

In a suit for rent under Madras Act I of 1908, sec. 77, the Defendants being admittedly occupancy raiyats having permanency of tenure and other rights attaching to that position:

Held—That although past practice may have its weight as one of the elements which are considered in fixing under the Act what are the fair and equitable conditions of a particular puttah, it cannot derogate from the status, privileges, rights and obligations of the parties under the statute, and the raiyats cannot validly maintain that payments made during the course of 20 years should form the lines and limits of their obligations for all time.

PARTHASARATHY APPA ROW v. CHEVENDRA VENKATA NARASAYYA (3) referred to.

As muchukas decreed for any revenue year remain in force until the beginning of the year for which fresh ones are exchanged or decreed, the decision in respect of one Fasli year cannot operate as res judicata in regard to a dispute as to the rent payable in a subsequent Fasli year. But it stands to reason and is in accordance with secs. 27 and 28 of the Act that the old rent decreed shall continue until reduced or enhanced by special applications under the statute.

(2) L. R. 28 I. A. 11; s. c. I. L. R. 23 All 227; 5 C. W. N. 193 (1900).

(3) L. R. 37 I. A. 110; s. c. 14 C. W. N. 938 (1910).

RADHAKRISHNA AYYAR v. SUNDARASWAMIER.

Even in regard to penal provisions, with a strict construction, it is a sound general principle that no construction is open to a Court of Law which is in violation of what that Court considers to be the true meaning of the provisions.

This was an appeal against a decree of the High Court of Madras dated the 14th November 1916, which varied a decree of the District Judge of Tanjore, dated the 18th January 1915, on appeal from a decree of the Revenue Divisional Officer of Kumbakonam, dated the 28th June 1913.

The suit was originally brought under sec. 77 of the Madras Estates Land Act I of 1908 by the Receiver of certain family property for rent alleged to be due from the Defendants who were occupancy raiyats.

The questions for determination arose on the construction of a puttah the material portions of which are set out in the judgment of the Board.

The Defendants (Appellants) contended that the puttah was not a proper one to be forced on the tenants under Madras Act I of 1908. The lower Courts decided that this question was "*res judicata*" by reason of decisions on the puttah under Madras Act VIII of 1865. The suit came before the Board on 3rd December 1920, [*Radhakrishna v. Sarinatha* (4)], when an objection was taken by the Respondent to the form of the certificate issued by the High Court. A further order and certificate, issued by the High Court but inadvertently, excluded from the record, was now produced, and the appeal came before the Board for decision.

Messrs. DeGruyther, K. C. and Parikh for the Respondent took a preliminary objection that no appeal to the Board lay

in this suit as the subject-matter was under Rs. 10,000.

He referred to:—*Radha Kunwar v. Reoti Singh* (5) and *Ramchand Manjimal v. Goverdhandas Vishindas Ratanchand* (6). The Court below have certified the value of the subject-matter and the question is whether the Board can go behind that certificate.

Banarsi Parshad v. Kashi Krishna Narain (2) and *Radha Krishna Das v. Rai Kishen Chand* (7).

Sir G. R. Lowndes, K. C. and *Mr. Kenworthy Brown* for the Appellants on the preliminary point argued that in cases such as this you can capitalize the rent for purposes of valuation, and the real difference between the parties was considerably more than Rs. 10,000. He referred to an Order in Council of 10th April 1838, Bentwich's Privy Council Practice, p. 146 and Safford and Wheeler's Privy Council Practice, p. 491.

[VISCOUNT CAVE intimated that the Board would reserve this point and would hear the arguments of Counsel on the appeal generally.]

Sir G. R. Lowndes, K. C. and *Kenworthy Brown* for the Appellants.—The suit is for arrears of rent under Act I of 1908.

I have refused to accept the puttah tendered to me by the inamdar and it is not binding on me. The inamdar contends that I am bound to accept it because it was decreed against me under Act VIII of 1865.

(2) L. R. 28 I. A. 11; s. c. I. L. R. 23 All. 227; 5 C. W. N. 192 (1900).

(5) L. R. 43 I. A. 187; s. c. 20 C. W. N. 1279 (1916).

(6) L. R. 47 I. A. 124; s. c. I. L. R. 47 Cal. 918; 24 C. W. N. 721 (1920).

(7) L. R. 28 I. A. 182; s. c. 5 C. W. N. 699 (1901).

(4) L. R. 48 I. A. 317; s. c. I. L. R. 44 Mad. 293; 25 C. W. N. 630 (1920).

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The latter has been replaced by Act I of 1908.

Para. 8 of the puttah though good under the old Act would be at variance with sec. 74 (3) of the new Act, and the word "decreed" under sec. 52 (3) of the new Act does not mean decreed under the old Act.

Decreed now means decreed as a proper puttah according to the provisions of the new Act.

The Act of 1865 made rent depend on contract, the Act of 1908 imports other considerations, *i.e.*, is it "fair and equitable."

Even if the terms of the puttah are binding on me a custom had arisen, recognized by both landlord and tenant, as to the amount payable on taking away the crop, and the terms of cl. 8 were not referred to by either side.

Parthasarathi Appa Row v. Chevendra Venkata Narasayya (3).

If the construction is as contended by the mamdar, then his suit is not for rent but for a penalty—and such a suit does not lie in the Revenue Court.

DeGruyther, K. C. and Parikh for the Respondent.—The acceptance of the puttah does not amount to a contract but it is evidence of the terms of a pre-existing tenancy.

Shanmuga Mudaly v. Palnati Kuppu Chetty (8).

This puttah has been in existence since 1881 and every year there has been a dispute with some of the tenants as to its terms and the Courts have decided in the landlord's favour.

On two occasions decrees have been made against these very tenants and no application has ever been made for reduction or enhancement.

The crop has been carried away by the tenants and cl. 8 of the contract comes into operation.

This provides that a rent of 170 Kalams per veli is payable, an amount which has been calculated as a reasonable assessment of the landlord's probable share, and not as a penalty.

Sir G. R. Lowndes, K. C. in reply

Urged that the very real difficulty experienced in construing the puttah was ample proof that it was not a "proper" puttah to force on a raiyat

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal against a decree of the High Court of Judicature at Madras dated the 14th November 1916. It varied a decree of the District Judge of Tanjore dated the 18th January 1915. The suit between the parties was brought in the Revenue Court of Kumbakonam under the Madras Estates Land Act, No. 1 of 1908, sec. 77. The claim of the Plaintiff was for rent said to have accrued and to be due by the Defendants in respect of their holdings in accordance with the terms of a puttah which will be afterwards noted. No further reference is required to the various stages of the litigation.

A preliminary question, however, is raised as to whether the appeal is competent. It is pointed out by the Respondent, who makes the objection, that the rent sued for amounted to Rs. 4,560, being rent for three years in arrear. The Respondent accordingly contends that it sufficiently appears that the amount or value of the subject-matter of the suit is not Rs. 10,000, as required by secs. 109 and 110 of the Code of Civil Procedure, 1908; and upon the case reaching this Board their Lordships, on the 3rd December 1920, held that the certificate *quoad* value was at least

(3) L. R. 37 I. A. 110; s. c. 14 C. W. N. 238 (1910).

(8) I. L. R. 25 Mad. 613, 621 (F. B.) (1902).

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ambiguous, and that such certificates "ought to be given in such a form that it is impossible to mistake their meaning on their face."

The only order then before the Board was in these terms :—

"It is hereby certified that as regards the value of the subject-matter and the nature of the question involved the case fulfils the requirements of secs 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council,"

and upon that the previous judgment of the Board proceeded. It now appears, however, that the above was not the only order, and that the parties had failed to bring up the order embracing the actual certificate and granted on the same day.

It is admitted by both parties that there did exist in the proceedings an order of the 21st September 1917, in the following terms :—

"We hold that the subject-matter is of a value greater than Rs 10,000, with reference to *Gooipersad Khoond v Juggut Chunder* (1) and that a substantial question of law is involved. We therefore certify that the case is a fit one for appeal to His Majesty in Council with reference to secs 109 and 110 of the Civil Procedure Code"

In their Lordships' opinion, this certificate is sufficiently clear, and is not open to the objections under which the former certificate under argument before the Board stood condemned.

The point, however, which still remains is whether that certificate must be accepted by the Board as conclusive, the actual sum in figures which is sued for being what it is, and so much smaller than Rs. 10,000.

The ruling provision as to certificates of value was No. 2 of the schedule to the Order in Council of the 10th April 1888. It is to the following effect :—

(1) 8 M. L. A. 166 (1860).

"That in all cases in which any of such courts shall admit an appeal to Her Majesty, her heirs and successors, in Council, it shall specially certify on the proceedings that the value of the matter in dispute in such appeal amounts to the sum of 10,000 company's rupees or upwards, which certificate shall be deemed conclusive of the fact, and not be liable to be questioned on such appeal by any party to the suit appealed"

It is admitted that at the date of the appeal this Order was in operation, and it accordingly governs the case, and, so far as the Board is concerned, it concludes the question of competency *quoad* value. In some of the cases which have occurred, it would rather appear as if the provisions of this Order had been left out of view.

On a date subsequent to the filing of this appeal, namely, the 9th February 1920, the Order was repealed by an Order in Council, passed by His Majesty on the date mentioned. While, however, in cases subsequent to that date, the value of the subject-matter of the appeal is not concluded by the certificate of the Court below, then Lordships desire to make these two observations :—In the first place, the sum of money actually at stake may not represent the true value. The proceeding may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit [*Banarsi Parshad v. Kashi Krishna Narain* (2)]. The Courts below may accordingly with propriety, as was done in this case, make the necessary certificate. In the second place, whether they did so or not, while their Lordships would, of course, be free, if

(2) L. R. 28 I. A. 11; s. c. I. L. R. 28 All. 227; 5 C. W. N. 193 (1900).

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greater value in the sense mentioned were established, to proceed with the appeal, yet they will always naturally and very greatly defer, on a subject of this nature, to the certificate given by the High Court.

The objection to the competency of the appeal is accordingly repelled.

Their Lordships proceed to the merits of the appeal.

The original Plaintiff in the suit was a Receiver appointed by the Court and the Plaintiff-Respondent is his successor and represents the proprietors of an inam village called Kadugamangalam. It is a matter of admission that the Appellants are occupancy ryots of certain of the village lands, having the permanency of tenure and the other rights attaching to that position under the law of Madras. Their Lordships desire to make it clear that nothing that has passed between these litigants during the long course of years, in which the law has been so frequently invoked, constitutes a derogation from the status, privileges, rights and obligations of parties under the Madras Land Acts. The provisions, for instance, of Chap. V of the Act as to the payment of arrears of rent, and the appraisement and division of produce, as also those of Chap. IV, dealing with puttahs and muchilkas, can be appealed to and are plainly applicable.*

In particular, it should be noted that Chap. IV of the Act as is specially provided for by sec. 50, applies to all ryots with a permanent right of occupancy, and by sec. 52 accordingly puttahs and muchilkas may be exchanged for periods of one or more revenue years; but no landholder shall be bound to tender, and no ryot to accept, a puttah for a period of more than one revenue year. It appeared to be maintained for the Appellants that payments made during the course of 20 years should form the lines and limits of the ryots' obligations

for all time. Setting aside the manifest contradiction by this of the actual relations of these parties, the Board has, in view of the argument, thought it right to express its opinion that the statutory rights and obligations of parties have not been thus impinged upon. Past practice may, of course, have its weight as one of the elements which are considered in fixing under the Act what are the fair and equitable conditions of a particular puttah [*Sri Raja Parthasarathi Appa Row Savaiaswa Row Bahadur Zemindar Garu v. Chevendra Venkata Narasayya* (3)].

Under the Madras Estates Act I of 1908, the inamdar, on the 28th October 1908, tendered a puttah for Faslî 1318 to the tenants and demanded from them a muchilka, but the tenants refused to accept the puttah, or to execute a muchilka. Puttahs, in identical terms having been also offered and refused, and no muchilkas having been executed for the two following years, Faslî 1319 and 1320, the suit was instituted on the 15th December 1911. It resulted in a decree for Rs. 4,367-7-3.

It may be stated that it was admitted that there had been numerous suits and numerous decrees in which the rights of the inamdar had been determined in accordance with puttahs substantially, if not entirely, in the same terms as those tendered in the present suit. The plaint correctly states: "Puttahs were tendered for the under-mentioned occupancy right lands in the enjoyment of the Defendants for Faslîs 1318, 1319, and 1320, duly according to custom and in conformity with the previous judgments, by the first Defendant in O. S. No. 61 of 1904, who was managing during the said Faslîs."

In 1902, the inamdar had sued and on

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the 19th April 1904, the Divisional Officer pronounced judgment in the Plaintiff's favour, and he expressed himself thus :—

"I consider that the dispute between the parties relating to the suit Fasli is identical with those decided in the previous Fasls in the judgments referred to above, and that no special pleas or circumstances are urged with reference to the suit Fasli for any fresh adjudication."

Their Lordships pause to say that they may repeat in terms this *dæctum* which was pronounced 18 years ago. It is a truly deplorable circumstance that judicial time should have been occupied and the substance of parties wasted by litigation over a further period of 18 years, for settling practically the same point. The careful provisions made by legislation for the steady protection from year to year of the rights of occupancy ryots on the one hand, and inamdars and other landlords on the other, have been put on one side and fruitless and repeated litigations have been indulged in.

But in the judgment referred to, the Divisional Officer proceeds —

"I therefore find that the previous judgments are *res judicata* in these suits as they have gone fully into the question of custom relating to the different stipulations in the puttah."

However natural it may have been to treat the position thus, their Lordships cannot sustain on legal grounds the plea of *res judicata* here suggested. In the language of the High Court :—

"The answer is that the general doctrine of *res judicata* is not in question, but the application of the special rule stated in sec 52 (3), Estates Land Act, under which muchilkas decreed for any revenue year remain in force until the beginning of the year, for which fresh ones are exchanged or decreed, and that there is no reason for restricting the scope of the general reference to muchilkas decreed to those decreed by any particular description of Court."

With this view the Board is in full agreement

The inamdar having again tendered puttahs in terms of sec 54 and the other relative sections, and the tenants having notwithstanding previous decrees again refused to accept the terms or to grant muchilkas, and the terms of the puttahs having been entirely approved by the Collector, the present suit had to be brought. The puttahs tendered are in terms of previous puttahs upon which judgment and decree was passed. It stands to reason, and it is in accordance with secs. 27 and 28 that the old rent thus decreed shall continue, until reduced or enhanced by special applications under the statute. No such applications have been made. All that remains in the case is the correct interpretation of the puttahs.

The argument presented to the Board involved the construction of the two cls. 1 and 8. These clauses are as follows :—

"1 Out of the 32 *pankus* in the aforesaid village, the lands comprised in the 5/8 *panku* which is in your enjoyment, *viz*, *Ayan nanja* of the extent of 2 Velis 3 Mahs 4 Kulis and 13 cents and *Padugue panja nanja* of the extent of 5 Mahs 38 Kulis and 59 cents, in all, *nanja* of the extent of 2 Velis 8 Mahs 43 Kulis and 8 cents, you shall cultivate at the proper seasons fertilizing them in all ways; harvest the crops that are grown, after the same have been estimated by our agents in the presence of (our) agents and others and under their orders and supervision, leaving the stubbles as is the practice with the Government *Amani* lands; stock in heaps on the threshing-floor the residue of the total yield of paddy that is left after paying the reapers' wages at the rate of 1 marakal per kalam and the *Thalaiyan*, *Narandhiran* paddy payable at the threshing-floor at the rate of 1 marakal per 15 kalams; and after the harvesting has been completed, you shall apportion in heaps our *Melvaram* due at the rate of 60 kalams for 100 kalams of paddy in the case of *Ayan nanja*

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and at the rate of 57 kalams for 100 kalams in the case of *Podugoi punja nanja* under the Sudder Court decree in Suit No. 68 of 1847 and in acknowledgment of our having received the Melvaram paddy, obtain a receipt from our agents"

"8. Even if the aforesaid nanja lands be not cultivated at the proper seasons, even if they be cultivated negligently, if they be allowed to lie fallow without being cultivated, even if damage of crops be caused by failure to harvest the crops at the right time, even if the yield be carried away, either without acting in accordance with the conditions specified in paragraph 1 herein, or without division of Varam, and even if nanja land be filled up (and raised in level) and punja cultivation made thereon, you shall pay at the rate specified in para 1 herein our Melvaram paddy in respect of the total yield of paddy calculated at an average of 170 kalams and 4 marakals per veli of nanja, the kadappu and kar produce being payable within the 15th of December, and the samba and pisanam produce by the 15th March"

What had happened in the present case was that during the Fasli years in question, the tenants in contravention of the terms of these puttahs had carried away the yield, without any of the proceedings with regard to the apportionment, in heaps, of the melvaram due to the landlord having taken place.

The obligations under cl. 1 having thus not been complied with, cl. 8 came into operation, which applied to various contingencies, including the following: "If the yield be carried away . . . without acting in accordance with the conditions specified in paragraph 1." In that contingency "you shall pay at the rate specified in paragraph 1 herein our melvaram paddy in respect of the total yield of paddy calculated at an average of 170 kalams and 4 marakals per veli of nanja, the kadappu and kar produce being payable within the

15th of December, and the samba and pisanam produce by the 15th of March."

The question is: In this stipulation, what is the meaning of the expression "the total yield of paddy," and in particular what is the application of the stipulation to the case of an oodu crop, that is, a crop sown together, one part of which takes only three months to ripen and be reaped, and another part of which takes eight months to ripen and be reaped? Is the return as to "the total yield of paddy" satisfied by payment of 170 kalams for the total yield of one of the portions? The Appellants maintain that it is.

It is well to have clearly in view what is the practice with regard to such a paddy crop. It is thus described in Mr Hemmingway's work on Tanjore in the Madras District Gazetteer, p 93.

"It has become usual in a good many places to mix a *kuruvai* and a *samba* crop on what is called the *udu* or *ottadai* system of cultivation. The species of samba used is the *ottadai* paddy, an eight months' crop from which the name of the system is derived. The amount of *kuruvai* used in this combination exceeds the *samba* largely, sometimes by as much as five to one. *Ottadai* is generally sown in the first-crop season. The more quickly matured variety is harvested first, and the ryot thereby secures a return for his labour both at the *kuruvai* and the *samba* harvests. The two kinds of grain are mixed in the seed-beds and the seedlings are planted indiscriminately."

The Appellants' counsel forcibly maintain that the payment of 170 kalams was a penal provision, and that, therefore, that provision ought to be most strictly construed.

It must not be forgotten that even in regard to penal provisions with a strict construction, no construction is open to a Court of Law which is in violation of what that Court considers to be the true

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meaning of the provision. That is a sound general principle.

But the Board, having considered the argument upon the clause, are of opinion that the rent of 170 kalamas was not a penal rent, but was a substituted rent. The true rent, had the tenants complied with their obligations, would have been a percentage of the yield: but were the harvest to be bodily carried away, it was necessary to provide for such a case, and this was done by cl 8 which imposed no penalty as such, but simply set forth a figure which, upon the whole, might be reckoned a reasonable fractional substitute for the actual percentage, which, owing to the tenants' conduct, had been rendered unascertainable.

Is, however, the stipulation applicable to the whole harvest of a mixed crop reaped at separate times, or is it applicable only to the first harvesting? "You shall pay," says cl 8, "at the rate specified in para. 1 in respect of the total yield of paddy calculated at an average of 170 kalamas": but then it is added that the early rice (kadappu kur) produce is payable in December and the samba, which is the late harvest produce, is payable in March. Putting that alongside of the subsequent obligation which was, under cl. 1, "to stock in heaps on the threshing-floor the residue of the total yield of paddy" (the same phrase as is used in cl 8), then Lordships have no doubt that the substituted rent applied to the yield of each portion of the crop, exactly as the setting aside on the threshing-floor was applicable to each portion. They are of opinion that the High Court has come to a correct conclusion upon this topic.

Their Lordships desire to add that a question of straw, insignificant in amount, was not argued, the very proper arrangement of both parties at the Bar being that

that would stand or fall with the judgment of the Court below.

Their Lordships will humbly advise His Majesty that the appeal be refused with costs

Solicitor: Mr. Douglas Grant for the Appellants

Solicitors: Messrs. Chapman Walker & Shephard for the Respondent.

G. D. M. Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

VISCOUNT HALDANE
LORD PHILLIMORE.
SIR JOHN EDGE.
SIR ROBERT STOUT.

1921,

Heard, 16 and
17, June.
Judgment, 12. July.

M. EHTISHAM ALI,
for himself and in
place of M. Sakhawat
Ali, since deceased,
Appellant,

v.

JAMNA PRASAD, since
deceased, and ors.,
Respondents.

Secondary evidence of deed, admissibility—Evidence of loss given by person, in whose custody it should be, when to be disbelieved—Deed of sale, if may be nullified by simple surrender—Right of purchaser of one mortgaged property to redeem all properties mortgaged—Deedings with equity of redemption by mortgagor after sale thereof, if admissible in evidence against purchaser in favour of vendor's representatives, and if evidence of adverse possession, when mortgaged property in possession of mortgagor.

If a witness in whose custody a deed should be depose to its loss, unless there is some motive suggested for his being untruthful, his evidence should ordinarily be accepted as sufficient to let in secondary evidence of the deed.

When a deed of sale has once been executed and registered, it can only be avoided by a subsequent registered transfer.

A purchaser of one only of several properties given in mortgage cannot divide

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the liability for it between the properties. He can redeem the one property on payment of the charge upon the whole and is entitled to do so.

Where a mortgagor of a usufructuary mortgage after having sold the equity of redemption went on dealing with it as if it still subsisted:

Held—That these subsequent dealings, if regarded as declarations in his own favour, could not be received in evidence on behalf of persons claiming under him. Nor could such dealings be regarded as acts of ownership so as to prove adverse possession, the possession remaining in the mortgagee.

This was an appeal from a judgment and decree, dated the 3rd May 1915, of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree, dated the 23rd October 1912, and the 29th March 1913, of the Additional Judge of Hardoi.

The main question for determination on the present appeal was whether the Plaintiff-Appellant, who claimed to be the purchaser of the equity of redemption, had established his title to redeem the mortgages in suit. The Court of first instance found for the Plaintiff, and allowed his claim, but the Appellate Court has held the contrary and dismissed the Plaintiff's suit.

The facts of the case may be shortly stated as follows:—

One Ehsan Ali was the owner of a market called Bazar Ehsanganj, including shops, etc., in Qasba Asiwan in the District of Unao in Oudh, and as such he was entitled to collect market dues from the shop-keepers and others who carried on business in the said market. In 1873 the annual collection amounted to Rs. 404. Ehsan Ali from time to time borrowed

money from Sheo Prasad, father of Defendants Nos. 1 and 2, and the grandfather of Defendants Nos. 3 and 4, and executed deeds of usufructuary mortgages in favour of the lender. The first, dated the 9th November 1873, was for Rs. 1,000, and the second, dated the 19th September 1875, was for Rs. 500. There were three other bonds, which the Defendants contend were deeds of further charge, dated the 4th May 1876, 16th September 1876, and 11th January 1878.

By the first deed the said mortgagor (Ehsan Ali) mortgaged "Bazar Ehsanganj inclusive of the *Hakiat* in all the shops situated in the said Bazar" and delivered over possession to the said mortgagee for a term of six years, and authorized the mortgagee to collect market dues to the extent of Rs. 244 per annum. The mortgagee on his part agreed to appropriate the sum of Rs. 180 per annum in lieu of interest on the principal amount, and Rs. 24 per annum for the wages of the *Chaukidar*, and to pay the balance of Rs. 40 to the mortgagor. The deed provided for an adjustment of accounts at the time of redemption.

By the second deed the mortgagee was empowered to collect the rest of the annual dues amounting to Rs. 160, and agreed to appropriate Rs. 90 per annum in lieu of interest on the principal, and to apply the remaining sum of Rs. 70 per annum in reduction of the principal.

It is unnecessary to specify the terms of the remaining three bonds.

The Plaintiffs alleged that on the 13th December 1882, the said mortgagor, Ehsan Ali, sold his equity of redemption in the mortgaged property mentioned above to Sakhawat Ali (Plaintiff No. 1) and Ewaz Ali (since deceased) and that the sons of the vendee last named subsequently sold

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their interest to the present Appellant Ehtisham Ali (Plaintiff No. 2)

The deed of sale dated the 13th December 1882, purported to be signed by Ehsan Ali, and appeared to be attested by three witnesses and was duly registered. The price was Rs. 3,000, out of which Rs. 200 was stated to have been paid in cash, and with reference to the remainder the deed provided as follows:—

“Out of this sum, I have left Rs. 2,800 with the vendee for the purpose of making payment to the said mortgagee and defraying Court expenses. The said vendee having paid the money to the said mortgagee and having taken its receipt and the mortgage-deeds, may enter into possession (of the mortgaged property). . . .

“As exchange of considerations has taken place between the contracting parties now no claim or dispute regarding the property sold and its consideration money is left to me or my heirs and representatives against the vendees and their representatives. If, per chance, at present or in future I or my heirs and representatives put forward any claim or dispute against the vendees or their representatives then it be untenable and not heard.”

On the 16th October 1911, the said Sakhawat Ali and Ehtisham Ali instituted the present suit to redeem the said mortgages, dated the 9th November 1872, and 19th September 1875. They further claimed to redeem the bonds, dated the 1th May 1876, 16th September 1876, and 11th January 1878, if the Court held that those bonds amounted to deeds of further charge. The Plaintiffs stated that the Defendants-mortgagees were in possession of the mortgaged property; and that the entire sum due to the mortgagees under all the bonds held by them had been discharged from rents and profits of the mortgaged property. The Plaintiffs therefore claimed to

recover from the Defendants possession of the mortgaged property, and such moneys as were found due from them after the rendition of account by the mortgagee.

The Defendants Nos. 2 to 4 filed a written statement denying the claim of the Plaintiffs. They pleaded, among other things, that the Plaintiffs did not derive any title to the equity of redemption on the following grounds:—

“The sale-deed, mentioned in para. 10 of the plaint, set up by the Plaintiffs, is not genuine and for consideration, nor did any right accrue to the transferees in accordance with the same.

“The vendees, mentioned in the sale-deed, did not pay any consideration money to Ehsan Ali Khan: and because the mortgage-money due to the mortgagees had much exceeded the valuation of the property, the said vendees refused to incur any expenses. Accordingly the said Ehsan Ali Khan, having cancelled the aforesaid deed, rejected it. The sale-deed was not, in any way, acted upon, and the proprietary possession of Ehsan Ali Khan remained intact. The Plaintiffs' statement that the said sale-deed has been lost is absolutely wrong.

“That the Plaintiffs and their predecessors never held possession over the property in dispute. As a matter of fact, in contravention of the terms of the sale-deed set up by the Plaintiffs, the mortgagor, Mohammad Ehsan Ali Khan, was himself in adverse possession of the property and exercised proprietary rights and used to deny the Plaintiffs' rights. Therefore, even if any right accrued to the Plaintiffs, it was extinguished in consequence of the adverse possession of Mohammad Ehsan Ali Khan.”

The suit was tried by the Additional Judge of Hardoi, who framed a number of issues. As the Appellate Court con-

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fining its decision to the question of the Plaintiffs' title alone, it is necessary to refer here to the 1st and 6th issues only. They were the following :—

(1) Whether Plaintiffs are purchasers of the rights of the mortgagee Ehsan Ali Khan by deeds dated the 13th December 1882, 10th January 1909, and 16th February 1911?

(6) (a) Are the Plaintiffs' deeds of sale invalid for being without consideration and because they have not been acted upon?

(b) Can Defendants raise this plea?

In support of their claim the Plaintiffs relied upon the deed of sale dated the 13th December 1882. In spite of their endeavours the Plaintiffs stated that they had failed to obtain the original of the said deed of sale from their vendors, who represented that they had lost the original document. The Plaintiffs examined their vendor Hashmat Ali, the son of the said Ewaz Ali, and he deposed that his deceased father had the original of the sale-deed, and that he had searched for it but could not find it. The Plaintiffs also examined one Wahid-ul-Hasan, whom the Additional Judge described as "a very respectable man," to prove the loss of the original sale-deed.

The learned Additional Judge who heard the witnesses recorded his estimate of their evidence in the following words :—

"The evidence of these men is unimpeachable. This is the best evidence I can think of, under the circumstances, to prove the loss. There is not an atom of evidence to rebut it. I am convinced that the sale-deed was lost by the sons of Ewaz Ali. It is in evidence of Hashmat Ali, that he had seen the sale-deed amongst the papers of his father, but at the time he was assigning his and his two brothers' share, he searched for it and found it was not there. The loss having been proved the

Plaintiffs are entitled to prove the sale-deed by producing secondary evidence."

The Plaintiffs therefore proceeded to prove the terms of the said deed of sale by filing a certified copy thereof, and examined two witnesses, Fazal Karim and Ghadir-ul-huda, who deposed that the said deed of sale was executed in their presence and that Rs 200 were paid in cash to the mortgagor, Ehsan Ali. The learned Additional Judge believed the evidence of those witnesses and said as follows :—

"The evidence of Plaintiffs' witness No. 1 and Plaintiffs' witness No. 2, who were present at the place where the sale-deed was executed, in my opinion, satisfactorily proves the deed and the passing of the consideration, viz., that Rs. 200 were paid and that the rest, Rs. 2,800, were left with the vendees to pay off the prior mortgages. I hold therefore that the sale-deed in favour of Sakhawat Ali, Plaintiff No. 1, and Ewaz Ali Khan—now represented by Plaintiff No. 2—executed by Ehsan Ali Khan on the 13th December 1882, is proved to have been executed for consideration."

The said Additional Judge delivered judgment on the 23rd October 1912. He found that the Plaintiffs were the purchasers of the equity of redemption, and that they were entitled as such to redeem all the five mortgages. He said as follows :—

"It is contended by the Defendants that the sale-deed (Ex 5) was never acted upon, as Ehsan Ali after executing it had continually disposed of the same property to the Defendant's father, *c.g.*, they cite the following nine instances in which the property was disposed of.

"The plea raised in this connection that Ehsan Ali Khan remained in adverse possession of the equity of redemption, after

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the sale effected in Sakhawat and Ewaz Ali Khan's favour, is untenable.. A man who has never been in possession of the property before or after the sale made in Sakhawat and Ewaz Ali's favour, can by no stretch of arguments be said to be in adverse possession.

"There remains the question, whether Defendants can raise the plea of want of consideration. My answer is, that they cannot. (*Vide* 8 O. C., p 159).

"Even the vendor would not have been entitled to evade the sale-deed, on the ground that no consideration passed.

"The title to the property having passed by the registration of the sale-deed under sec. 54, Act IV of 1882, the vendor's remedy was to sue for the sale consideration."

The learned Additional Judge further held that the mortgagées had realized more money than what they were entitled to under the five bonds above-mentioned. He therefore made a decree in terms following, on the 29th March 1913 :—

"The Plaintiffs' claim be and is hereby decreed for possession by redemption of the property mortgaged under deeds dated 9th November 1873, and 19th September 1875, without payment of any sum to the Defendants. I hereby further direct that a decree for recovery of Rs. 9,012-12-8 be also passed in terms of the account prepared [Ex Z (3)] in favour of the Plaintiffs.

"Plaintiffs will get their full costs in this suit."

The Defendants appealed from the said decree of the Additional Judge to the Court of the Judicial Commissioner of Oudh, and filed their petition of appeal on the 30th July 1913, that is, some days after the expiry of the period prescribed for filing. The learned Judicial Commis-

sioners delivered judgment on the 3rd May 1915. They held that the Defendants' appeal was filed within time, and that if it were not there were circumstances which justified them in admitting the appeal under sec. 5 of the Indian Limitation Act. On the merits they held that they "are not satisfied that the Plaintiffs have succeeded in satisfactorily establishing the loss of the original sale-deed or in proving that they have a subsisting right to the equity of redemption." The learned Judicial Commissioners were unable to believe the witnesses on whose evidence the said Additional Judge found in favour of the Plaintiffs. They held that the acts and conduct of the mortgagor Ehsan Ali after the date—13th December 1882—of the sale to the Plaintiffs, were admissible for the purpose of ascertaining the validity and genuineness of the said sale. The result therefore was that the learned Judicial Commissioners allowed the appeal of the Defendants, set aside the decree of the Additional Judge, and made a decree dismissing the claim of the Plaintiffs with costs in both Courts.

From the said decree of the Judicial Commissioners the Plaintiffs appealed to His Majesty in Council, and all the rights and interest possessed by the Plaintiff Sakhawat Ali (since deceased) having been transferred to the Appellant Ehtisham Ali, the latter alone prosecuted this appeal.

Mr. L. DeGruyther, K. C. (with Mr. B. Dubé) for the Appellant.

After dealing with the facts submitted that *Herambder v. Kashi Nath* (1) could be good law only if the property were worth less than Rs. 100; sec. 54 of Transfer of Property Act, IV of 1882.

There was no evidence for the recon-

(1) [L. R. 14 Bom 472 (1890).]

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veyance of the property. If it was not lost where was it?

Mr. B. Dubé (following) referred to secs. 17, 23, 47, 48, 50, 57, 58. of the Registration Act, and to Evidence Act (I, of 1872), sec. 91; p. 599, Ameer Ali's Evidence Act, Edn. V (proviso 4) and *Umedmal v. Dadu Bin Dhondiba* (2).

Where there is a recital of payment of consideration, onus of proof of failure of consideration is on the other side. Effect of registration is, that the property has passed whether there was consideration or not.

Mr. Kenworthy Brown (with Mr. R. M. Palat) for the Respondents.—On the question of parties, submitted that the mortgage comprised of property which was not included in the sale. They cannot bring an action to redeem part without bringing in others who are interested in the other portions, C. P. C., Or. 34, r. 1.

Nothing has been done on the basis of the sale-deed. Conclusion of High Court is right.

Sale-deed may be to take effect on a condition or the transferees may have found transaction not paying. Non-production of document may be due to some endorsement adverse to vendor.

As to adverse possession of equity of redemption, see *Kharapmal v. Daim* (3).

Mr. B. Dubé in reply referred to *Bombay Cotton Manufacturing Co., Ltd. v. Motilal Shiolal* (4).

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—Ehsan Ali Khan, being in possession of a bazaar called Ehsaganj, mortgaged it to Sheo Prasad

by a mortgage dated the 9th November 1873, and further encumbered it with charges in favour of the mortgagee, the total amounting to Rs. 2,073. The mortgage was a usufructuary one, and the mortgagee was put in possession of the bazaar. Along with the bazaar certain other properties were also mortgaged. On the 13th December 1882, Ehsan Ali Khan is said by the Plaintiff, who is the present Appellant, to have sold the property, subject to the mortgage and charges, to the Appellant's predecessor in title for Rs. 3,000, it being calculated that Rs. 2,800 would be the amount of the encumbrances with interest and costs and Rs. 200 the value of the equity of redemption. Therefore only Rs. 200, as the Plaintiff alleges, was paid to Ehsan Ali Khan. The devolution of the property thus sold, if it was in fact sold, from the original vendees to the Appellant is not in dispute.

On the 16th October 1911, the Plaintiff (the present Appellant), with another co-Plaintiff whose interest he has since acquired, instituted this suit, claiming under the alleged deed of sale and the subsequent devolution to be representatives of the original mortgagor, against the Respondents, who are the representatives of Sheo Prasad, the original mortgagee, asserting their title to redeem and alleging that upon the true taking of the accounts the mortgage charges had been fully paid off, that certain terms as to interest and compound interest were penal or illegal, and that, in truth, money was due to them from the representatives of the mortgagee. They prayed for possession, for a decree for the surplus amounts and for other relief.

The Defendants traversed the statements in the plaint and pleaded that the alleged deed was not genuine or for consideration; that no right accrued from it to the vendees; that they did not pay any

(2) I. L. R. 2 Bom. 547 (1873).

(3) I. L. R. 33 I. A. 23, 32; s. c. I. L. R. 32 Cal. 292, 9 C. W. N. 231 (1904).

(4) I. L. R. 42 I. A. 110, 113; s. c. I. L. R. 39 Bom. 380, 13 C. W. N. 617 (1915).

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consideration money to Ehsan Ali Khan and refused to complete; that, accordingly, Ehsan Ali Khan cancelled the deed and retained his interest, that he in fact dealt with it subsequently by further charges in favour of the mortgagee and by professing to sell it over again to Wasi-uz-zaman, who also in his turn repudiated the sale because the property was not worth it; and they relied upon the supposed adverse possession of Ehsan Ali Khan. They further said that on some occasion without date, but subsequent to the transactions already mentioned, Ehsan Ali Khan finally sold to them his equity of redemption for Rs. 10, and, somewhat inconsistently, they said that the heirs of Ehsan Ali Khan, who by this time was dead, were necessary parties to the suit. However, they offered no evidence in support of the Rs. 10 story. Upon these pleadings the Subordinate Judge framed twelve issues, of which the first, sixth and tenth are material for the purpose of the present appeal. They are as follows. -

"1. Whether Plaintiffs are purchasers of the rights of the mortgagor, Ehsan Ali Khan, by deeds dated the 13th December 1882, the 10th January 1909 and the 16th February 1911

"6. (a) Are the Plaintiffs' deeds of sale invalid for being without consideration and because they have not been acted upon?

"(b) Can Defendants raise this plea?

"10. Are the sons of Ewaz Ali Khan and the heirs of Ehsan Ali Khan necessary parties to the suit?"

During the trial the Plaintiffs stated that the original sale deed was lost, but that it had been registered; and they offered as secondary evidence a copy certified by the Registrar; and the first matter to be determined is whether the copy could be admitted as secondary evidence. The Plaintiffs, for the purpose of proving the loss, called the son of Ewaz Ali Khan, who

deposed that he, on behalf of himself and his brother, sold their share of the property to the second Plaintiff, the present Appellant, that he was asked to hand the sale deed over; that he had seen it among his father's papers; that he searched for it and could not find it. They also called another witness who had acted as agent in the matter, who said that he had asked the son for the deed; that he understood that he searched for it, but he said he could not find it. Neither of these witnesses was cross-examined. But the case made by the Defendants in their written statement was insisted upon, namely, that the deed had not been kept by the vendees, but had been handed back to Ehsan Ali Khan because the transaction had become abortive. No evidence, however, was given to prove this contention as a substantive fact except evidence to show that, as pleaded, Ehsan Ali Khan had subsequently to the alleged transaction dealt with the property as if he had not sold it and in the manner pleaded in the Defendants' written statement.

In these circumstances the Subordinate Judge accepted the evidence that the deed was lost, and allowed the copy from the register to be admitted as evidence. The Plaintiffs then put it in, and, further, produced two witnesses who swore that they had seen the deed signed and Rs. 200 paid over. These witnesses were the servants of one Imtiaz Ali, a gentleman of position, and an uncle of the Plaintiff, Sakhawat Ali. And it appeared in evidence that Imtiaz Ali had negotiated the sale probably with a view to the benefit of his nephew. His servants therefore might very naturally have had knowledge of the transaction. There were three witnesses to the deed, but it was proved that they were all dead. It was not disputed that the copy produced at the trial was a

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correct copy from the register, and that the deed had apparently been registered with all due formalities, though there was no indication upon the register that the Rs. 200 had been paid over in the presence of the Registrar. The Subordinate Judge therefore held that the sale of the property had been effected, and he considered it immaterial whether or not the Rs. 200 had been paid, though apparently he thought that they had. As regards the defence resting upon the alleged subsequent dealings by the original mortgagor with the property, he considered that they were immaterial, as he said 'Ehsan Ali had sold his property and had no interest left in it. He was no longer concerned with that equity of redemption. Being a statement in his own favour, Ehsan Ali himself could not use it in his own favour, much less could the Defendants use it.' He accordingly declared that the Plaintiffs had a right to redeem, and proceeded to take the accounts. He found that the mortgage had been fully discharged, so he gave the Plaintiffs possession without payment of any sum to the Defendants, and further gave them a decree for recovery of Rs. 9,012 and their costs.

From this decree the Defendants appealed to the Court of the Judicial Commissioner of Oudh. The learned Judges of this Court dealt only with the preliminary question. They said: "We are not satisfied that the Plaintiffs have succeeded in satisfactorily establishing the loss of the original sale deed, or in proving that they have a subsisting right to the equity of redemption. The decision of other matters is unnecessary." They accordingly dismissed the suit with costs. From this decision the present appeal to His Majesty in Council has been brought.

The view taken by the learned Judges in the Court below was that the statement

of the two old servants could not be trusted; that there were no account-books produced to show the payment of the Rs. 200; that no explanation was made of the delay in redemption; that the subsequent dealings by the mortgagor were inconsistent with his having made any previous real sale; that he settled accounts from time to time with the mortgagee as if he were still liable to him, that they could not accept the statement of the son of Ewaz Ali Khan as to his having seen the deed at one time and searched for it later; that the heirs of Ehsan Ali had not been examined, and the Court was not in a position to say that the non-production of the original sale deed had been sufficiently accounted for. They went so far as to determine that the Rs. 200 had not been paid to the mortgagor; and they seem to have thought that the mortgagor could be considered in adverse possession, and that therefore the Defendants could rely on the statutes of limitations after twelve years, and that the heirs of Ehsan Ali Khan ought to have been made parties to the suit. They further said that a surrender of rights by the return of a sale deed was not uncommon in that country, and that a sale might become inoperative by surrender or the failure of the parties to enforce it.

It will be seen from this that the two matters of the admissibility of secondary evidence of the deed, and what ought to be deemed to be the truth of the original transaction, run into one another.*

It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed. And if in addition

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he was not cross-examined,* this result would follow all the more. There is no doubt that the deed was executed, for it was registered, and registered in a regular way, and it is the duty of the registrar, before registering, to examine the grantor, or some one whom he is satisfied is the proper representative of the grantor, before he allows the deed to be registered. There can be no doubt, therefore, that Ehsan Ali Khan executed the deed and was party to its registration, and in the deed there is an admission that he has received the Rs. 200, which would be the full consideration as the vendee had to take upon himself the liability for the mortgage money. He says in the deed that he has received the consideration money in full, and that out of it he has left Rs. 2,800 with the vendees for the purpose of making payment to the mortgagee and defraying Court expenses, and that he has no further claim to the property sold or the consideration money. That he should have taken part in having such a deed registered if he did not receive the consideration money is highly improbable. At any rate, the burden is on him and on people claiming under him to prove that what apparently happened did not happen. And when the Judges in the Court of Appeal say that the heirs of Ehsan Ali Khan have not been examined, they apparently forget that if the Defendant's case were true and the deed had been returned to Ehsan Ali Khan as valueless, it ought to be in the possession of his heirs or assigns; and some evidence ought to have been offered on the part of the Defendants to show that this was so or had been the case. When it is further remembered that a part of the defence was that the Defendants had finally bought the equity of redemption, it would appear that they themselves ought to have got the deed and

produced it from their custody as part of their case.

While making these comments, their Lordships reserve their opinion as to the value of a defence founded upon such a transaction as the Defendants set up. Certainly in law no title would pass under it, for immovable property of this value can only be transferred by a registered deed, and when a deed of sale has been once executed and registered it can only be avoided by a subsequent registered transfer. Whether in some form of suit (not this one) between some parties any equitable relief could be got out of such a transaction it is unnecessary to pronounce, for in their Lordships' opinion it was not proved.

As to the alleged subsequent dealings by Ehsan Ali Khan with the property, they could not, if regarded as declarations in his own favour, be received in evidence on behalf of those claiming under him, any more than they could be received if he were himself the Defendant. They could not be regarded as acts of ownership so as to prove adverse possession, because he never was in possession, the possession remaining in the mortgagee.

As regards the duty to make Ehsan Ali Khan's heirs parties, subject to one contention raised at the Bar on behalf of the Respondents, their Lordships have no hesitation in saying there was no such duty. The Plaintiffs sought to redeem; they had to make out their title to redeem, and they gave *prima facie* evidence. It was for the Defendants to rebut it, and call in answer evidence, if there was any, in rebuttal. Moreover, the Defendants had dispensed the Plaintiffs from any necessity, if there ever had been any, to make Ehsan Ali Khan's heirs parties, because they themselves pleaded that all their rights had been transferred for Rs. 10.

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The one circumstance to be considered was that suggested at the Bar, that the original mortgage was not only of the bazaar but of other properties, and that the Plaintiffs only claimed title to redeem the bazaar. This, however, in no way injuriously affects the title or interest of anyone to whom the equity of redemption in the other properties has passed. The Plaintiffs could not divide the liability for the mortgage between the properties. They could only redeem the one property on payment of the charge upon the whole. This they were entitled to do. The owners of the equity of redemption in the other properties have to this extent the benefit of the Plaintiff's redemption.

It might be doubted—their Lordships do not propose to decide it—whether any of the evidence given on behalf of the Defendants to the effect of the subsequent dealings by Ehsan Ali Khan with the property was admissible; but if it is to be looked at at all, it contains some material which is actually helpful to the Plaintiff. It has been said that the mortgagee subsequently endeavoured to sell the property to one Wasi-uz-zaman. This man says that he knew that Ehsan Ali Khan had sold the property, as he expresses it, in Imtiaz Ali's family, and that when the sale deed was talked of to him he said he would have nothing to do with it, because the property had been already sold, which means that though a sale deed to him was executed, he gave up acting upon it when he found that the property had been previously sold. It is remarkable that in the copy of the sale deed to him, which purports to recite all the previous facts, the date of the sale deed on which the Appellant relies, is misstated, which is not consistent with its being, as alleged, back in the possession of Ehsan Ali Khan.

The one remaining circumstance in

favour of the Defendants is that this suit is brought after so long a delay; but it is well within the period of limitation for the redemption of mortgages; and, at any rate for a time, the margin of value after the encumbrances were discharged was small. The Defendants were in possession and would have to account for all that they received, and it might have been thought best to wait till the Defendants had accumulated a sufficient balance to make it worth while to redeem and to have the accounts taken.

Upon the whole, their Lordships can see no reason for disagreeing with the Subordinate Judge who saw the witnesses. There being no positive evidence to contradict them, the Defendants' case rests upon suggestion only; therefore their Lordships think the Plaintiff made good his title to redeem.

With regard to the terms on which he should redeem—that is, how the accounts should be taken, whether there should be allowance made for penal or illegal interest and so forth—as these matters were not gone into in the Court of Appeal, their Lordships cannot make, and have not been asked to make any pronouncement upon them. The matter must be remitted to the Court of the Judicial Commissioner. Their Lordships will therefore humbly recommend His Majesty to allow this appeal, and to remit the case to the Court of the Judicial Commissioner to decide the other points raised on appeal from the Court of the Subordinate Judge; and that the Plaintiff do have his costs in the Court of Appeal and of the appeal to His Majesty, and that the other costs be left to be disposed of by the Court of the Judicial Commissioner.

Solicitors: *Messrs. Watkins & Hunter* for the Appellant.

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Solicitors : Messrs. T. L. Wilson & Co.
for the Respondents.

R. M. P.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1269 OF 1920.

CHATTERJEE, J. DINA BANDHU SAHA,
PEARSON, J. Plaintiff, Appellant,
1922, v.
Heard, 12 and ABDUL LATIF
13, June. MOLLA, Defendant
Judgment, 15, June No. 1, Respondent.

Principal and agent Authority—Liability of principal for fraud by agent Criminal misappropriation by agent—Liability of principal—Indian Contract Act (1872), sec. 238.

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent

Where certain goods consigned were misappropriated by the agents while carrying them in the boat in the course of their business for their principal.

Held, in a suit by the consignor for damages, that the principal was also liable for the misappropriation committed by his agents.

There is nothing in sec. 238 of the Indian Contract Act to shew that in order to render the principal liable the fraud must be committed for the benefit of the principal

LLOYD v GRACE, SMITH & Co. (4). BARWICK v. ENGLISH JOINT STOCK BANK (1) and HOULDSWORTH v CITY OF GLASGOW BANK (3) referred to.

GOPAL CHANDRA BHATTACHARYA v. SECRETARY OF STATE FOR INDIA IN COUNCIL (2) explained.

(1) L R 2 Exch. 259 (1867).

(2) 18 C. W. N 619 (1909).

(3) L R. 5 A. C. (House of Lords) 317 (1880).

(4) L R. [1912] A. C. 716.

This was an appeal preferred on the 19th of May 1920, against the decree of Babu Jagadis Chandra Sen, Subordinate Judge of Zillah Jessore, dated the 20th of February 1920, modifying the decree of Babu Tara Prasanna Chatterjee, Munsif, 1st Court at Jessore, dated the 31st of January 1919

The facts of the case are as follows :—

This appeal arose out of a suit by the Plaintiff against the Defendants for recovery of the price of certain goods consigned in the boat of the Defendants and misappropriated by them. The claim was laid for Rs. 690 for the price of goods including a sum of Rs. 16 paid for hire of the boat and Rs. 71 and odd as damages. Plaintiff's case was that Defendant No. 1 and the *manjhis* (boatmen) of his boat, namely Defendants Nos. 2 to 4, made, on the 2nd Magh 1323 B. S., a contract with the Plaintiff's agent Kunja Behari Kapuria at Mokam Basundia that they would carry the Plaintiff's goods from Chhatiantola hat and Basundia in the District of Jessore to Bepin Behari Poddar in the Arat of Brindaban Roy at Mokam Jhalakati in the District of Barisal within the 20th of Magh, by taking Rs. 21 as the boat hire and took Rs. 2 as earnest money through the Defendant No. 2. That in accordance with this contract 207 earthen pots of *gur* were loaded at Chhatiantola on a subsequent date; that the boat then came to Basundia Ghat and 236 tins of *chita gur* were loaded there, and that on the 8th Magh, Rs. 14 and the *chalan* were made over to Defendant No. 1 and Defendant No. 2, that the consignment did not reach the place of destination, and that the goods were sold and the proceeds appropriated by the Defendants. Plaintiff prosecuted the Defendants on a charge of criminal breach of trust, and Defendants Nos. 2 to

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4 were convicted. Thereupon Plaintiff instituted the present suit.

The boatmen, Defendants Nos 2 to 4 did not appear. Defendant No. 1 alone contested the suit, and his defence was that he had some boats which were let out on hire, he never went on the boats nor took the goods of any *mahajan*, that the boatmen settled the hire of the boat and they after taking the hire gave it to him who paid them some money out of the same, that while his boat was in the ghat Defendant No. 2 took out the said boat, that he (Defendant No. 1) never undertook to carry Plaintiff's goods as alleged, that there was no contract with the Defendant No 1, that he never let out his boat to the Plaintiff's firm and that he had no concern with what his *manjhis* did with the goods, and he was not liable for their action, that he came to learn that the boat sank with the goods in the river down Khulna

The Court of first instance held that Defendant No. 1 let out his boat to Plaintiff's firm and undertook to carry the goods to Jhalakati, that he himself did not take delivery of the goods, that the goods were misappropriated and the story of loss of the goods by the sinking of the boat in the river was not true.

The Munsif decreed the suit against all the Defendants, and directed that the Plaintiff would first try to satisfy his decree from the other Defendants and then execute the decree for the balance, if any, against Defendant No. 1.

The following portion of the Munsif's judgment will be found material.

"We have got from the written statement of the suit that the *manjhis* (boatmen) bring the freight secured in carrying goods to him (Defendant No. 1) and he pays out a portion of the money to the *manjhis* (Defendants Nos. 2 to 4) as labour.

This arrangement would make him (Defendant No. 1) directly liable for all damages in transit to person who knew whose boat they were dealing with, under the arrangement as disclosed in the written statement the Defendant No. 1 would be an undisclosed principal or partner if the Plaintiff's firm did not know to whom the boat belonged, and as the profits all go to the Defendant No 1, he is directly liable whether he was disclosed or not before engagement. The promptness with which Plaintiff's men went to the Defendant No 1 soon after foul play was suspected also shews that they knew whose boat they engaged."

On appeal by the Defendant No 1, the Subordinate Judge of Jessore held that Defendant No. 1 was not liable for the price of the goods.

The decree of the Munsif was modified; only a decree for Rs 16 being the boat hire advanced was passed against Defendant No. 1, and as against Defendants Nos. 2 to 4 a decree was passed for the balance of the Plaintiff's claim

Against the decision of the Subordinate Judge the Plaintiff preferred this second appeal.

The material findings of the Subordinate Judge will appear from the judgment of the High Court.

Babu Surendra Chandra Sen (with him *Babus Gopal Chandra Das* and *Hemendra Chandra Sen*) for the Appellant.—The findings of the lower Appellate Court amount to this: Defendants Nos. 2 to 4, the boatmen, as agents of Defendant No. 1, the owner of the boat, entered into the contract with the Plaintiff to carry the goods. Defendants Nos. 2 to 4 misappropriated the goods while carrying them in the boat to the place of destination. The question is whether the principal, Defendant No 1, is liable to the Plaintiff for the misappro-

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priation committed by his agents, Defendants Nos. 2 to 4. The misappropriation by Defendants Nos. 2 to 4 was while acting as agents in the course of their business for their principal, Defendant No. 1, and within the scope of the duties with which they were entrusted. To render the principal liable for the fraud of his agent it is not necessary to establish that the principal must authorise his agent to commit the fraudulent act. The principal must be answerable for the manner in which his agent conducts himself in doing the business which he was engaged in by his master. The principal, I submit, is liable for all acts of wrong committed by his agent in the course of the business in which he is employed by the principal. The learned Subordinate Judge has taken a wrong view of the law in holding that in order to make the Defendant No. 1 liable it must be proved that the misappropriation by the other Defendants was for the benefit of Defendant No. 1. Whether the fraud is for the benefit of the principal or for the benefit of the agent, the principal is always liable for the fraud of his agents if committed in the course of their employment.

Sec. 238 of the Indian Contract Act does not say that the fraud must be committed for the benefit of the principal.

The liability of the principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them. The principal is the person who has selected his agent and must therefore be taken to be liable for his agent's acts. If the Defendant No. 1 and the other Defendants are deemed to be partners, the relation of partners *inter se* is that of principal and agent and therefore each partner is liable for the acts of the other.

The Subordinate Judge is wrong in

giving a decree only against the agents, Defendants Nos. 2 to 4. The suit ought to be decreed also as against the principal, the Defendant No. 1.

Referred to decided cases.

Babu Kshettra Mohan Ghose for the Respondent.—Defendant No. 1 did not enter into any contract with the Plaintiff for carrying of the goods. He did not accompany the other Defendants in the boat while the goods were carried. The misappropriation took place in the way, and it was done by Defendants Nos. 2 to 4 for their own private benefit. Upon the findings I submit that Defendants Nos. 2 to 4 did not carry the Plaintiff's goods as agents of Defendant No. 1 and as such Defendant No. 1 cannot be made liable for the action of Defendants Nos. 2 to 4. Even if Defendants Nos. 2 to 4 carried the goods as agents of Defendant No. 1, the Defendant No. 1 is not liable unless it is proved that Defendants Nos. 2 to 4 misappropriated the goods for the benefit of Defendant No. 1. Defendants Nos. 2 to 4 misappropriated the goods for their own private benefit. That being so, the Defendant No. 1 cannot be made liable for the act of Defendants Nos. 2 to 4. In order to render the principal liable for the wrongful actions of his agents it must be proved that the same were done for the benefit of the principal.

The loss of the goods was occasioned by a criminal act on the part of the Defendants Nos. 2 to 4 which was beyond the scope of their authority. A principal does not authorise his agent to act wrongfully and consequently frauds are beyond the scope of the agent's authority. Misappropriation in this case was not within the scope of the duties entrusted to Defendants Nos. 2 to 4.

I submit that sec. 238 of the Contract Act is not applicable inasmuch as the ele-

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ments to fix the liability on the principal are wanting.

I rely upon the cases in *Gopal Chandra Bhattacharya v. Secretary of State for India in Council* (2) and *Barwick v. English Joint Stock Bank* (1).

My submission is that the decision of the lower Appellate Court is correct and that Defendant No. 1 is not liable to the Plaintiff.

Babu Surendra Chandra Sen in reply.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for recovery of price of certain goods delivered to the Defendants for being carried from Basundia in the District of Jessore to Jhalakati in the Barisal District and which were misappropriated on the way by Defendants Nos. 2 to 4.

The Defendant No. 1 is the owner of the boat and the Defendants Nos. 2 to 4 were the boatmen or *manjhis*.

The suit was decreed against all the Defendants Nos. 1 to 4 by the Court of first instance; but on appeal by the Defendant No. 1, it was held that the Defendant No. 1 was not liable for the price of the goods and only a decree for Rs. 16 being the boat hire advanced was passed against him.

The Plaintiff has appealed to this Court and the question for consideration is whether the Defendant No. 1 is liable for the loss of the goods.

The Court of appeal below found that the Defendant did not enter into any contract with the Plaintiff for carrying the Plaintiff's goods. What he meant, however, was that there was no contract with the Defendant No. 1 personally as it would appear from the other findings arrived at

by the learned Subordinate Judge. He finds that "the Defendant No. 1 admits that his boat is let out on hire, that the boatmen settle the terms of hire, that the hire is paid to him and the Defendant No. 1 pays the wages of the boatmen from the hire. There cannot be any doubt that the Defendant No. 1 derives profits by letting out his boat on hire." . . . "In para. 5 of the written statement it is alleged by the Defendant that he never goes in the boat to settle hire, that the persons who remain in the boat settle hire, that when the hire is paid to the Defendant, he gives a portion to the boatmen." Then again he says :—

"It is admitted that Defendant No. 1 derives benefit by letting out his boat on hire. He lets out his boat through his boatmen. Defendant No. 1 is the principal and Defendants Nos. 2 to 4 are his agents."

There is no doubt, therefore, that the Court of appeal below found that the Defendants Nos. 2 to 4 as agents of Defendant No. 1 entered into a contract with the Plaintiff to carry his goods.

The learned Subordinate Judge says :—

"In this case it may be presumed that Defendant's agents are responsible for safely carrying Plaintiff's goods to Jhalakati. If they are guilty of negligence or for any act within the scope of the agents' apparent authority, the principal, Defendant No. 1, would have been made liable." . . .

"The Defendants Nos. 2 to 4 committed a criminal offence with respect to the goods during the carrying of goods on the way. The goods must have been misappropriated on the way. Under no circumstances, it can be held that any criminal act with respect to the goods was within the scope of the authority of the agents, Defendants Nos. 2 to 4." Further on he observes :

"There cannot be any doubt that the acts

(1) L. R. 2 B. 250 (1887).

(2) 12 O. W. N. 619 (1900).

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done by the agents in the present case are beyond the authority of the agents. There is no evidence to show that Defendant No. 1 induced the Plaintiff to believe that his *manjhis* had authority to misappropriate the goods on the way. Defendant No. 1 cannot be made liable for the loss accrued to Plaintiff for the price of goods entrusted to Defendants Nos. 2 to 4."

We are of opinion that the learned Subordinate Judge has not taken a correct view of the matter.

Sec. 238 of the Contract Act lays down that misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals, but misrepresentations made, or frauds committed by agents, in matters which do not fall within their authority, do not affect their principals.

The learned Subordinate Judge seems to be of opinion that the fraud committed by the agents must be for their principal; in other words for the benefit of their principal and that is the argument which is advanced on behalf of the Respondent before us. But in the first place, the section does not say that the fraud must be committed for the benefit of the principal. A distinction is drawn in the section between frauds "committed by agents acting in the course of their business for their principals" and frauds "committed by agents in matters which do not fall within their authority;" the question, therefore, in each case being whether fraud was committed by the agents while acting in the course of their business for their principals.

It is also contended that the section does not apply because the loss of the goods was

occasioned by a criminal act on the part of the Defendants Nos. 2 to 4.

In the case of *Barwick v. English Joint Stock Bank* (1), Willes, J., observed as follows:—

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit though no express command or privity of the master be proved. That principle is acted upon every day.

It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

The learned Pleader for the Respondent relied upon the words "and for the master's benefit" in the passage from the judgment of Willes, J., quoted above, as showing that the principal is not liable unless the fraud is committed by the agent for the master's benefit as well as in the course of business for the principal. In this contention, he is supported by the decision of this Court in the case of *Gopal Chandra Bhattacharya v. The Secretary of State for India in Council* (2). In that case the learned Judges held that "the true rule of law with regard to the liability of the master for the misconduct of the servant is that the master is liable for the fraud of his servant in the course of his service and for the master's benefit and

(1) L. R. 2 Exch. 269 at p. 266 (1867).

(2) 18 C. W. N. 619 (1909).

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that a master is not liable for the misconduct of the servant committed for the servant's own private benefit, and that it is not necessary that the benefit should accrue to the master." The learned Judges in enunciating that proposition relied upon the cases of *Barwick v. English Joint Stock Bank* (1), *Houldsworth v. City of Glasgow Bank* (3) and certain other decisions.

Barwick's case (1), however, has been misunderstood, as pointed out by the House of Lords in *Lloyd v. Grace, Smith and Co* (4). In that case, a widow who owned two cottages and a sum of money secured on a mortgage, being dissatisfied with the income derived therefrom, consulted a firm of solicitors and saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm, he induced her to give him instructions to sell the cottages and to call in the mortgage money and for that purpose to give him her deeds and by means of certain documents in the course of his business defrauded the widow and dishonestly disposed of the property of the widow for his own benefit. It was held by the House of Lords that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. Referring to *Barwick's* case (1), Lord Macnaghten (at p. 732) observed as follows: "It was, I think, in reference to the facts of the particular case under review, where the fraud, if committed, must have been committed for the benefit of the principal, that Willes, J., expressed himself in the language which has been misunderstood. What

Willes, J., said was this: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." "To that statement of the law, no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it be not committed for the master's benefit. Willes, J., does not, I think, say anything of the kind. In a sentence immediately preceding the sentence I have quoted, he observes that the question whether the principal is answerable for the act of an agent was settled as early as Lord Holt's time—a general observation not confined to the case where the principal is a gamer by the fraud. The question as to the meaning and effect of the ruling of Willes, J., may, I think, be best ascertained by reference to a few cases in which some of the learned Judges who took part in the decision in *Barwick's* case (1) delivered opinions."

Lord Macnaghten then discussed the cases on the point and explained *Barwick's* case (1) as also the case of *Houldsworth v. City of Glasgow Bank* (3) in which the proposition of law enunciated by Willes, J., in *Barwick's* case (1) was quoted with approval. His Lordship pointed out at p. 738: "It is a hardship to be liable for the fraud of your partner. But that is the law under the Partnership Act. It is less a hardship for a principal to be held liable for the fraud of his agent or confidential servant. You can hardly ask your partner for a guarantee of his honesty; but there were such things as fidelity policies. You

(1) L. R. 2 Exch. 259 (1867).

(3) L. R. 5 A. C. (House of Lords) 317 (1880).

(4) L. R. [1912] A. C. 716.

(1) L. R. 2 Exch. 259 (1867).

(3) L. R. 5 A. C. (House of Lords) 317 (1880).

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can insure the honesty of the person you employ in a confidential situation or you can make your confidential agent obtain a fidelity policy." His Lordship (Earl Loreburn) observed at p. 725: "Willes, J. cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that."

The case of *Gopal Chandra Bhattacharya v. The Secretary of State for India in Council* (2) was decided upon a principle erroneously supposed to have been laid down in *Barwick's* case (1). Having regard to the statement of the law by the House of Lords in the case of *Lloyd v. Grace, Smith & Co.* (4), we think that the Defendant No. 1 is liable for the loss occasioned to the Plaintiff's goods by reason of the goods having been misappropriated by his agents, the Defendants Nos 2 to 4, as there is no question that the goods were entrusted to them and were being carried by them in the course of their business when the misappropriation took place. The principle of law enunciated by the House of Lords in the case of *Lloyd v. Grace, Smith & Co.* (4) is in accordance with the law as enacted in sec 238 of the Indian Contract Act. As stated above there is nothing in that section to show that in order to render the principal liable the fraud must be committed for the benefit of the principal.

For these reasons, we are of opinion that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored with costs here and in the lower Appellate Court.

H. C. S.

Appeal allowed.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2152 of 1919.

CHATTERJEA, J.
PEARSON, J.
1922,
10, February.

BHULU BEQ, Defendant
No. 1, Appellant,
v.
JATINDRA NATH SEN
and ors., Plaintiffs,
Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, r. 95—Action-purchaser, entitled to actual possession, given symbolical possession only of immovable property. Effect—Limitation, fresh start to—Person claiming under certified purchaser, right of.

Where under Or. 21, r. 95 of the Civil Procedure Code actual possession should have been given, delivery of symbolical possession operates nevertheless as a complete transfer of possession as against the judgment-debtor so as to give a fresh start of limitation to the person to whom such possession is given.

This principle can be availed of by a person claiming under the certified purchaser.

JUGOBUNDHU MOOKERJEE v. RAM CH. BYSAKH (1) and JOGOBUNDHU MITTER v. PURNANUNDA GOSSAMI (2) referred to.

UMBICKA CHURN GOOPTA v. MADHAB GHOSHAL (8), SHYAMA CHARAN CHATTERJI v. MADHAB CH. MUKHERJI (11), HARI-MOHON SHAHA v. BABURALI (12) followed. PEAREE MOHUN PODDAR v. JUGOBUNDHU SEN (5) and MOHADEV SAKHARAIN PARKAR v. JANU NAMJI HATLE (4) dissented from.

This was an appeal against the decree of Babu Bejoy Gopal Chatterjea, Subordinate Judge, 2nd Court of Howrah in Zilla Hoogly, dated the 15th of August 1919,

(1) I. L. R. 5 Cal. 584 (F. B.) (1880).

(2) I. L. R. 16 Cal. 530 (F. B.) (1889).

(4) I. L. R. 30 Bom. 378 (F. B.) (1912).

(5) 24 W. R. 418 (1875).

(8) I. L. R. 4 Cal. 870 (1879).

(11) I. L. R. 11 Cal. 93 (1884).

(12) I. L. R. 24 Cal. 715 (1897).

(1) L. R. 2 Exch. 259 (1867).

(2) 13 C. W. N. 619 (1909).

(4) L. R. [1912] A. C. 716.

BEHULU BEG v. JĀTINDRA NATH SEN.

reversing the decree of Babu Sasheejivan Sen, Munsif, 2nd Court at Ulluberia, dated the 21st of February 1918.

The facts of the case are fully set out in their Lordships' judgment.

Babu Sarat Ch. Mukherjee for the Appellant.

Asiranjana Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The property in dispute in this case is alleged by the Plaintiff to have belonged to one Khoda Buksh and held by the Defendant No. 1 as tenant under him. Certain heirs of Khoda Buksh obtained a decree for rent against the Defendant No. 1 and in execution of the decree put up the property to sale. The Defendant No. 6 purchased it on the 13th June 1904. Formal possession was taken by the purchaser on the 29th April 1905 and in September 1910, he conveyed the lands to the Plaintiff.

The suit was for establishment of the Plaintiff's title and for recovery of possession.

The defence *inter alia* was that the property did not belong to Khoda Buksh nor did the Defendant No. 1 hold it under him as tenant. A question was also raised whether one Ohijuddin Ahmed had a one-third share in the property.

With regard to the last question, the learned Subordinate Judge came to the conclusion that there was some *nishkar* property in which Ohijuddin had one-third share.

So far as the disputed property was concerned, the learned Judge on a consideration of the evidence came to the conclusion that the property belonged to Khoda Buksh alone.

The next and the main defence was

that the Defendant No. 1 had been in possession of more than 12 years inspite of the auction-purchase by Defendant No. 6 and that therefore the Plaintiff's suit was barred by limitation. It appears, as stated above, that the auction-purchaser obtained only formal possession through Court. That was within 12 years of the suit.

It is contended before us by the learned pleader for the Defendant-Appellant that where the property sold is not in the possession of tenants or other persons entitled to occupy the same, the purchaser must obtain actual possession, and symbolical possession delivered in such a case cannot give the purchaser a 'fresh start' for limitation.

The question whether symbolical possession operates, as between the decree-holder and the judgment-debtor, as actual possession was considered in two Full Bench decisions of this Court. In the case of *Jugobundhu Mookerjee v. Ram Ch. Bysakh* (1), it was laid down that delivery of possession by going through the process prescribed by sec. 224 of Act VIII of 1859 is the only way in which the decree of the Court awarding possession to the Plaintiff can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, such delivery must, as against the Defendant, be deemed equivalent to actual possession. To the same effect is the decision in the case of *Jogobundhu Mitter v. Purnanunda Gosami* (2). In these two cases however, the only possession which could be delivered was symbolical possession because the land was in the occupancy of tenants.

It has accordingly been contended on behalf of the Appellant that, that prin-

(1) I. L. R. 5 Cal. 584 (F. B.) (1890).

(2) I. L. R. 16 Cal. 580 (F. B.) (1899).

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iple cannot apply to a case where the decree-holder or purchaser could obtain actual possession and we have been referred to the cases of *Shotenath Mookherjee v. Obhoyrind Roy* (3) and *Mohadev Sakharain Parkar v Janu Nampi Hatle* (4).

In those cases, it was held that the delivery of merely formal possession of immoveable property (in the cases where the property is not in the possession of a tenant or other person entitled to occupy the same), to a purchaser at a Court sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession.*

These authorities are no doubt in favour of the Appellant, and the view taken in these cases at one time was taken in some other cases in this Court. See the case of *Pearce Mohun Poddar v. Jugobundhoo Sen* (5), though in some other cases, a different view was taken [see *Ashudoolu v. Shaikh Akbar Ali* (6) and *Mahomed Wali v Noor Buksh* (7)]. Some of the cases on the point were considered by Birch and Mitter, JJ, in *Umbicka Churn Goopta v. Madhab Ghoshal* (8) and the learned Judges held that formal possession given to a decree-holder by an officer of the Court in execution of his decree is sufficient to give him a fresh cause of action and notwithstanding that he may never have obtained actual possession he or his assigns may sue to recover possession at any time within 12 years from the time when such formal possession was given. The learned Judges dissented from the view taken by Markby, J., in *Pearce Mohun Poddar v. Jugobundhoo Sen* (5), as

being opposed to the decision of the Judicial Committee in *Gunga Govind Mandal v Bhoopal Chandra Biswas* (9), where their Lordships observed that the decree and execution put an end altogether to limitation, and that it was immaterial whether the decree-holder obtained actual possession or not. It may be pointed out however, that in the case before the Judicial Committee, the property was in the possession of tenants.

In a later decision, the same view was adopted. In the case of *Lokeshwar Koer v Purgan Roy* (10), Garth, C. J., was of opinion that the Plaintiff having been put in possession under the decree by an officer of the Court, the form in which execution was given was quite immaterial. He said "All that was necessary was for the officer of the Court to go upon a portion of the land, and give the Plaintiff possession of that portion in respect of the whole, and any formal mistake which may have been made by the officer in the mode of giving possession could not prejudice the Plaintiff." It was accordingly held following the decision in *Jugobundhu Mookerjee v Ram Ch Bysakh* (1), that as between the parties to the suit, formal possession operates, in point of law and in fact, as a complete transfer, of actual possession from the one party to the other.

This principle was followed in the case of *Shyama Charan Chatterji v. Madhab Ch. Mukherji* (11), where the learned Judges held that the delivery of formal possession in execution of a decree for possession gives a cause of action against a Defendant who remains in occupation of the premises, which may be enforced in a regular suit.

(3) 1 L. R. 5 Cal. 331 (1879).

(4) 1 L. R. 26 Bom. 372 (F. B.) (1912).

(5) 24 W. R. 418 (1878).

(6) 7 W. R. 60 (1867).

(7) 25 W. R. 127 (1870).

(8) 1 L. R. 4 Cal. 570 (1879).

(9) 1 L. R. 5 Cal. 524 (F. B.) (1880).

(10) 10 W. R. 101 (P. C.) (1872).

(11) 1 L. R. 7 Cal. 418 (1881).

(12) 1 L. R. 11 Cal. 93 (1884).

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Then in the case of *Harimohon Shaha v. Baburali* (12), where the auction-purchaser who had obtained symbolical possession brought a suit for possession of land within 12 years of the date on which he obtained symbolical possession, it was held that the suit was not barred. Maclean, (C. J.), observed as follows:—"Be that as it may, we have the fact which cannot be got over, that possession, call it symbolical possession if you will, was given by a Civil Court in this case to the Plaintiff, and in the case of *Lokeshwar Koer v. Pungan Roy*, (10) it was laid down that the formal possession given by a Civil Court under an execution operates, in point of law and of fact, as between the parties, as a complete transfer of possession from one party to the other."

... It may be that it was wrongly given by reason of the fact that actual possession ought to have been given under sec. 318 of the Code, but still possession was given to the Plaintiff by a Civil Court; and under the circumstances, it seems to me that the period of limitation must begin to run from the date of that possession being given." See also *Mir W'azi-uddin v. Lala Deoki Nandan* (13), where the learned Judges considered the question whether the auction-purchaser at a sale for arrears of revenue has 12 years from the date on which formal possession is delivered to him by the Collector.

So far as our Court is concerned, all the later decisions are in favour of the view taken by the lower Court.

In the Madras High Court, the view taken by this Court has been adopted. See *Gorind v. Venkata Sastrulu* (14), where it was held that the delivery of

symbolical possession, even though erroneously made, i.e., even though made under circumstances which do not make sec. 319 applicable operates to give the person so put in possession a fresh cause of action and to place the judgment-debtor in the position of a trespasser.

The Allahabad High Court has also taken the same view; see *Jagannath v. Mulap Chand* (15).

The Bombay High Court as stated above has taken a different view in the case of *Mahadeo v. Janu* (4), but the weight of authority is in favour of the view that symbolical possession as against the judgment-debtor operates as actual possession and gives a fresh start of limitation even in a case coming under sec. 318 corresponding in Or. 21, r 95 of the present Code. We must accordingly hold that the suit is not barred by limitation.

It has been contended by the learned pleader for the Appellant that even if the principle can be availed of by the auction-purchaser, the Plaintiff being a *benamdar* cannot take the benefit of the principle.

But the Defendant No. 6 was the certificated purchaser and the Plaintiff claims under him. In these circumstances, we think that the principle applies to the Plaintiff also.

The learned Pleader attacked the finding of the learned Subordinate Judge on the question of title of Khoda Bux. There is evidence in support of the finding and the finding was arrived at upon a consideration of the whole evidence.

We think, in these circumstances, that the appeal must fail and is dismissed with costs.

S. C. C. Appeal dismissed with costs

(10) I. L. R. 7 Cal. 418 (1881).

(12) I. L. R. 24 Cal. 715 (1897).

(13) 6 C. L. J. 472 at pp. 481, 482 (1907).

(14) 17 Mad. L. J. 596 (1902).

(4) I. L. R. 86 Bom 373 (F. B.) (1912).

(15) I. L. R. 28 All. 722 (1903).

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

1922,

Heard,

27, February.

Judgment,

3, April.]

MAHARAJA SIE

MANINDRA CHANDRA

NANDI, Appellant, v.

v.

RAM KUMAR LAL

BHAGAT and ors,

Respondents.

Civil Procedure Code (Act V of 1908), Or. 22, r. 10 and sec. 41—Lessee under Defendant in a successful suit for possession, if may be added as a party after mesne profits finally assessed—Case, if one of devolution of interest—(Question if may be raised in execution proceedings.

Plaintiff's suit to recover possession of certain villages with mesne profits against R was dismissed by the trial Court but decreed preliminarily on appeal. Between the dates of the two decrees R granted a lease of a term of years of the right of mining for mica and otherwise exploiting the jungle to M who subsequently to the Appellate decree surrendered his lease. In pursuance of that decree, to which M was no party, mesne profits were assessed and finally decreed against R, and no appeal was preferred against that decree. Meanwhile Plaintiff had applied under Or. XXII, r. 10 of the Civil Procedure Code to make M a party in the proceedings so as to have the mesne profits ascertained in his presence and thereby avoid future objections by M. M inter alia disputed the Plaintiff's title to the minerals which he averred belonged to the superior landlord, the zemindar. The application was refused by the Trial Court but granted on appeal by the High Court long after the decree passed against R:

Held, reversing the High Court—That the liability, if any, of M to pay damages for removal of the mica

was not a liability which devolved to him from R, they both being liable, if liable at all, as trespassers.

That there being no assignment, creation or devolution of any interest within the meaning of Or. XXII, r. 10, C. P. C., that rule did not apply.

That the questions which arose between Plaintiff and M could not be raised in execution proceedings under sec. 47 of the Code.

What should in reality form the basis of an independent suit against a separate party for some act done by himself cannot be introduced as a question to be tried in execution proceedings in another suit.

PROSENNO COOMAR SANYAL v. KALI DAS SANYAL (1) referred to.

This was an appeal from a decree of the High Court, Patna, dated the 16th November 1916, which reversed a decree of the Additional Subordinate Judge of Hazaribagh, dated the 13th November 1914.

The facts are as follows. In 1907 a suit was instituted by the present Respondents against Raja Makund Sahi for possession of six villages in the Hazaribagh District. On 21st September 1908, that suit was dismissed by the Subordinate Judge. In 1909 while an appeal was pending Makund Sahi leased the villages to the present Appellant, the Maharajah of Cossimbazar, enabling him to open up and work mica mines and cut timber thereon.

The appeal was heard in 1913, the judgment of the Subordinate Judge was reversed, and an account was ordered to be taken of the mesne profits. The account was taken by the Amin who duly issued a report which was confirmed by the Subordinate Judge. Prior to its confirmation

(1) L. R. 19 I. A. 108; s.c. I. L. R. 19 Cal. 653 (1902).

MAHARAJA SIR MANINDRA CHANDRA NANDI *v.* RAM KUMAR LAL BHAGAT.

the present Respondents applied to have the present Appellant, the Maharajah of Cossimbazar (amongst other lessees), made a party Defendant so as to have the matter decided in their presence. Objections were filed by the Appellant who *inter alia* stated that he had surrendered his lease on learning of the Plaintiff's claim, and who disputed their title to the minerals. He also objected to the form of procedure.

The application was rejected by the Subordinate Judge who held that there was no power under the provisions of Or. XXII, r. 10 of the Civil Procedure Code to add the objectors as parties to the suit.

Against the said order the Respondents appealed to the High Court at Patna which reversed the order appealed from and ordered the Subordinate Judge to make the objectors parties to the suit and ascertain the mesne profits in their presence.

From this decree the Appellant appealed to His Majesty in Council.

Messrs DeGruyther, K. C and Ramsey (Ex parte) for the Appellant

There is no power under Or. XXII, r. 10 of the Civil Procedure Code to make me a party to the execution proceedings.

The mesne profits payable to the Respondents are the rents payable by us to Makund Sahi and not the value of the mica extracted.

It was only after the decree of the High Court that the application was made to join the Appellant as a party. If there is any action against the Appellant it should be the subject-matter of a separate suit.

Prosunno Coomar Sunyal v. Kali Das al. (1) is not in point—that case merely that the auction-purchaser is the representative of the judgment-debtor.

Reference was also made to *Ganapathy Mudaliar v. Krishnamaachariar* (2).

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The present Respondents brought as Plaintiffs, on the 15th April 1907, a suit against Raja Makund Sahi to recover possession of six villages and jungle which they claimed. The Raja defended the action, which in due course came on for trial, and on the 21st September 1908, the Court of first instance decided against the Plaintiffs, and dismissed the suit. Just one year afterwards, on the 21st September 1909, the Raja gave a lease of a term of years of the right of mining for mica, and otherwise exploiting the jungle, to the present Appellant, whose case is that he had not notice of the pending litigation.

The unsuccessful Plaintiffs appealed to the High Court, which on the 15th May 1913, reversed the decision of the first Court and made a decree in favour of the Plaintiffs ordering the Raja to put them into possession of the six villages and jungle, and it was further ordered:—

"That the case be sent back to the lower Court [*inter alia*] to take an account of the mesne profits to which the Plaintiffs-Appellants are entitled for the three years prior to the institution of the suit, and also for the period thereafter till the delivery of possession or the expiration of three years from this date, whichever event happens earlier."

When the case was accordingly remitted to the Court of first instance, a Commissioner or Amin was appointed to make the necessary enquiry, and on the 22nd August 1914, he made his report.

On the 2nd January 1915, the Subordinate Judge recorded that the parties did not object to the report of the Amin and

(1) L. R. 19 I. A. 166; s. c. 1, L. R. 19 Cal. 653 (1902).

(2) L. R. 45 I. A. 54; s. c. 1, L. R. 41 Mad. 403; 22 O. W. N 543 (1917).

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that it might therefore be accepted, and he ordered "that the suit be decreed finally; that the Amin's report be considered to be a part of the decree; and that the Plaintiffs do recover possession with mesne profits, as determined by the Amin, and the costs of this suit from the Defendant with interest at 6 per cent. per annum." In this way the suit came to its natural termination.

It happened, however, that the Amin took a somewhat unusual course in conducting the enquiry which led to his report. When enquiring into the mesne profits he first of all ascertained the rents which the Raja had received from the present Appellant and other tenants totalling Rs. 42,075, with a further profit of Rs. 500 from the jungle. Not content with this, he proceeded further to enquire what were the profits which the various lessees might be taken to have made from the mica which they had extracted during the terms of their leases pending the somewhat protracted litigation. What exactly was his object in doing this, or who set him in motion to do it, is not quite clear. The law as to mesne profits is thus expressed in sec. 2, sub-sec. 12 of the Code of Civil Procedure:—

" 'Mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

It might be said that in ascertaining such profits the successful Plaintiffs would not be limited to the actual rents which the trespassing Defendant had received. And apart from the question of mesne profits, a claim might have been preferred for damages for the mica actually removed. Again, it would be conceivable

that in a suit properly framed the lessees from the Raja, who had, though ignorant of the Plaintiffs' title, carried away what was the Plaintiffs' mica, could be rendered liable for damages in respect of what they had so taken away. But these lessees were not included in the suit. The Amin with some *naïveté* stated twice in the course of his report that he had had little assistance from the Plaintiffs or their agents, who had, in fact, taken very little interest in the execution of the enquiry, and that he obtained his information largely by the help of the Defendant Raja and his servants. However, he reported under both heads, bringing what he described as the net profit obtained from the mines up to a sum considerably exceeding a lakh of rupees.

The report was in narrative form and finished without any definite recommendation. Whether the conclusion from it was intended to be that the Defendant Raja was to pay as mesne profits the rents which he had received or whether he was to pay as mesne profits the net profits of the mines—it could not be both—does not clearly appear; though from what subsequently happened it can almost certainly be inferred that it was only the smaller figure, that is, the sum of the rents. This report having been made and filed, but before it was confirmed, the Plaintiffs—the present Respondents—relying upon the statements with regard to the profits obtained from the mines, made an application by a petition dated the 4th September 1914. This petition stated that the several lessees had in collusion with the Raja obtained a settlement of the disputed property in an illegal manner, and had misappropriated a large quantity of mica, worth between one and two lakhs of rupees, and prayed that they should be ordered to appear at the time of the ascer-

MAHARAJA SIR MANINDRA CHANDRA NANDI v. RAM KUMAR LAL BHAGAT.

tainment of the mesne profits so as to have the matter determined and decided in their presence, and that to avoid future objections they should be made Defendants. It will be observed that unless it be inferentially, no relief was claimed against the Appellant and the other lessees.

The Appellant was summoned, and put in a counter petition in which he raised various objections or defences. He stated that the Plaintiffs had been aware all along of what he was doing under his lease, he claimed that the application was barred by limitation, he said that the application was made in collusion with the Defendant Raja: and that since he knew of the Plaintiffs' claim to the property he had surrendered his lease, namely, on the 1st August 1914, and he disputed the Plaintiffs' title to the minerals even on the footing that they were entitled to the land, averring that the minerals belonged to the superior lord, the zemindar. He also took objection to the form of procedure.

On these statements the matter came before the Subordinate Judge, who on the 13th September 1914, rejected the Plaintiffs' application, holding that under the construction of Or. XXII, r. 10 of the Code of Civil Procedure, there was no such assignment of interest by the Defendant Raja to the present Appellant and the other lessees as to warrant their being brought into the suit.

From this order the Plaintiffs appealed to the High Court. There is no date upon their memorandum of appeal and nothing to show whether it was lodged before or after the order of the 2nd January 1915. It rather looks as if it was later, but it is not material. Their appeal came on before the High Court, which, on the 16th November 1916, allowed the appeal and

ordered the Subordinate Judge to make the six tenants including the present Appellant, parties to the suit, and to ascertain the mesne profits in their presence.

It is from this decree that the present appeal is brought.

From a perusal of the order in its bare form it is not easy to see what could be its object. What advantage could it be to the Plaintiffs or the Defendant Raja that the mesne profits which the Defendant Raja was to pay should be assessed in the presence of the lessees? Moreover, they had been already assessed, and that, finally, the report of the Amn had been accepted, and the mesne profits, whatever they were found by it, had been decreed, and the decree had not been appealed from.

But light is thrown by the language of the learned Chief Justice. He says: "In my opinion the Appellants are entitled to have the persons in question added as parties to the proceedings, and compel them to account for any profits which they may have received from the land."

This opinion appears to be founded on the language of Or. XXII, r. 10, and it is desirable to examine the Code of Civil Procedure with a view to seeing whether it lends support to this opinion. By sec. 47

"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

"(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding"

Or. XXII, r. 10, states—

"(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave

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of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

The High Court appear to consider that in an action to recover possession of land where the Defendant while he is in possession has granted leases, proceedings in execution may involve removal of the tenants, and that for such a purpose a lease may be considered an assignment within the meaning of r. 10.

It is unnecessary for their Lordships to express any opinion as to whether this view is right or not, because the Appellant is not setting up his lease or claiming to remain in occupation as tenant—on the contrary, he states that he has surrendered his lease—and because the application was not to remove him. The order contemplates cases of devolution of interest from some original party to the suit, whether Plaintiff or Defendant, upon someone else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of r. 10 for all other cases. But they are all cases of devolution. There is, it should be noted in this rule, a significant change of language from that used in the earlier Code, where it is stated in sec. 372 as follows --

"In other cases of assignment, creation or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed, as the case may require."

The words "in addition to" in the earlier Code have disappeared. But the matter does not rest upon this change. The liability, if any, of the Appellant to pay damages for removal of the mica is not a liability which has devolved to him from the Defendant Raja. They were

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both liable, if liable at all, as trespassers, and a case, if any, against the Appellant must rest upon his action and the direct relation established thereby between him and the Plaintiffs.

Serious injustice would be done if any other view was taken. A party added by devolution during the pendency must take the suit as he finds it. Judgment already rendered would be binding upon him. He would not, in the present case, be able to question the title of the Plaintiffs to the mica, though he has a serious contention that the title to the minerals rests with the zemindar. Again it is all very well to say that the mesne profits, by which is meant the value of the lost mica, are to be ascertained in his presence. There has been at least a preliminary assessment by the Amm which he would have considerable difficulty in setting altogether aside, and this assessment has been made in his absence. He would come before the Subordinate Judge with a preliminary finding against him for over a lakh of rupees. Or XXII, r. 10, does not apply. There has been no assignment, creation or devolution of any interest within the meaning of that rule.

Their Lordships have been reminded of the decision of this Board in the case of *Prosunno Poomar Sanyal v. Kali Das Sanyal* (1) and of the general principle therein expressed, that a wide construction should be put upon the provisions of the Act with regard to introducing parties by devolution and of the desirability of ascertaining all possible points in execution proceedings without a fresh suit.

But giving all force to these considerations, they cannot see how that which should in reality form the basis of an independent suit against a separate party,

(1) L. R. 19 I. A. 166. s. c. I. L. R. 19 Cal. 683 (1892).

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for some act done by himself, can be introduced as a question to be tried in execution proceedings in another suit. Sec 47 of the Act does not apply. If the added persons did commit trespasses, these were distinct ones, and not committed by them as representatives of the original Defendant. To hold otherwise, would be to confuse the rights.

Considerations both of form and of substance are opposed to the order from which this appeal is brought.

Their Lordships will therefore humbly recommend His Majesty that this appeal should be allowed, and the decree of the High Court discharged and the decree of the Subordinate Judge restored, and that the Appellant should have his costs before this Board and in the two Courts below.

Solicitors: Messrs. Watkins and Hunter for the Appellant.

G. D. M.

Appeal allowed

[CIVIL REVISIONAL JURISDICTION.]

THE BENGAL NAUPUR
RAILWAY COMPANY, LTD.,
Applicant,

v.

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Opposite
Pally.

WOODROFFE, J.

GRAVES, J.

B. B. GHOSE, J.

1922,

17, January.

Indian Income Tax Act (VII of 1918), sec. 9 (2)

(iii)—Company managing Railway on behalf of Secretary of State—Surplus profits of Company only liable to tax—Guaranteed interest and interest paid on borrowed capital, if to be included in computing the taxable income.

The Bengal Nagpur Railway Co. was assessed to income-tax on an income made up of (1) the Company's surplus profits and (2) the guaranteed interest, the item No. (2) being made up of (a) the interest debtable to the undertaking of the Secretary of State's open line capital, (b) the

payment to the Secretary of State of the amount of the guaranteed interest payable by him to the Company in England on the share capital of the Company which the Company by agreement had made over absolutely to the Secretary of State and (c) the amount payable on account of interest on debenture stock and debentures:

Held—That the matter could not be treated as a case of a Company owning in the ordinary way a Railway, as a private venture. The liability to tax must be determined with reference to the special agreement between the two parties and the nature of their relation to one another. From this point of view the Secretary of State is the owner of the Bengal Nagpur Railway which has been constructed and is managed for him by the Company. This is their business on the income of which tax is leviable. The principle applicable is that the Company should pay tax on what they get. In that view the Company are liable to income-tax in respect only of item No. (1) representing their share of surplus profits which they get in return for their service in the management of the Railway. The Company are not liable in respect of sum (2) (a). Though this capital has been the means whereby profits have been earned in which the Company share, this is not the Company's property. All receipts earned by the use of these sums are paid to the Government account and the interest is deducted before the profits in which the Company are entitled to share, can be ascertained. Nor are the Company liable in respect of sum (2) (b). This in effect represents monies which the Secretary of State pays in London to the Company and which he recoups himself in this country out of the earnings of the Railway and which has to be deducted before the surplus profits can

THE BENGAL NAGPUR RAILWAY CO., LD.

be ascertained. As regards sum (c) it was conceded that it was not liable to tax as it represented interest on borrowed capital.

This was a Reference to the High Court under sec. 51 (1) of the Indian Income Tax Act, VIII of 1918, by the Chief Revenue Authority, on the 25th July 1921.

The facts are as follows :—

On the 12th January 1921, the Bengal Nagpur Railway Company was served by the Collector of Income Tax, Calcutta, with a notice of assessment and demand for payment of income-tax and super-tax for 1920-21 on the income derived from the Company's business in India. The Company objected to the assessment and made an application on the 30th May 1921 to the Board of Revenue for drawing up a case and referring the same to the High Court under sec. 51 (1) of the Income Tax Act. The Board of Revenue thereupon drew up a statement of the case and made the following reference to the High Court. :—

Statement of case.

An application has been made by the Bengal Nagpur Railway Company, Limited, to the Board of Revenue as Chief Revenue Authority under sec. 51 (1) of the Indian Income Tax Act, 1918, for a case to be stated on the question whether the Company is liable to income-tax on a sum of Rs. 1,57,98,766.

The Company was assessed by the Collector of Income Tax, Calcutta, to income-tax for the year 1920-21 on an income of Rs. 1,72,60,595 calculated as follows :—

	Rs.
Surplus profits . . .	14,63,387
Guaranteed interest . .	1,57,98,766
	1,72,62,153
Less outstandings .	1,558
	<hr/> 1,72,60,595

v. THE SECRETARY OF STATE FOR INDIA.

The sum of Rs. 1,57,98,766 is made up as follows :—

(a) Rs. 1,07,59,381 interest debitable to the undertaking of the Secretary of State's open line capital.

(b) Rs. 13,07,440 payment to the Secretary of State in rupee currency of the amount of guaranteed interest payable by him on the share capital of the Company.

(c) Rs. 37,31,945 payable on account of interest on debenture stock and debentures.

It is contended on behalf of the Company that in computing the taxable income of the Company, the sum of Rs. 1,57,98,766 should be deducted from the net earnings of the Company under sec. 9 (2) (iii) of the Income Tax Act as this sum represents the interest paid on borrowed capital.

In order to explain the nature of the transactions in respect of the sums mentioned in para. 2 it is necessary to refer to the contracts between the Secretary of State and the Bengal Nagpur Railway Company, Limited, which are contained in the annexure—contracts relating to the Bengal Nagpur Railway system. The relevant portions of these contracts are secs. 36 to 39 and sec. 49 of the main contract, dated the 9th March 1887 and secs. 2, 3, 5, 7 and 9 of the supplementary contract, dated the 5th November 1912. The effect of these sections is briefly as follows

The Company raised £3,000,000 in shares and paid this sum to the Secretary of State (sec. 36). This money became the absolute property of the Secretary of State (sec. 39) who agreed to pay interest thereon to the Company (sec. 37). The application of the receipts of the Company is dealt with in sec. 49. By sec. 2 of the supplementary contract of 1912 it was provided that the Secretary of State's open

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line capital as on the 31st December 1910 should be taken to be the sum of £15,500,000 and the Company's open line capital at the same date should be taken to be the sum £3,000,000. Sec 5 provided for the raising of money required for capital expenditure by means of advances by the Secretary of State, or by the issue of debentures or debenture stock of the Company. Sec 9 provided for the arrangements with regard to the interest payable to the Company and to the Secretary of State respectively and the division between them of the surplus profits of the undertaking.

It is admitted on behalf of Government that the sum of Rs. 37,31,945 payable on account of interest on debenture stock and debentures should be deducted from the Company's taxable income under sec. 9 (2) (iii) of the Income Tax Act as representing interest on borrowed capital. As regards the two other sums (a) and (b) in para. 2 it is contended on behalf of Government that these sums represent income which accrued in British India and is therefore taxable income unless it can be brought under one of the exceptions allowed by the Income Tax Act and that these sums do not represent interest on borrowed capital and cannot be deducted under sec. 9 (2) (iii) as claimed by the Company. In the opinion of the Board the two sums (a) Rs. 1,07,59,381 interest paid to the Secretary of State on the amount of his open line capital, and (b) Rs. 13,07,440 payment to the Secretary of State of the amount of guaranteed interest payable by him on the share capital of the Company are not interest on borrowed capital and cannot be deducted under sec. 9 (2) (iii) of the Income Tax Act from the Company's income and have been properly included by the Collector of Income

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Tax, Calcutta, as part of the taxable income of the Company.

(Sd.) D. H. LEES,

Member, Board of Revenue, Bengal.

The 25th July 1921

Mr Langford James appeared for the B. N. Railway Co.

The Advocate-General and Mr. B. L. Mitter for the Secretary of State.

The JUDGMENT OF THE COURT was delivered by

WOODROFFE, J.—This is a Reference under sec 51 (1) of the Indian Income Tax Act, VII of 1918. The Bengal Nagpur Railway Company have been called upon to pay tax on Rs. 1,72,60,585 income. This represents earnings of the Railway allocated for payment of the Company's share of surplus profits under the terms of agreement with the Secretary of State, namely, Rs. 14,63,387 and Rs. 1,57,98,766 allocated in payment of—(a) A sum of Rs. 1,07,59,381 being the interest debitable to the undertaking of the Secretary of State's open line capital. This sum is the interest due to the Secretary of State on 15½ million pounds capital found by him. (b) A sum of Rs. 13,07,440 being the payment to the Secretary of State in rupee currency of the amount of the guaranteed interest payable by him on the share of the capital of the Company. This interest is paid on 3 million pounds share capital found by the Bengal Nagpur Railway Company and made over to the Secretary of State to be held by the latter absolutely as his property and re-payable only in the event mentioned in sec. 94 of the agreement between the Secretary of State and the Bengal Nagpur Railway Company.

(c) A sum of Rs. 37,31,945 payable on account of interest on borrowed capital raised by issue of debenture stock and

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debentures. No claim to tax is made by the Government in respect of this sum which item therefore need not be further considered.

The Board has held that tax is payable on sums (a) and (b). Apparently it has treated this matter as if it were the case of a Company owning in the ordinary way a Railway, as a private venture and has therefore held it to be liable to tax on all earnings save such sums as may be deducted under sec. 9 (2) (iii) of the Income Tax Act. In this view only sum (c) could be deducted as representing interest on borrowed capital but not sums (a) and (b) which represent capital contributed by the Secretary of State and the Company respectively and not interest on borrowed capital. But I think the matter cannot be so dealt with, but the liability to tax must be determined with reference to the special agreement between the two parties and the nature of their relation to one another. From this point of view it is conceded that the Secretary of State is the owner of the Bengal Nagpur Railway which has been constructed and is now managed for him by the Company. This is their business on the income of which tax is leviable. In my opinion the principle applicable is that the Company should pay tax on what they got. The question then is—what is that sum? It is conceded by Government that sum (c) is to be excluded. It is conceded by the Company that they are taxable in respect of the sum of Rs. 14,63,387 representing their share of surplus profits which they get in return for their service in the management of the Railway. The question then is, are they liable in respect of any further sum, which means, do they get anything else? In my opinion they are not liable in respect of sum (a), this is interest due to the Secretary of State

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on 15½ million capital found by him. It is true that this capital has been the means whereby profits have been earned in which the Company share. But this is not the Company's property. It is also three million pounds supplied by the Company, are the property of the Secretary of State, and all receipts earned by the use of these two sums are paid to Government account. Thereout the Government supply what sums are necessary to defray expenditure under the contract. Out of such receipts the Government repays itself the interest on the capital sum supplied by it. And this interest is deducted before the profits in which the Company are entitled to share can be ascertained. It is this share of surplus profits which is income earned by the Company and so liable to tax. Sum (b) represents interest which the Company get for their three million capital money and which has to be deducted before surplus profits can be ascertained. This is deducted in order that the Secretary of State may meet his obligations to the Company in respect of the three million pounds they have made over to him. It is stated that that money was borrowed in England and the liability is to pay interest in England. It is stated in the case of the Company that the sum of Rs. 13,07,440 is payment to the Secretary of State in rupee currency of the amount of the guaranteed interest payable by him on the share capital of the Company. The guaranteed interest on the Company's share capital is payable and paid in London as in the case of a debenture obligation by the Secretary of State and is independent of the earnings of the Railway. The payment, it is contended, of the sum of Rs. 13,07,440 constitutes the payment of a debt due from the Company to the Secretary of State. In effect the transaction is one in which the Secre-

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 tary of State pays in London certain monies to the Company which he recoups himself in this country out of the earnings of the Railway. In that view of the case I am of opinion that the Company is not liable for tax in respect of this sum.

I answer then the Reference by saying that in my opinion the Company is liable only to tax on the sum stated in the Reference as being their share of surplus profits. A copy of this judgment is directed to be given to the Revenue Authority.

Messrs. Orr, Dignam & Co., Solicitors for the Applicant Co.

Mr. Kesteven Gooding, Officiating Government Solicitor, for the Secretary of State.

J. N. R. Reference not accepted.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 34 OF 1920.

CHATTERJEA, J. RAJA JAGADISH CHAN-
PEARSON, J. DRA DEO DHABAL DEB,
1922, Defendant, Appellant.
Heard, 14, 15, and v.
16, March. BHUBANESWAR MITRA
Judgment, and ors., Plaintiffs.
14, July. Respondents.

Transfer of Property Act (IV of 1882), sec. 99—Civil Procedure Code (Act V of 1908), Or 34, r. 14—Sale in contravention of these provisions, if a nullity—Purchase by mortgagee of mortgagor's equity of redemption at an execution sale in another suit, if the mortgagee holds such property as trustee for the mortgagor—Sale of properties of which a receiver has been appointed without leave of the Court appointing him, if absolutely void or voidable—Leave, if necessary for attachment and sale of properties of which a receiver has been appointed but of which he has not taken possession.

A and B, who had executed three mortgages in favour of C, sold their equity of redemption in the mortgaged properties to D, after the same had been purchased (benami) by C at a sale held in execution

of a decree which C had obtained against A and B on a claim quite independent of the mortgage. The mortgagors' application to set aside the sale to C was dismissed by the Appellate Court and the sale confirmed. In the mortgage suit which C instituted against A and B, D was allowed to appear and it was contended on his behalf that C held the properties which he had purchased as a trustee for the mortgagors and that D, as purchaser of the equity of redemption, was entitled to redeem on accounts being taken as between a trustee and a beneficiary.

Held—That the mortgagors' application to set aside the sale to C having been dismissed and the sale confirmed, the equity of redemption passed to C and no right was left in the mortgagors which they could transfer to D; and that, in the circumstances, the latter could not contend that C held the property as a trustee for the mortgagors.

Held, also—That Or. 34, r. 14 of the Civil Procedure Code of 1908 is confined to claims arising under the mortgage and does not apply to a case where the sale takes place in execution of a decree for money upon a claim not arising under the mortgage.

KAMINI DEBI v. RAM LOCHAN SARKAR (2) and KHIARAJMAL v. DIAM (3) considered.

Where in a mortgage suit an order was made appointing a receiver, but before the receiver took possession, the properties were sold in execution of a decree in another suit, the leave of the Court which appointed the receiver not having been previously obtained.

Held—That the rule that possession of

(2) 5 B. L. R. 450 (1870).

(3) L. B. 32 I. A. 23; s. c. I. L. R. 32 Cal. 206; 9 C. W. N. 201 (1904).

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a receiver may not be disturbed without leave, does not apply, so far as third parties are concerned, until a receiver has been actually appointed and is in actual possession.

Held, also—*That a sale of properties of which a receiver has been appointed, without leave of the Court which appointed him, is not void, but only voidable, liable to be set aside by appropriate proceeding.*

LIVINIA ASHTON v. MADHAB MONI DAS (17) and KANAI LAL JALAN v. MANOO BISI (16) referred to

Held, also—*That, in the present case, the mortgagors who had applied to set aside the sale on the ground, among others, that the sale was held without taking the permission of the Court which appointed the receiver, having subsequently abandoned that ground, D, then assignee, could not urge it again by way of defence to a suit.*

This was an appeal preferred on the 1st of March 1920, against the decree of Babu Haripada Mazumdar, Subordinate Judge, 1st Court, of Zillah Midnapur, dated the 19th of December 1919.

The facts of the case will appear from the judgment.

Babus Ram Ch. Mozumdar, Pramatha Nath Bandopadhyaya and Jyotir Mohun Bhattacharjee for the Appellant.

Dr. D. N. Mitter and Babus Bhupendra K. Ghose and Sib Ch. Palit (for Deputy Registrar) for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit upon three mortgages executed by the Defendants Nos. 1 and 2 in favour of the Plaintiff. The mortgages were dated the

17th July 1908 (for Rs. 5,000), 7th July 1909 (for Rs. 1,300) and 5th May 1910 (for Rs. 1,362) respectively. A nine annas durmokarari right in 10 mouzabs and also a fractional share of the mokarari right in 2 of the mouzabs, and the jole mandali right in another (11th mouzah) were mortgaged. The Defendants Nos. 3 and 4 were purchasers of some of the properties long after the mortgages.

The suit was originally instituted on the 15th January 1913 against the mortgagors (the Defendants Nos. 1 and 2) and the transferees (the Defendants Nos. 3 and 4), and was laid at Rs. 11,114-10 as The Defendants Nos. 1 and 2 entered appearance and filed written statement on the 9th March 1913. The preliminary judgment was passed on the 4th November 1913 and the preliminary decree on the 22nd December 1913.

Two days after the suit was instituted, i.e., on the 17th January 1913, an application was made for the appointment of a receiver, and on the 5th May 1913 an order was made for the appointment of a receiver. On the 20th June 1913 one Jagabandhu Bose was appointed receiver. On the 16th July 1913 the Plaintiff made an application to the Court stating that Jagabandhu Bose was unable to work as receiver and that some one else should be appointed in his place. On the 24th July 1913 one Khettra Nath Pal was appointed receiver, and on the 26th August 1913 possession of the properties was delivered to the receiver. On the 25th July 1914 Khettra Nath was discharged from receivership.

Before the institution of the suit on the mortgages, the Plaintiff instituted four suits against the Defendants Nos. 1 and 2, in the year 1912, three out of which were for rent in respect of the mortgaged properties. The fourth suit was for money

(16) 29 C. L. J. 424 (1919).

(17) 11 C. L. J. 439, 494 (1910).

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due to Plaintiff and was brought in the Small Cause Court Side of the Subordinate Judge's Court. That suit was decreed against the Defendants Nos. 1 and 2. The decree was transferred to the Munsif's Court for execution, and in execution of the decree, a nine annas share of *durmokarani* interest of the 10 mouzahs which were mortgaged was sold on the 12th July 1913 for Rs. 1,002 the ostensible purchaser being one Tinkari Bose. On the 17th March 1914, the Defendants Nos. 1 and 2 applied for setting aside the sale and it was set aside by the Munsif who held that Tinkari Bose was *benamdar* for the Plaintiff, and the price fetched at the sale was inadequate. On appeal, however, the District Judge set aside the Munsif's judgment and confirmed the sale. On application to the High Court a rule was issued, to set aside the order, but it was discharged on the 23rd November 1914. On the 8th August 1914 possession was delivered to Tinkari Bose. On the 7th September 1914 Tinkari Bose applied to be made a party to the mortgage suit and he was made a party on the 14th November 1914. On the 13th October 1915 Tinkari executed a conveyance of the properties purchased by him in favour of the Plaintiff.

On the 22nd August 1915 the Defendants Nos. 1 and 2 sold their equity of redemption to the Appellant. The Appellant on the 14th February 1916 applied to be added as a party to the mortgage suit. The application, however, was rejected on account of some formal defect on the 18th February 1916. On the 23rd February 1916 the application for being added as a party was renewed, and it was again rejected on the 31st July 1916. The Appellant then moved the High Court against the order with the result that the Court ordered that he be made a party and the objections of both parties may be heard. The main objection of the Plaintiff was that the Appellant did not purchase any interest in the properties so as to entitle him to redemption of the same. The Appellant's principal contentions were first that the purchase ostensibly made in the name of Tinkari Bose was really made by the Plaintiff, Tinkari being merely his *benamdar*, secondly, that under the circumstances the Plaintiff was really a trustee for the mortgagors, and the Appellant was entitled to redeem on accounts being taken between a trustee and a beneficiary; and thirdly, that the equity of redemption having been sold at a time when the receiver had already been appointed, and without the permission of the Court which appointed the receiver, the sale was altogether void in law, and that even, if voidable, it can be avoided in the present litigation.

In execution of one of the rent-decrees obtained by the Plaintiff against the Defendants Nos. 1 and 2, their *mourasi* interest in two of the mortgaged properties were put up to sale on the 25th May 1915 and was purchased ostensibly by Tinkari Bose.

In execution of another rent-decree obtained by the Plaintiff, the *jote mandali* interest of the Defendants Nos. 1 and 2 in the 11th mouzah mortgaged was put up to sale and was also purchased by Tinkari Bose on the 22nd January 1915.

In execution of the third rent-decree the *cutchery bari* of the Defendants Nos. 1

and 2 in the mortgaged properties was put up to sale, and was purchased by the Plaintiff himself, on the 6th November 1913, who obtained possession of it on the 17th July 1914.

The Court below overruled all these contentions of the Appellant. The first question for consideration is whether the purchase by Tinkari was

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benami for the Plaintiff. The onus of proving *benami* is certainly upon the Appellant.

The Appellant relies (among other things) upon the observations in the judgment of the Munsif, dated the 17th March 1914 setting aside the sale, and in the order of the High Court, dated the 23rd November discharging the rule. The Munsif held that Tinkari was "decree-holder's man and the property was purchased in his *benami*," and further that "Tinkari Bose is a mere *benamdar* which fact is not challenged by the decree-holder or auction-purchaser." He also found that there were irregularities in the publication of the sale and the properties were sold at an inadequate price. The order of the Munsif, however, as stated above, was set aside on appeal by the District Judge on the 29th May 1914. The learned Judge did not consider the question of *benami*, but held that the properties were not sold at an inadequate price and the judgment-debtors had not sustained substantial loss and accordingly decreed the appeal and confirmed the sale. The High Court in discharging the rule (granted for setting aside the order of the District Judge) observed that while the mortgage suit was pending the decree-holder "executed his money-decree and in execution purchased some of the mortgaged properties himself." As contended on behalf of the Respondent, the order of the Munsif having been set aside by the District Judge on appeal, the Appellant cannot rely upon the observations of the Munsif on the question of *benami*, nor can he rely upon the observation of the High Court as it was merely a statement of facts and not a decision upon the question, no question of *benami* having been raised or considered by it. It appears that separate appeals were preferred by the Plaintiffs and Tin-

kari against the order of the Munsif to the District Judge, but as stated above, the judgment of the District Judge proceeded only upon the question whether substantial loss had resulted to the mortgagor by the sale. There is no reference to the question of *benami* in the judgment, and it does not appear that the question of *benami* was raised before the Appellate Court. All that can be said is that the fact expressly stated in the judgment of the Munsif, *viz.*, that Tinkari was *benamdar* was not challenged by him or the decree-holder (the Plaintiff), before the Munsif, nor before the High Court as the statement of facts quoted above indicates.

The Plaintiff has not examined himself. He has, however, examined Tinkari, and the latter says that he purchased the properties with his own money and was in possession until he conveyed the properties to the Plaintiff. There is no evidence that the purchase money belonged to the Plaintiff, but the Appellant relies upon various matters as showing the improbability of Tinkari being the real purchaser.

Tinkari, it appears, is a pleader's clerk, his earnings, according to his own account, are about Rs. 60 per month. He says he has some 10 bighas of *lakheraj* land and 32 bighas of *jamai* lands, but the lands are recorded in the record-of-rights in the names of his brothers. He never saw the disputed mouzali and did not make any enquiry about the condition and income of the mouzalis before the purchase. He says he had about 1,525 rupees at the house of Atul Babu, pleader, whom he served as clerk. This Atul Babu has not been examined. The incumbrances on the properties amounted to Rs. 14,400. There were some costs in taking delivery of possession and a criminal case cost about Rs. 200. It is improbable that a person like Tinkari would purchase the

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properties at Rs. 1,002 with such heavy liabilities when admittedly he made no enquiries about them. The learned Subordinate Judge, however, says that he was in the habit of purchasing properties at auction-sales for selling them at a profit. But Tinkari speaks of only one such purchase—*a bastu*, and that he subsequently sold it. It does not appear what the value of the property was.

The properties purchased by Tinkari at the sale held in execution of the Small Cause Court decree, as well as at the sales held in execution of the rent-decrees, were all sold by him to the Plaintiff for Rs. 1,101 by a *kobala*, dated the 13th October 1915. There is an endorsement of payment of the consideration on the *kobala* by the Sub-Registrar. It is to be observed that in the conveyance, it is stated "you shall be entitled to take from my Tehsildar Parbatu Charan Bose the balance of the *tehibil* in his hands." The amount of cash money in the hands of the Tehsildar is not stated. Such a provision is extraordinary and is only consistent with the document being a release by a *benamdar* in favour of the real owner. Tinkari admits that there was no account of arrears due from the *mahal* before the sale to the Plaintiff and the price was settled by making a rough account of income and expenditure and he does not remember if he saw that account. One Kunjo Patnaik who took delivery of possession is said to have been in the service of Tinkari. Kunjo is admittedly now a clerk of Tarak Babu, pleader, son of the Plaintiff. Tinkari says that Kunjo was in his service for about a month after delivery of possession of the properties. The delivery of possession took place on the 8th August 1914. The Appellant has produced two post cards which go to show that Kunjo was acting after September 1914 and up to the

time when Tinkari executed the conveyance to the Plaintiff. The first post card (Ex. B) is dated the 15th November 1914 written by Kunjo to Boloram Mahto, admittedly a servant of the Plaintiff and in charge of the *cutchery bari* after Plaintiff's purchase of the *cutchery*. In that post card Kunjo wrote as follows.—"Do not be anxious for your salary and fooding charges. Defray those expenses from your pocket now. I shall go there as soon as I can and on my arrival there I shall pay your salary and other dues." The second post card (Ex. B1) is dated 6th December 1914 and is also written by Kunjo to Boloram. It advises the remittance of Rs. 2 by money order for fooding charges of Boloram and then states: "You should guard the fuel and timber and make enquiries if any one commits theft. Tell Tarak Babu (the Defendant No. 1) not to cut paddy from the *niyote* lands of Jadra, and if he cuts forcibly, make two or three persons witnesses, a criminal case shall have to be instituted against him. Tarak Babu is defeated in the High Court so he has no title to the village."

There is another post card, dated the 25th October purporting to be written by Jhareswar Sen to Kunjo, in which it was stated that master had gone to Calcutta, and requested Kunjo to keep the house and the timber and fuel in the charge of Balai (Boloram) Mahto, gave directions if anything "untoward" happened, and also directions about some block of stones for constructing a granary. The Court below says that the genuineness of the post cards has not been satisfactorily proved and even if genuine they do not go to prove much for the Defendant. Jhareswar denies that the post card (Ex. B2) was written by him, but the Defendant Tarak says that it is in the handwriting of Jhareswar, and Exs. B and B1

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are in the handwriting of Kunjo. There is nothing suspicious about the appearance of these post cards, and the contents are such as are likely to be written to the persons addressed. Kunjo who is in the service of Plaintiff's son has not been examined. If, as Tinkari says, Kunjo was in his service only for about a month after the 8th August 1914, it is difficult to see why he was writing letters to Boloram about his salary and about the *mahal* in November or December 1914, nor again why Kunjo should write letters about the payment of salary of Boloram or ask him to look after the affairs of the *mahal* bearing in mind the fact that Boloram was the Plaintiff's servant and in charge of only the *cutchery bari* which alone had been purchased by the Plaintiff at that time.

These post cards indicate that at the time when they were written, the Plaintiff was the owner of the properties (which was long before the conveyance by Tinkari to the Plaintiff), and that Kunjo, Boloram and Jhareswar were all agents for and acting for the Plaintiff.

The Defendant No. 1 Tarak says that he came to the Plaintiff at Midnapur for compromise when the appeal in the case for setting aside the sale was pending before the District Judge, and that the Plaintiff at that time had agreed to give up the properties if the mortgage debt and also the decretal debt (under the Small Cause Court decree) were paid to him. It is said that Tarak came with one Anukul Babu to see the Plaintiff in that connection. This Anukul Babu has not been examined. But the Plaintiff has not come forward to deny the facts stated by Tarak.

Then again the Defendant examined some witnesses to show that there was some dispute as to the rents payable (about *kists* and interests) and also about rent-

receipts being granted in the name of Tinkari, that they came to the Plaintiff for settlement and that Plaintiff gave certain orders in that connection. This is said to have taken place before the Plaintiff's purchase from Tinkari. The Court below has disbelieved the evidence of these witnesses. The witnesses are tenants of the *mahal*, and the Appellant has got a seven annas share in the mouzahs. The same thing, however, may be said of the witnesses for the Plaintiff who denied that there was any such dispute, as the Plaintiff is the owner of a nine annas share of the mouzahs. However that may be, the witnesses for the Defendant were examined from the 4th to the 9th December when all those statements were made. The Plaintiff's witnesses were examined on the 10th and 11th December and yet the Plaintiff did not come forward to deny them. An explanation is attempted in this Court, viz., that the Plaintiff's daughter was seriously ill at Calcutta and he had to come away. But assuming that was true, there was no application for adjournment of the case, nor any application for examination by Commissioner. There is no doubt that the onus of proving *benami* was upon the Defendant, but after the definite statements made by the Defendant's witnesses as to the Plaintiff's dealings with the property indicating that he was the owner of the property, the Plaintiff, we think ought to have examined himself and denied those statements on oath. There is also no explanation why Kunjo who as stated above is the clerk of the Plaintiff's son was not examined by the Plaintiff. We do not think the Court below was right in rejecting the evidence of the Plaintiff in the manner it has done.

As to the alleged admission made by the Plaintiff that Tinkari was his *benamidar*, and that the tenants should accept

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dakhilas in his name, it looks at first sight as improbable, because the real owner, if he wants to retain the *benami* character is not likely to give out that he is the real owner. But if, what the Defendant No. 1 Tarak and the witnesses state, *viz.*, that they came to the Plaintiff for settlement be true, the very fact that they came to the Plaintiff for that purpose before he purchased the property from Tinkari would indicate that the persons concerned knew that Tinkari was the *benamdar* and Plaintiff was the real owner. It is also suggested on behalf of the Appellant that the interviews spoken to by Tarak and other witnesses took place after the proceeding for setting aside the sale had been disposed of by the Munsif, and in which the fact that Tinkari was the *benamdar* for the Plaintiff was not challenged by Tinkari or by the Plaintiff. There is some force in this suggestion.

It is true that the *dakhilas* were granted to tenants in the name of Tinkari, and Tinkari was sued for rent by the landlords to some of which the Appellant (as a co-owner of the *mahal*) was a party. But if the purchase by Tinkari was *benami* for the Plaintiff, the papers would stand in the name of the *benamdar* in order to keep up the *benami* character of the transaction as is usual in such cases. The landlords sued the person who was the ostensible purchaser and there is nothing to show that they were aware that Tinkari was not the real owner. Besides they had no interest in raising a dispute as to who was the real purchaser, as they would get decree for rent whether it was brought against the *benamdar* or the real purchaser. The claim for rent prior to the date of purchase appears to have been contested by Tinkari and the decree directed that he would not be liable for the period prior

to his purchase. But any defence necessary to be set up on behalf of the purchaser would be set up in the name of Tinkari, the ostensible purchaser. It appears that one Ramkalpo Ganguli bid at the sale up to Rs. 1,000, and Tinkari bid up to Rs. 1,002. This Ramkalpo appears to have been the *am-mukhtear* of the Appellant's estate at the time of the sale, though he was dismissed subsequently. The Appellant again expressed his willingness to purchase the properties a little before proceedings were taken for setting aside the sale. All these facts, however, are consistent with Tinkari being a *benamdar* and they only go to show that the Appellant was desirous of purchasing the properties, as he has a seven annas share in the properties and he did, as a matter of fact, purchase the equity of redemption from the mortgagors on the 22nd August 1915.

The opinion of the trial Court upon the question of credibility of witnesses is certainly entitled to great weight, and the question of *benami* is not to be decided upon suspicion. But the learned Subordinate Judge has not, we think, given due weight to the circumstantial evidence and the probabilities of the case pointed out above in considering the evidence of the witnesses, and the inference arising from the absence of the Plaintiff and Kunjo from the witness-box. On the whole we are of opinion that it was the Plaintiff and not Tinkari who was the real purchaser.

The next question is whether the Plaintiff having purchased the property in execution of a money decree was a trustee for the mortgagors.

Sec. 99 of the Transfer of Property Act provided that where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the

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mortgage or not attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under sec. 67. The Full Bench in the case of *Asutosh Sikdar v. Behari Lal Kirtania* (1) held that a sale held in contravention of the provisions of sec. 99 of the Transfer of Property Act is not a nullity, but an irregular sale liable to be avoided merely on the proof that the terms of the section had been contravened. Under Or. 34, r. 14, however, the rule is confined only to claims arising under the mortgage. Here the sale took place on the 12th July 1913, (after Or. 34, r. 14 was enacted) in execution of a decree for money upon a claim not arising under the mortgage. But the learned pleader for the Appellant relies upon the principle of equity enunciated by Macpherson, J., in *Kamini Debi v. Ram Lochan Sarkar* (2), and recognised by the Judicial Committee in the case of *Khizarjmal v. Dham* (3). In the former case, Macpherson, J., held that the mortgagee cannot properly, in execution of a simple decree for money, the repayment of which is secured by a mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged, but if he does so, and purchases it himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title. This case came up for consideration before the Judicial Committee in *Mahabir Prasad v. Macnaghten* (4), where their Lordships observed that it was probable that in the case of *Kamini Debi v. Ram Lochan* (2), the mortgagee had not obtained leave from the

Court to purchase, and that leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. See also *Mahomed Mira Ravathar v. Sakvasi Vijaya Raghunadha* (5). The learned pleader sought to distinguish *Mahabir Prasad's* case (4) on the ground that there the mortgaged property itself was sold, and not merely the equity of redemption. This distinction was also sought to be drawn by the High Court in that case. But their Lordships after referring to the argument of Mr. Doyne based upon the decision of Macpherson, J., in *Kamini Debi's* case (2) that "the Respondents must be held to have purchased as trustees for the Appellants" observed "the same argument which is not raised in the pleadings seems to have been addressed to the High Court, who in their judgment distinguish between that case and the present, on the ground that in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had: and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent

(1) L. L. R. 35 Cal. 61: s. c. 11 C. W. N. 1011 (F. B.) (1907).

(2) 5 B. L. R. 450 (1870).

(3) L. R. 32 I. A. 23: s. c. I. L. R. 32 Cal. 299: 2 C. W. N. 201 (1904).

(4) L. R. 16 I. A. 107: s. c. I. L. R. 16 Cal. 362 (1889).

(2) 5 B. L. R. 450 (1870).

(4) L. R. 16 I. A. 107: s. c. I. L. R. 16 Cal. 362 (1889).

(5) I. L. R. 23 Mad. 227: s. c. 4 C. W. N. 228 (F. C.) (1899).

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purchaser. If the decision of Macpherson, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchaser of the mortgaged property." Much reliance is placed on the case of *Khiarajmal v. Diam* (3), where Lord Davey observed:—"Their Lordships throw no doubt on the principle which has been acted on in many cases in India that a mortgagee cannot by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution relieve himself of his obligations as mortgagee or deprive the mortgagor of his right to redeem on accounts taken, and with the safeguards usual in a suit on the mortgage." It is to be noted that these observations of their Lordships had reference to the case of a purchase by the mortgagee in execution of a money decree for the mortgage debt. Referring to the fact that the lower Court had made a decree for redemption of the whole estate on the ground that "the mortgagee could not acquire the equity of redemption directly or indirectly by purchase at a Court sale except by a suit brought on the mortgage on accounts taken and time specially allowed for redemption," it was observed:—"Their Lordships cannot concur in this view which they think is based on a misapplication of a sound principle of equity," and then after stating that their Lordships throw no doubt on the principle which had been acted on in many cases in India (quoted above) observed:—"But In suit No. 160 of 1878, the debt sued for was not the mortgage

debt. The creditors were different and the debtors were different, and the debt does not appear from the plaint to have been secured by a mortgage." It appears therefore that the principle which had been acted upon in many cases in India in their Lordships' opinion was not applicable to cases where the debt was not the mortgage debt.

In *Martand v. Dhondo* (6), where the mortgagee in execution of a money decree attached the mortgaged property, and without notifying or disclosing his mortgage lien caused the properties to be sold, and without obtaining leave from Court to bid at the sale, purchased some of the properties *benami* at an under value, it was held that the sale was rendered nugatory not by the provisions of sec. 294 (though permission to bid granted under that section might have validated the purchase) but by the impossibility of a mortgagee by such sales and purchases freeing himself from the liability to be redeemed. The learned Judges referred among other cases to *Bhugobatty Dassi v. Shama Charan Bose* (7) and *Kamini v. Ram Lochan* (2), but did not refer to *Mohabir Prosad v. Macnaghten* (4), nor does it appear to have been cited in argument.

In the case of *Mayan Pathati v. Pakuian* (8), the question for decision was whether a sale in contravention of sec. 99 of the Transfer of Property Act was void or merely voidable and it was held that it was the latter. There is an observation, however, that "notwithstanding the confirmation it may be that the sale in question cannot affect the right of the Appellants owing to the impossibility of the Re-

(2) 5 B. L. R. 450 (1870)

(4) L. R. 16 I. A. 107; s. c. I. L. R. 16 Cal. 882 (1889).

(6) I. L. R. 22 Bom. 694 (1887).

(7) I. L. R. 1 Cal. 327 (1877).

(8) I. L. R. 22 Mad. 247 (1899).

(3) L. R. 32 I. A. 23; s. c. I. L. R. 32 Cal. 296; 9 C. W. N. 201 (1904).

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spondent as mortgagee freeing himself by such a sale and purchase from the liability to be redeemed. *Martand v. Dhondo* (6).'' In that case the sale was in contravention of the provisions of sec. 99 of the Transfer of Property Act.

In a later case *Dharanikota Venkayya v. Budharazu Surayya* (9), the Madras High Court declined to follow the decisions in *Kamini Debi v. Ram Lochan* (2) and *Martand v. Dhondo* (6). In the case of *Abdul Rashid Khan v. Dilsukh Rai* (10), where the equity of redemption was not sold in execution of a money-decree obtained for the mortgage debt, Stanley, C. J. and Burkitt, J., observed "independently of the provisions contained in sec. 99 of the Transfer of Property Act, we are not prepared to hold that a mortgagee is precluded by law from purchasing the equity of redemption and freeing himself from his liability to be redeemed provided that the purchase is carried out in complete good faith and no advantage is taken by him of his position as mortgagee. We are not aware of any principle upon which such a sale can be impeached merely on the ground that the purchaser was a mortgagee of the purchased property." In a later case, *Lal Bahadur Singh v. Abharan Singh* (11), a Full Bench of the Allahabad High Court were of opinion that if a mortgagee brings the mortgaged property to sale in contravention of the provisions of sec. 99 of the Transfer of Property Act, such sale is not void, but merely voidable. Stanley, C. J., observed: "It seems to me that if the equity of redemption is sold in execution of a decree and purchased either by a third party, or by a

mortgagee with the leave of the Court, the equity of redemption is transferred from those persons who previously held it to the purchaser and that the result is that if the sale is neither void nor set aside, there is no longer a right to redeem left in the previous owners of the equity of redemption." The question in these cases was whether a sale in contravention of sec. 99 of the Transfer of Property Act is a nullity—a question which was settled in our Court by the decision of the Full Bench in *Asutosh Sikdar v. Behari Lal* (1). But in *Poncham Lal v. Kishun Prosad* (12), Woodroffe and Caspersz, JJ., observed that it was a well-established principle that a purchase by the mortgagee of the equity of redemption constitutes him a trustee for the mortgagor, that he does not (unless there has been a release of the equity of redemption or other circumstance which in law would bar his right to redeem) acquire an irredeemable title, and that the mortgagor is under no necessity to have the sale set aside first, in order to be entitled to redeem the property. But in that case although the property was sold in execution of a money decree (on a *roka*) it was governed by the provisions of sec. 99 of the Transfer of Property Act which was then in force. On the other hand, Mookerjee and Beachcroft, JJ., in the case of *Bharat Ramanuj Das v. Ishan Chandra* (13) held that a mortgagee can purchase an equity of redemption at a sale held in execution of a money decree obtained by a stranger against the mortgagor and that he does not hold the equity of redemption as a trustee for the mortgagor and for his benefit. The learned Judges

(2) 5 B. L. R. 450 (1870).

(6) I. L. R. 22 Bom. 624 (1897).

(9) I. L. R. 30 Mad. 862 (1907).

(10) I. L. R. 27 All. 517 (1905).

(11) I. L. R. 37 All. 165 (F. B.) (1915).

(1) I. L. R. 35 Cal. 61. s. c. 11 C. W. N. 1011 (F. B.) (1907).

(12) 14 C. W. N. 579: s. c. 12 C. L. J. 574 (1910).

(13) 27 C. L. J. 431 (1917).

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disseminated from the case of *Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Ltd.* (11) and distinguished the case of *Pancham Lal v. Kishun Prosad* (12) on the ground that it was a case of a purchase by the mortgagee in contravention of the provisions of sec. 99 of the Transfer of Property Act. The case of *Pancham Lal v. Kishun Prosad* (12) came up for consideration before the Full Bench in *Uttam Chandra Daw v. Raj Krishna Dalal* (15). It is contended for the Appellant that the principle of equity was recognized in that case, but could not be given effect to having regard to the form in which the suit was laid. The equity of redemption in that case was sold in execution of a decree upon a claim not arising under the mortgage, but the principle of equity was considered on the assumption that the sale was held in execution of a decree arising under the mortgage. One of the learned Judges (Mookerjee, J.) expressed his opinion that there was no such equity. The other Judges did not express any definite opinion as the suit was not one framed for enforcing the trust, if any, nor brought within the period of limitation prescribed for such a suit. It cannot therefore be said that the Full Bench decided the point raised before us.

But the principle of equity enunciated by Macpherson, J., in *Kamini Devi's case* (2) was with reference to a simple decree for money, the repayment of which is secured by a mortgage. In the case of *Khiurajmal v. Diam* (3) also, Lord Davey referred to the principle of equity as ap-

plicable to cases where the equity of redemption is sought to be taken in execution of a money decree for the mortgage debt. In the other cases cited above there was either a contravention of the provisions of sec. 99 of the Transfer of Property Act (in cases decided before Or. 34, r. 14 was enacted) or no leave to bid was obtained by the mortgagee.

It is unnecessary to consider in the present case whether the principle of equity is applicable to such cases. In the present case the equity of redemption was sold in execution of a decree for money upon a claim quite independent of the mortgage. The leave of the Court was obtained by the mortgagee to bid at the sale. The judgment-debtors applied for setting aside the sale but the application was dismissed by the Appellate Court, and the sale was confirmed. The equity of redemption passed to the purchaser, and no right was left in the mortgagors which they could transfer to the Appellant. The Appellant in these circumstances cannot contend that the purchaser held the property as trustee for the mortgagors, assuming that the Appellant as a Defendant can set up the trust as an answer to the suit without bringing a suit to enforce the trust, if any.

• We are accordingly of opinion that the second contention must be overruled.

The third contention is that the sale having been held at a time when a receiver was appointed, without the permission of the Court which appointed the receiver, the sale is void, at any rate is voidable and can be declared invalid in the present suit.

As stated above, an application for appointment of a receiver was made on the 17th January 1913, and an order was made for the appointment on the 5th May 1913. On the 20th June 1913 an order was made for appointing Jagabandhu Bose as re-

(2) 5 B. L. R. 450 (1870).

(3) L. R. 32 I. A. 33; s. c. 1. L. R. 32 Cal. 296; 9 C. W. N. 201 (1904).

(12) 14 C. W. N. 579; s. c. 12 C. L. J. 574 (1910).

(14) I. L. R. 23 Mad. 377 (1899).

(15) I. L. R. 47 Cal. 377; s. c. 24 C. W. N. 293 (F. B.) (1919).

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ceiver and for removal of Defendants Nos. 1 and 2 from possession and delivery of possession to the receiver. The Plaintiff on the 16th July 1913 put in a petition to the Court stating that Jagabandhu was unable to work, and prayed that one Khetra might be appointed receiver. Khetra was appointed receiver on the 24th July 1913, and the Nazir was directed to deliver possession to Khetra by removal of the Defendants Nos. 1 and 2 from possession. But the sale had taken place on the 21st July 1913 before Khetra was appointed. It is contended, however, that the order for appointment of Jagabandhu as receiver was made before the sale (on the 5th May 1913) and Khetra was appointed in his place, that the legal effect of the appointment was to vest the estate in the receiver and the legal possession must be taken to have been with the receiver, though no actual possession was taken until Khetra was appointed on the 24th July 1913.

As there was no order for security being given by the receiver, the order for appointment had the effect of vesting the estate in the receiver as between the parties to the suit, *i.e.*, as between the mortgagor and the mortgagee. But in the first place, the Plaintiff, though he was the mortgagee, obtained the decree in the Small Cause Court not as a mortgagee, but as an ordinary creditor, and as such stood in the same position as a stranger to the suit. Now the rule that "the possession of a receiver may not be disturbed without leave, does not apply, so far at least as third persons are concerned, until a receiver has been actually appointed, and is in actual possession. It is not enough that an order has been made directing the appointment of a receiver. Until pointment has been perfected and receiver is actually in possession, a creditor

is not debarred from proceeding to execution. The order appointing a receiver is for the benefit of the parties to the action. It does not affect third persons until the appointment is completed and perfected. An execution creditor may therefore seize chattels after an order has been made appointing a receiver on his giving security but before the security has been given or possession taken." [See Kerr on Receivers, 7th Edition, 195-196; *Kunai Lal Jalan v. Manoo Bibi* (16)]. In the next place, the sale held without the leave of the Court which appointed the receiver was not void, but was only voidable. Reference was made to High on Receivers, 4th Edition, page 167, where it is stated: "Even though an execution has been levied upon the property before the appointment of the receiver, it is held that there cannot be a lawful sale under such execution without leave of the Court appointing the receiver . . . And the sale under execution of the equity of redemption of premises which are in the possession of a receiver pending a foreclosure suit is void and no title thereunder passes to the purchaser." The property in the cases referred to in the above passage, however, was in the actual possession of the receiver. In our Court, moreover, sales of properties in the possession of the receiver without leave of the Court which appointed the receiver have not been treated as void, but as voidable. In the case of *Livmia Ashton v. Madhab Mani Dasi* (17), it was observed: "A purchaser of such property (in the hands of a receiver) at an execution sale buys at his peril and the sale may be cancelled upon an appropriate application to the execution Court," and in *Kanai Lal Jalan v. Manoo Bibi* (16), the learned Judges said:

(16) 29 C. L. J. 424 (1910).

(17) 11 C. L. J. 489, 494 (1910).

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"It is further clear that the sale held at the instance of the Maharaja was at the worst only voidable . . . in other words when property is in the custody of a receiver appointed by a Court, a sale under an execution issued by another Court may be avoided by an appropriate process. In the case before us, no steps have ever been taken either by the receiver or by the beneficiaries for cancellation of the execution sale in which the Maharaja became the purchaser."

In the present case, it appears from the judgment of the High Court discharging the rule obtained by the Defendants Nos. 1 and 2 in the proceedings for setting aside the sale, that the sale was sought to be set aside on two grounds, one of which was that the sale was held without taking the permission of the Court which appointed the receiver. But although the question was raised it was abandoned, and the mortgagors having abandoned the point, their assignee the Appellant cannot be allowed to raise it again by way of defence to a suit. We are accordingly of opinion that this contention also should be overruled.

Although we are of opinion that the Plaintiff purchased the property in the *benami* of Tinkari, the appeal must fail on our findings upon the other two points.

The result is that the appeal must be dismissed but we direct that each party his own costs in both Courts.

C. Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 545 OF 1922.

CHATTERJEA, J.

PANTON, J.

1922,

Heard, 16, August.

Judgment,

17, August.

ASHUTOSH CHAT-

TERJI, Petitioner,

v.

UPENDRA CHANDRA

AICH, Opposite

Party.

Calcutta Rent Act (III of 1920, B. C.), sec. 18, jurisdiction of President of the Tribunal to revise Rent Controller's order fixing the standard rent under sec. 2 (f) (i)—President's jurisdiction to revise, if limited to standard rents fixed under sec. 15 only—"Fix," meaning of.

In respect of certain premises let out "after the first day of November 1918," the Rent Controller, after a consideration of the evidence, determined the standard rent of the premises under sec. 2 (f) (ii) of the Rent Act. On an application to the President of the Tribunal under sec. 18 for revision of the order, he held that revision under sec. 18 could be made only in cases where the Controller fixed the standard rent under sec. 15 of the Act and that hence the present order was not open to revision by him:

Held—That the order of the Rent Controller is liable to revision by the President of the Tribunal under sec. 18 of the Act. The Act contemplates fixing of the standard rent by the Controller even in cases not coming under sec. 15, in other words, in cases coming under sec. 2 (f) (ii).

In the absence of any definition in the Act, the word "fix" means "to settle," "to specify" or "to determine," and there is no sufficient reason for limiting the word to the case of settlement of the rent by the Controller, when there is no clear indication in the Act that the word is used in that restricted sense.

This was a Rule granted on the 24th July 1922 against the order of Mr. S. C. Banerjee, President of the Tribunal (Cal-

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cutta Improvement Trust), dated the 10th July 1922, refusing to entertain an application for revision of an order of the Rent Controller (Mr. B. D. Banerjee), dated the 28th September 1921, fixing the standard rent.

The material facts of the case are as follows:—In certain proceedings under the Calcutta Rent Act, arising out of an application to the Rent Controller by the tenant, for certifying the standard rent of certain premises, the landlord stated that the premises were let out at a monthly rent of Rs. 70 and the tenant stated that it was Rs. 50 only.

The Rent Controller, after a consideration of the evidence, came to the conclusion that the rent should not be more than Rs. 50 per mensem and that the rent was fixed at this rate when the tenant came in, and he determined Rs. 50 as the standard rent of the premises under sec. 2 (f) (ii) of the Act. Both parties applied to the President of the Calcutta Improvement Tribunal for revision under sec. 18 of the Act, and he held that an application for revision under sec. 18 could be made only in cases where the Rent Controller fixes the standard rent under the provisions of sec. 15 of the Act, that as the Controller's decision in the present case had been given expressly under sec. 2 (f) (ii), he did not "fix" any standard rent for the premises and that therefore the order was one which could not be revised by him under sec. 18. Against this decision the present Rule was obtained.

Babu Amarendra Nath Bose for the Petitioner.

Babu Abinash Chandra Ghose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This Rule arises out of proceedings

under the Calcutta Rent Act, and the question involved is whether the President of the Tribunal is right in holding that an application for revision under sec. 18 of the Act could not be made in this case because there was no decision of the Controller fixing the standard rent.

The landlord stated that the premises were let out at a rent of Rs. 70; the tenant, on the other hand, stated that it was Rs. 50 only. The tenant applied to the Rent Controller for certifying the standard rent.

The Rent Controller after a consideration of the evidence came to the conclusion that the rent should not be more than Rs. 50 per month inclusive of taxes, and that the rent was fixed at this rate when the applicant came in, and he made the following order: "Rupees fifty inclusive of taxes is therefore the standard rent of this portion (eastern) of the premises occupied by the applicant under sec. 2 (f) (ii) of the Act."

Both parties applied to the President of the Tribunal under sec. 18 of the Act, and he was of opinion that an application for revision under sec. 18 could be made only in cases where the Rent Controller fixes the standard rent under the provisions of sec. 15 of the Act, that as the Controller's decision in the present case has been given expressly under sec. 2 (f) (ii) of the Act, he did not fix any standard rent for the premises and that therefore the order was one which could not be revised under sec. 18 of the Act.

Now sec. 18 provides for an application for revision to the President of the Tribunal, if the decision of the Controller fixing the standard rent for any premises is questioned. There is no doubt that there was a decision of the Controller in this case. The only question is whether there was a decision fixing the standard rent.

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The standard rent is defined in sec. 2, cl. (f), and it means (i) the rent at which the premises were let on the first day of November 1918, or when they were not let on that date, the rent at which they were last let before that date and after the first day of November 1915, with the addition, in either case, of ten per cent. on such rent; (ii) in the case of any premises which were or shall be first let after the first day of November 1918, the rent at which the premises were or may be first let; (iii) in the cases specified in sec. 15, the rent fixed by the Controller.

The word "fix" has not been defined in the Act. It no doubt means "to settle" and that is the view which has been taken by the learned President. It also means "to specify" or "to determine" (see the Oxford Dictionary). In the absence of any definition of the word in the Act, we do not see any sufficient reason for limiting the word to the case of settlement of the rent by the Controller, unless there is a clear indication in the Act that the word is used in that restricted sense. We do not find any such indication. On the other hand, reference to some of the other sections would indicate that the expression "fixing" is applicable not only to the cases specified in sec. 15, but also cases coming under the 1st and 2nd clauses of sec. 2 (f). Thus sec. 8 provides that "Wherever an increase of the rent of any premises is allowable under the provisions of this Act, no such increase shall be recoverable until the expiry of one month after the landlord has served on the tenant a notice in writing of his intention to increase the rent accompanied by a certificate from the Controller fixing the standard rent." It appears from the terms of this section that no increase of the rent allowable under the Act can be recovered unless notice be served upon the

tenant accompanied by a certificate from the Controller fixing the standard rent.

This will cover a case of the rent originally payable on the 1st November 1918 with the addition of the statutory 10 per cent. on such rent.

It is contended, however, by the learned pleader for the Opposite Party that that section contemplates a case where the rent exceeds the standard rent because the additional 10 per cent. is included in the standard rent under sec. 2 (f).

There is no doubt that the ten per cent. is included in the standard rent; but the 10 per cent. addition is an "increase of the rent" which is allowable under the provisions of this Act, because sec. 2 (f) is also a provision of the Act, and the section seems to lay down that no sum in excess of the rent originally payable can be recovered without a certificate from the Controller fixing the standard rent, where of course there is a dispute between the parties.

The learned pleader for the Opposite Party pointed out that sec. 8 of the Burma Rent Act (II of 1890), which has been followed by the Calcutta Rent Act, lays down that the certificate of the Controller fixing the standard rent must be served along with a notice upon the tenant only in cases mentioned in secs. 5 and 7, but that the cls. (a) and (b) of sec. 8 which thus limit the application of the section, have been omitted from the Calcutta Rent Act. The natural inference, however, from that omission would be that instead of confining the operation of sec. 8 to certain cases, i.e., secs. 5 and 7, the Calcutta Rent Act provides generally for a notice wherever an increase of the rent of any premises is allowed. The learned pleader also contended that the word "certifying" has been used in the Act as distinguished from "fixing." But the two expressions

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Then in the case of *Harimohon Shaha v. Baburali* (12), where the auction-purchaser who had obtained symbolical possession brought a suit for possession of land within 12 years of the date on which he obtained symbolical possession, it was held that the suit was not barred. Maclean, C. J., observed as follows:—"Be that as it may, we have the fact which cannot be got over, that possession, call it symbolical possession if you will, was given by a Civil Court in this case to the Plaintiff, and in the case of *Lokeshwar Koer v. Purgan Roy* (10) it was laid down that the formal possession given by a Civil Court under an execution operates, in point of law and of fact, as between the parties, as a complete transfer of possession from one party to the other." . . .

"It may be that it was wrongly given by reason of the fact that actual possession ought to have been given under sec. 318 of the Code, but still possession was given to the Plaintiff by a Civil Court; and under the circumstances, it seems to me that the period of limitation must begin to run from the date of that possession being given." See also *Mir Wazi-uddin v. Lala Deoki Nandan* (13), where the learned Judges considered the question whether the auction-purchaser at a sale for arrears of revenue has 12 years from the date on which formal possession is delivered to him by the Collector.

So far as our Court is concerned, all the later decisions are in favour of the view taken by the lower Court.

In the Madras High Court, the view taken by this Court has been adopted. See *Govind v. Venkata Sastrulu* (14), where it was held that the delivery of

symbolical possession, even though erroneously made, i.e., even though made under circumstances which do not make sec. 319 applicable operates to give the person so put in possession a fresh cause of action and to place the judgment-debtor in the position of a trespasser.

The Allahabad High Court has also taken the same view; see *Jagannath v. Milap Chand* (15).

The Bombay High Court as stated above has taken a different view in the case of *Mahadeo v. Janu* (4), but the weight of authority is in favour of the view that symbolical possession as against the judgment-debtor operates as actual possession and gives a fresh start of limitation even in a case coming under sec. 318 corresponding in Or. 21, r. 95 of the present Code. We must accordingly hold that the suit is not barred by limitation.

It has been contended by the learned pleader for the Appellant that even if this principle can be availed of by the auction-purchaser, the Plaintiff being a *benamdar* cannot take the benefit of the principle.

But the Defendant No. 6 was the certificated purchaser, and the Plaintiff claims under him. In these circumstances, we think that the principle applies to the Plaintiff also.

The learned Pleader attacked the finding of the learned Subordinate Judge on the question of title of Khoda Buksh. There is evidence in support of the finding and the finding was arrived at upon a consideration of the whole evidence.

We think, in these circumstances, that the appeal must fail and is dismissed with costs.

S C. C. Appeal dismissed with costs.

(10) I. L. R. 7 Cal. 418 (1881).

(12) I. L. R. 24 Cal. 715 (1897).

(13) 6 C. L. J. 472 at pp. 481, 482 (1907).

(14) 17 Mad. L. J. 598 (1906).

(4) I. L. R. 36 Bom. 373 (F. B.) (1912).

(15) I. L. R. 28 All 742 (1908).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 850 OF 1921.

WALMSLEY, J.
PEARSON, J.,
1921,
18, November.

KASHI PRAMANIK and
ors., Accused,
Petitioners,
v.
DAMU PRAMANIK,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 342, mandatory—Stage at which the Magistrate should examine accused.

Where the accused was questioned by the Magistrate before all the witnesses for the prosecution had been examined, cross-examined and re-examined, the conviction was set aside and the case remanded to the lower Court for a fresh trial.

This was a rule granted on the 29th of September 1921 against an order of the Deputy Magistrate of Rajshahye (M. H. M. Furrokh), dated the 27th of June 1921.

The facts of the case are not material to this report.

Mr. K. N. Chaudhuri (with Babu Probodh Ch. Chatterji) for the Petitioners.—The word "examination" in sec. 342, Cr. P. Code means examination, cross-examination and re-examination.

The following cases were cited:—*Emperor v. Basapa Nungapa* (3), *Emperor v. Fernandez* (1) and *Raghu Bhujji v. King-Emperor* (4), also a passage in *Gangadhar Goala v. R. Reed* (5).

Babu Jotindra Mohan Chaudhuri (Jr) for the Opposite Party.

The JUDGMENT OF THE COURT was delivered by

WALMSLEY, J.—This rule was issued on two grounds. The first is that the trying Magistrate did not comply with the provisions of sec. 342 of the Code of Criminal Procedure. This

(1) I. L. R. 45 Bom. 672 (1920).

(3) 17 Bom. L. R. 893 (1918).

(4) 5 P. L. J. 430 (1920).

(5) 25 C. W. N. 009 (1921).

point is, I think, established, and following the ruling in *Emperor v. Fernandez* (1) and the case in the Patna High Court of *Mitrajit Singh v. Emperor* (2), the proper course for us to follow is to set aside the conviction and sentence of the Petitioners and remit the case to the trial Court in order that the provisions of sec. 342 of the Code may be followed and the matter disposed of in accordance with law.

The second ground is that the charges found against the accused are defective. This is not a matter on which I should be disposed to interfere, if there were no other defects in the case. But as the case must be remitted on the first ground, I think, we should also direct that the charges be amended. The first charge under sec. 143, I. P. C. omits to state the common object of the unlawful assembly. The common object should always be stated when a charge is framed under sec. 143, I. P. C. or the connected sections. The second charge is under sec. 379, I. P. C., and the property said to have been stolen is described simply as Damu's property. It is represented to us that the land on which the paddy said to have been cut by the accused was grown could have been described with much greater precision. That appears to be true and I think that as the first charge must be amended, the second charge should also be amended by a more accurate description being given of the land from which the complainant alleges the paddy was cut and removed by the accused. The amendment of the charges will involve the duty of giving the accused an opportunity of cross-examining the witnesses for the prosecution again. The case is, therefore, remitted to the first Court to be disposed of as directed above.

B. K. C.

(1) I. L. R. 45 Bom. 672 (1920).

(2) 6 P. L. J. 641; [1920] Pat. 7; 2 P. L. T. 520 (1921).

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Mr. Neogy's Bill and Enrolment of Advocates.

We publish in another column Mr. Neogy's Bill for the amendment of sec. 4 of the Legal Practitioners Act of 1879 side by side with sec. 1 as it exists now. It will be seen that his object is that a Vakil may be entitled to practise in all matters on the Original Side of the High Court on the roll of which he is entered. The present law is that Advocates enrolled by the High Courts which exercise Original Jurisdiction are alone entitled to practise on the Original Side. The High Courts of Calcutta, Madras and Bombay are the only High Courts in India which exercise Original Jurisdiction in these Presidency Towns. In the High Courts of Madras and Bombay, Vakils of a particular standing may, under the powers conferred on the Hon'ble Judges under sec. 9 of the Letters Patent, be enrolled as Advocates. In Madras only such Vakils as have obtained the M. L. degree from the University of Madras may be so enrolled. In Bombay there is no such hard and fast rule but the Judges may, under their discretionary power, enrol a Vakil of sufficient practice, standing and experience as Advocate. In Calcutta alone, only Barristers-at-Law and Scotch and Irish Advocates may be enrolled as Advocates. As the High Courts of Madras and Bombay have for some time past been enrolling Advocates from amongst the Vakils, we see no reason why the Calcutta High Court should exclude them as a class from being admitted to a similar privilege. We think that the Madras rule is much too stringent. A University degree of a high order does not necessarily make one a successful practitioner of law. It would be more reasonable to enrol Advocates by reference to their forensic ability, standing and experience. We think that it is high time that the Hon'ble

Judges should frame rules for the admission of Advocates from amongst the Vakils

When the object that Mr. Neogy has in view may be met by the Calcutta High Court framing rules on similar lines as the other High Courts in India under the Letters Patent, we do not think that it will be wise or desirable on the part of the Indian Legislature to interfere in matters which the Legislatures both in this country and in England have always left to the jurisdiction of the High Court of Judicature. Quite apart from such question we shall take the liberty of pointing out how the course proposed to be adopted by Mr. Neogy will result in anomalies. We invite attention to what in fact is the main provision of the Bill, namely, that a Vakil on the roll of any High Court . . . shall be entitled to practise in all matters in the Original Jurisdiction. Assuming that the Bill is passed, the result will be that a Vakil will not only then be entitled to plead on the Original Side but will also be entitled to act, i.e., do Solicitor's or Attorney's work. Would not this be highly unfair to the Solicitors and Attorneys practising in the Calcutta High Court? It must be remembered that they have to pay a high premium of several thousand rupees for getting attached to a firm of solicitors. They have to serve a period of articleship for five years. With their articleship does not mean a mere nominal compliance but hard work and drudgery of various kinds such as drafting of legal documents and attending to all the details of original suits and the practice and procedure relating to them at all stages. After five years of grinding they have to pass a very stiff examination. Is it therefore fair that a Vakil without any training whatsoever in such work would be entitled on enrolment to do their work both in chambers and in Court and before the Registrar, Referees and Master? Mr. Neogy no doubt, suggested in his speech when introducing the Bill that the Solicitors might continue to instruct the Vakils on the Original Side. But the functions of the Solicitors are not merely to instruct but also to appear before the Judge in chambers and to act in various stages of the

suit When the Solicitors cannot practise on the Appellate Side without qualifying themselves as Vakils, even after their prolonged preliminary training, would it be unfair if they maintained that Vakils should not be entitled to act on the Original Side before qualifying themselves as Solicitors? We have said before that we are not opposed to even the merger of the legal professions but should it come it can only come after due consideration of the various interests, both vested and prospective, that are likely to be affected by it. We venture to suggest therefore that the object that Mr. Neogy has in view will be achieved if the Hon'ble Judges would accept our suggestion.

According to the practice in the Madras High Court, Vakils are allowed to act, i.e., do Solicitor's work on the Original Side. Then again in Burma Advocates (Barristers) are allowed to do Solicitors' work. In Calcutta Advocates can only plead and cannot act. Solicitors can alone act on the Original Side. If the time-honoured practice in the Calcutta High Court has to be altered it can only be done after consultation and with the consensus of those whose interests and status will be affected by it. The allocation of different functions to different classes of lawyers or to attach them to different sides of the High Court, as is done in England, is nothing unfair. The Vakils here can plead and act on the Appellate Side. Advocates can only plead on the Original Side or the Appellate Side of the Calcutta High Court. It will not be to the interest of Vakils as a class if they are all admitted to the privilege of Advocates and are so debarred from acting. It is to the interest of junior Vakils that they should be allowed to act and plead on the Appellate Side. So the only practical and satisfactory solution of the question raised by Mr. Neogy would be to enrol only such Vakils as Advocates who would not suffer in practice by being debarred from acting. Junior Vakils will have their turn later on.

When the Advocates are in requisition on the Original Side, people of this country will no longer send their sons to England and waste a fortune for getting them called to the English Bar. Nor will the Vakils find it worth their while to throw away thousands of rupees for getting called to the English Bar and wait for briefs in consent cases and undefended suits before they can command a practice on the Original Side. It will be otherwise if

Vakils of standing are enrolled as Advocates. This is no idle speculation on our part. Only twenty years ago the leaders of Calcutta Bar on the Original Side were all English Barristers. Now, they have been replaced by Indian Barristers. In the same way as soon as the Vakil-Advocates make a headway on the Original Side, they will before long attain the position of leaders there and the Vakil Bar will be a nursery of legal talent in the country.

Review.

REPORTS OF THE INDIAN ELECTION PETITIONS, 1920. By E. L. L. Hammond, C.B.E., I.C.S. Allahabad, The Pioneer Press, 1922.

Mr. Hammond has been studying the electioneering law since the Reforms were introduced into India. Just before the Election of 1920 he published his "Indian Electioneering," which came very handy to the candidates for the Provincial Councils and the Indian Legislature. In that book he presented the Indian Election rules and in doing so pointed out where they followed the English law and wherein they differed. His exposition of the law of corrupt practices furnished a useful guide for avoiding the pitfalls of an election. This compilation of the election cases that followed the last election may be regarded as a companion volume which illustrates by concrete examples where an election may be successfully impugned for infringement of the electioneering rules and for corrupt practices of the candidates or their agents. Reports of twenty-two cases are given in this volume. The Editor begins the report by giving a head-note to each case. The petition is given in full and the decision as well. Matters of practice, such as, in what particulars an election petition may be amended after filing, are also noted. The cases have been compiled for all over India. The last case given is that of *Yatindra Nath Roy Chowdhury v. Surendra Nath Roy* from Bengal. In this case the petition failed but no cost was awarded against petitioner as there were some material irregularities. The *Hissar* case is one of what is known in electioneering law as "treating." The case was that a 100 voters of a village were fed and given sweet-meats on the polling day by two persons intimately connected with the candidates. Although direct responsibility on the part of the candidate in this connection was not established, yet the election was set aside on inferences of agency. Cost was awarded against him. In the *Durbhanga* case amongst

other grounds it was alleged by the petitioner that the Respondent had represented to the voters that he had Mr. Gandhi's support and that the Respondent's ballot-box had been sent by Mahatma Gandhi. The Commissioners disbelieved the allegation and the petition was dismissed with costs. Some of the election petitions have a lot of latent humour in them. For instance, in one case the allegation was that the Respondent was regarded in his constituency as in league with cattle thieves and that he had made use of threats of cattle lifting. In view of the election that will take place in 1923, every one who may be interested in it will find this volume of reports very useful and interesting reading.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION Before TRUNON and GREAVES, J.J. APPEAL FROM ORIGINAL DECREE No 56 OF 1917. GURU DAS CHOUDHURY and ors., Defendants Nos 1 to 7, Appellants v. KAMAL KUMAR DUTT, Plaintiff-Respondent. The 13th January 1919

Hindu Will—Will by mother—Sons given power to enjoy surplus profits but not to alienate—Estate devised, life-estate only

This was an appeal against the decree of Babu Debendra Nath Pal, Subordinate Judge of Howrah, dated the 17th February 1917.

The question in this appeal was as to the validity of a mortgage of certain property, executed on 3rd May 1889 by one Nagendra Nath Mullik in favour of one Kedar Nath Kundu Chowdhury. Kedar Nath had sued on his mortgage and obtained a decree on the 19th September 1892 under which the properties were put up to sale. Defendants Nos. 1 to 7 claimed title to the properties in suit under purchases made at this sale. The Plaintiff sued to recover from these Defendants an eight annas share in these properties and his case briefly was that Nagendra Nath Mullik had no right to deal with the said share which belonged absolutely to one Jogendra Nath Mullik through whom he claimed. It appears that the properties were formerly held by Shama Sundari Dassi, mother of Nagendra and Jogendra, and that by a Will executed on the 16th March 1872, the lady had dealt with them as her own, and one of the questions which arose for consideration in the suit was as regards the construction of the

said Will. When the suit was pending in the Original Court Plaintiff had amended the plaint and set up an alternative claim as the heir of Shama Sundari.

By her Will Shama Sundari appointed her sons Jogendra and Nagendra trustees of her properties and directed them to make proper arrangements for managing and preserving them, to pay out of the profits certain public charges, costs of repairs, the maintenance of certain persons and the expenses of certain religious observances and ceremonies. The balance of the profits, the Will provided, should be appropriated and enjoyed by Jogendra and Nagendra during their life-times. The Will further provided that on the death of Jogendra and Nagendra the son or sons-born of them sons who might be alive should be equally and fully entitled to the properties and should possess and enjoy the same. Jogendra and Nagendra were not to be entitled to transfer the properties which were also not to be sold for their debts, but if they desired to do any meritorious work they would be entitled to pay reasonable expenses for the same out of the profits and their heirs would be bound to finish any such work commenced but left incomplete by them. There was a provision that if the income of the estate was insufficient to pay the revenue due to Government, Jogendra and Nagendra would be entitled to pay the same by mortgaging the properties.

Held—That Jogendra and Nagendra acquired life interests only under the Will.

That Jogendra having died without leaving a son and later on Nagendra having died without leaving any son surviving him, there was an intestacy after Nagendra's death of the corpus of the estate.

That the decree of 19th September 1892 in the mortgage-suit did not bind the estate of Shama Sundari, inasmuch as that suit was against Nagendra's administratrix, his daughter Giribala, and no representative of Shama Sundari had been brought on the record; and in consequence the decree-holder and those claiming under him had acquired no title against the heir of Shama Sundari.

That Plaintiff as such heir was entitled to recover in this suit from the Defendants.

Sir Rash Behari Ghosh and Babus Bandy Nath Dutt and Bhupendra Kumar Ghosh for the Appellants.

Sir D. C. Mitter, Dr. Dwarka Nath Mitter and Babu Samarendra Kumar Dutt for the Respondent.

N 6

Annual dismissed

MR. NEOGY'S BILL.

Further to amend the Legal Practitioners Act, 1879.

It is hereby enacted as follows.—

1. This Act may be called the Legal Practitioners (Amendment) Act, 1922.

2. For sec. 1 of the Legal Practitioners Act, 1879, the following shall be substituted, namely.—

"4 (1). Notwithstanding anything to the contrary provided by any law or by any rule framed by any High Court under the Letters Patent constituting such Court or otherwise, every person now or hereinafter entered as an advocate or a vakil on the roll of any High Court under such Letters Patent or under sec. 11 of this Act, shall be entitled to practise in all matters in the Original as well as Appellate Jurisdiction of the Court on the roll of which he is entered

"(2). Every such advocate or vakil shall be entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered, and in all revenue-offices situate within the local limits of the Appellate Jurisdiction of such Court, subject, nevertheless, to the rules in force relating to the language in which the Court or office is to be addressed by pleaders or revenue-agents, and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto, shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in British India other than a High Court on whose roll he is not entered, or, with the permission of the Court, in any High Court on whose roll he is not entered, and in any revenue-office.

"(3). Advocates and vakils entered on the rolls of any High Court shall, in the conduct of cases, have pre-audience according to the respective dates of their enrolment."

LEGAL PRACTITIONERS ACT
(XVIII OF 1879).

1. Every person now or hereafter entered as an advocate or vakil on the roll of any High Court under the Letters Patent constituting such Court, or (under sec. 41 of this Act), (or enrolled as a pleader in the Chief Court of the Punjab under sec. 8 of this Act) shall be entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered, and in all revenue-offices situate within the local limits of the Appellate Jurisdiction of such Court, subject, nevertheless, to the rules in force relating to the language in which the Court or office is to be addressed by pleaders or revenue-agents, and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in British India other than a High Court on whose roll he is not entered, or, with the permission of the Court, in any High Court on whose roll he is not entered, and in any revenue-office.

Provided that no such vakil (or pleader) shall be entitled to practise under this section before a Judge of the High Court, Division Court or High Court exercising Original Jurisdiction in a Presidency Town

11 (1) A High Court not established by Royal Charter may, from time to time, with the previous sanction of the Local Government, make rules as to the qualifications and admission of proper persons to be advocates of the Court, and, subject to such rules, may enrol such and so many advocates as it thinks fit

(2) Every advocate so enrolled shall be entitled to appear for the suitors of the Court, and to plead or to act, or to plead and act, for those suitors, according as the Court may by its rules determine, and subject to those rules.

ASHUTOSH CHATTERJI v. UPENDRA CHANDRA AICH.

refer to two different things. The certificate is to be granted after the rent is fixed and it is to be granted to either of the parties. We do not think, therefore, that the use of the two expressions leads to the conclusion that the fixing of rent by the Controller can be made only under the provisions of sec. 15.

It appears, therefore, that the Act contemplates fixing of the standard rent by the Controller even in cases not coming under sec. 15, in other words, in cases coming under sec. 2 (f) (ii): and if the word "fix" has been used in that section in a particular sense, we must give the word the same meaning in other portions of the Act where it occurs.

We are accordingly of opinion that the order of the Rent Controller is liable to revision under sec. 18 of the Act. The order of the President is therefore set aside and the case is sent back to his Court in order that he may hear the applications made to him by both the landlord and the tenant and dispose of them according to law.

The Opposite Party, however, must pay the costs of the Petitioner, the hearing-fee in this Court being assessed at two gold mohurs. The costs in the lower Courts will abide the result.

J. N. R. Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

VISCOUNT CAVE.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

1922,

Heard, 20, 21, February
and 2, March.

Judgment,
21, March.

KHAN BAHADUR
MOHAMMAD ABDUL
GHANI KHAN, since
deceased (now represented by Mohammad
Ibadul Ghani Khan
and anr.), and anr.,
Appellants,

v.

MUSAMMAT FAHR
JAHAN BEGAM and
ors., Respondents.

Oudh Taluqdar, primogeniture sanad to—Construction—"Successors," if includes transferees by Will or deed—Sunni Mahomedan law—Document whether deed or Will—Test—Inartistic, drafting in India—Gift inter vivos, conditions of—Delivery of possession, actually or constructively, sufficient—Gift of immovable property reserving usufruct in part—Delivery of actual possession of the other part, sufficient as delivery constructively of the whole.

Held, on a construction of a primogeniture sanad granted to an Oudh Taluqdar, that the word "successors" in it meant those designated persons who would succeed in the event of an intestacy and not persons who took, by sale, gift or bequest.

That the grantee's widow to whom the Taluqdar left the Taluqdari property by Will, when by right of inheritance under the sanad it should have gone to the elder of the two surviving brothers, was not competent to alienate the property under the terms of the sanad as a "successor" of the grantee, but could do so subject to the provisions of the Sunni Mahomedan law, the personal law by which she was governed.

In Mahomedan law the broad distinction between a gift (hiba) and a bequest (wasiat) is that in the case of a gift the immediate right of property in the subject of the gift is conferred and in the case of a bequest

KHAN BAHADUR MOHAMMAD ABDUL GHANI

the vesting of the right of property is postponed.

Held, on a construction of the document in question in this case (after adverting to the difficulty of construing Indian documents owing to the absence of a uniform and accurate system of conveyancing and to the fact that deeds and Wills are as a rule most inartistically drawn, frequently by persons not possessed of legal knowledge), that it was intended to be an irrevocable disposition by the donor of all her moveable and immoveable property and all her zamindari and lambardari estate mentioned in the deed and in the schedules thereto, subject to the reservation for her own use during her life-time of the usufruct of some of the immoveable properties.

The reservation of the usufruct does not by itself make the gift of such property by a Sunni Mahomedan void under Mahomedan law.

NAWAB UMJAD ALLY KHAN v. MUSSUMMAT MOHUMDEE BEGAM (2) followed.

For a valid gift inter vivos under the Sunni Mahomedan law, the three conditions which are necessary are (a) manifestation of the wish to give on the part of the donor, (b) the acceptance of the donee, either impliedly or expressly, and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively.

The old and admittedly authoritative texts of Mahomedan law relating to gifts

(2) 11 M. I. A. 517; 10 W. R. P. C. 25 (1867)

KHAN v. MUST. FAKHR JAHAN BEGAM.

could not have been intended to lay down for all time what should alone be the evidence that title to lands had passed.

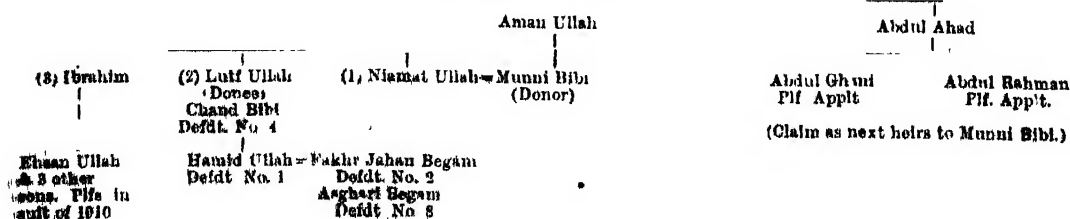
The object of the Mahomedan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

Where by the same act, the donor gave the whole of her zamindari property to the donee, but a part of it being given subject to the reservation of the usufruct in the donor, actual physical possession was taken by the donee of the rest only.

Held—That the taking possession by the donee of a part only amounted to taking possession constructively of the whole zamindari including the part of which physical possession was not taken even though the donee did not apply for mutation of names in respect of the latter property.

These were consolidated appeals from a judgment and two decrees, dated the 19th December 1917 of the Court of the Judicial Commissioner of Oudh, which reversed a decree, dated the 13th July 1915 of the Subordinate Judge of Kheri.

The parties are Sunni Mahomedans and their relationship is shown by the following pedigree.—



KHAN BAHADUR MOHAMMAD ABDUL GHANI KHAN v. MUST. FAKHR JAHAN BEGAM.

The suit was instituted on the 20th February 1914 by the Plaintiffs-Appellants as the legal heirs of Munni Bibi for the recovery of certain lands in Mundia Misr Jalalpur and Gundhia.

The lands in question were originally held by Niamat Ullah Khan who died in 1867 having by his Will, dated the 20th May 1865, bequeathed his entire estate to his wife Munni Bibi who survived him and succeeded to the Taluqa. Niamat Ullah's name was entered in Lists Nos. 1 and 2 annexed to the Oudh Estates Act, I of 1869.

On the 15th November 1876 a share in the village Gundhia was granted by Government to Munni Bibi who was in possession of the lands in suit until her death on the 16th June 1906.

On the 7th March 1884 Munni Bibi had executed a document in favour of her husband's elder brother Lutf Ullah Khan.

By this document which is fully set out in the judgment of the Board Lutf Ullah was enabled to enter into possession of the whole of Munni Bibi's property with the exception of certain scheduled lands, which were "exempted" and of which she retained possession during her life.

On the death of Munni Bibi, Lutf Ullah obtained possession of the "exempted" lands also and the present first Appellant claims to have become entitled thereto on Lutf Ullah's death intestate a year or two later. Subsequently the sons of Ibrahim set up an alleged Will of Munni Bibi, dated the 10th June 1906, in their favour and brought a suit for possession. To that suit the Plaintiffs-Appellants offered no defence and Abdul Ghani who was called as a witness expressly disclaimed any share in the property.

That suit was finally dismissed on the 13th March 1912.

The present suit was instituted by the

Appellants on the 20th February 1914 claiming as heirs of Munni Bibi under the Mahomedan law of succession.

The claim of the Plaintiffs was denied by the Defendants and the Respondents. Mussammat Fakhr Jahan Begam and Pandit Sheo Dayal pleaded *inter alia* that the property in dispute passed to Lutf Ullah Khan by the document of 7th March 1884 and that the transfers under which they held possession were validly made by Lutf Ullah.

The Subordinate Judge by whom the suit was tried found that the document of 7th March 1884 operated as a Will so far as the lands in suit were concerned. He held that sec. 41 of the Transfer of Property Act did not apply to the case of Pandit Sheo Dayal and the other transferees and gave the Plaintiff a decree for possession of a two-third share of the property. Against this decree appeals were preferred by the second and fifth Defendants and the Plaintiffs filed cross-objections. The appeals and objections were heard by a Court of the Judicial Commissioner of Oudh composed of Stuart and Kanhaiya Lal, JJ., who delivered separate judgments on the 19th December 1917.

The learned Judicial Commissioners agreed in holding that the document of 7th March 1884 was a deed of gift and not a Will and that title to the property in dispute passed thereunder to the donee, and they held that in any event the Plaintiffs' claim, was barred by the provisions of sec. 41 of the Transfer of Property Act. In the result a decree was passed in the appeal and the cross-objections and the suit were dismissed. From this decree the Plaintiffs appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellants.—The document of the 7th March 1884 is a gift,

KHAN BAHADUR MOHAMMAD ABDUL GHANI and not a Will : and possession of the subject-matter was never given, therefore it is invalid

If it is construed as a Will it can only be valid as to one-third of the property unless the heirs consented to the devise, and the evidence shows that they did not consent.

The contention that the parties were Hindus has been abandoned, and the question is now purely one of Mahomedan law.

Niamat Ullah devised the whole of his estate to Munni Bibi in 1865, *i.e.*, prior to the Oudh Estates Act, 1869 and died in 1867.

Had Niamat Ullah died after the Act, succession to his estate would have been governed by sec 22 of the Act but Munni Bibi took under the Will and prior to the Act.

Thakurain Balraj Kunwar v Rao Jagatpal Singh (3) and *Thakur Sheo Singh v Raghubans Kunwar* (4)

Mr. Dubé —The Act has been amended by Act III of 1910 and the definition of "legatee" is amended.

Mr. DeGruyther, K. C. —Munni Bibi died in 1906 prior to the amendment. You cannot apply the terms of the Act because no "legatee" took under it, nor the terms of the *sanad*, because Munni Bibi was not a "successor." You are bound therefore to fall back on the ordinary principle of Mahomedan law.

Ghulam Abbas Khan v. Amatul Fatima (1).

The document executed by Munni Bibi contains a gift to her brother-in-law Lutf Ullah of all except three properties. These latter Munni Bibi is to retain

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during her life and Lutf Ullah is to have them at her death.

Nawab Umjad Ally Khan v. Mussummat Mohumdee Begum (2).

There was no delivery during Munni Bibi's life-time and the donee was not on the register until after her death

To complete a transfer there must be actual delivery of possession

Ronald Wilson's Mahomedan Law, (1908), p 322

Ranee Khujooroomissa v Mussammatt Roushan Jehan (5)

You cannot have a completed gift where the donee allows the donor to remain in possession

Hamilton's Hedaya (Grady's Edition), Book 30, p. 482

There must be delivery of possession so far as the property is capable of delivery

Chaudhri Mehdi Hasan v Muhammad Hasan (6), *Sadik Husain Khan v Hashim Ali Khan* (7) and *Mahomed Buksh Khan v Hossein Bibi* (8)

Even assuming the document is to be construed as a Will the question that arises is—Has the heir in fact foregone his right in regard to this particular document and this particular legacy?

[VISCOUNT CAVE.—Referring to *Daulatram v. Abdul Kayum* (9)—Does not acquiescence amount to consent?]

Mr. DeGruyther, K. C.—Any admission we made as to the Will of 1906 was only an admission as to that document and only as regards Ehsan Ullah

(2) 11 M. I. A. 517 10 W. R. P. C. 25 (1867).

(5) L. R. 31 A. 291 at p 307 s. c. I. L. R. 2 Cal. 184 (1876).

(6) L. R. 33 I. A. 68, 75; s. c. 10 C. W. N. 706 (1906).

(7) L. R. 43 I. A. 217; s. c. 21 C. W. N. 130 (1916).

(8) L. R. 15 I. A. 81, 95; s. c. I. L. R. 15 Cal. 684 (1888).

(9) I. L. R. 20 Bom. 497 (1901).

(1) L. R. 49 I. A. 135 (1921)

(3) L. R. 31 I. A. 132 at p. 143; s. c. 8 C. W. N. 699 (1904).

(4) L. R. 32 I. A. 208 (1905).

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Consent must not be presumed from any actions, it must be affirmatively established. It must be shown that I treated the document as a Will and as a document alienating my two-third share and that I was willing that it should do so.

The evidence does not support any such theory.

Estoppel under sec 41 of the Transfer of Property Act, 1882 is only operative in favour of a transferee for value in good faith.

I have not induced Sheo Dayal to think that Lutf Ullah was full proprietor. I was not entitled to possession so I could not go and apply for mutation of names. I never either expressly or impliedly consented to the transfer. Mere inaction cannot operate as an estoppel.

Baswantapa Shidapa v. Ranu & Malhana (10)

Moreover in the mortgage to Sheo Dayal there was express notice to the mortgagee that the property had once belonged to the wife of Niamat Ullah.

Ramcoomar Koondoo v. Macqueen (11)

Sec 41 of the Transfer of Property Act is only a branch of sec 115 of the Indian Evidence Act. The section says that the transferee must take all reasonable steps to ascertain that the transferor has power to transfer. He took no such steps.

Mr. Dubé for the Respondents was not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are consolidated appeals by the Plaintiffs from two decrees, dated the 19th December 1917, of the Court of the Judicial Commissioner of Oudh, which reversed the de-

crees, dated the 13th July 1915, of the Subordinate Judge of Kheri, and dismissed the suit.

The suit was brought on the 20th February 1914 in the Court of the Subordinate Judge by Mohammad Abdul Ghani Khan and Mohammad Abdul Rahman Khan against Mohammad Hamid Ullah Khan, Musammat Fakhr Jahan Begam, Musammat Asghari Begam, Musammat Chand Bibi and Pandit Sheo Dayal, for the possession of Mauza Mundia Musir, a 4 annas and 5 pies share in Mauza Gundhua, and two groves, a house and certain *sir* land in Jalalpur, and for mesne profits. It was a suit of ejectment on title. The Plaintiffs alleged that the right to possession of all the properties in suit was in them as the heirs of Musammat Munni Bibi, who had died on the 16th June 1906, and that the Defendants had no title. The Defendants, who are the Respondents, were not all jointly interested in any of the properties. Some of the Defendants were in possession of some of the properties, others of the Defendants were in possession of other parts of the properties in suit, but the different titles of all the Defendants originated in a document of the 7th March 1884, which was executed by Munni Bibi, and has been variously construed as a deed of gift and as a Will.

Munni Bibi was the widow of Niamat Ullah Khan, who died childless on the 29th August 1867. Niamat Ullah Khan, Munni Bibi and the Plaintiffs, who were her first cousins, were Mohammedans of the Sunni sect, and the Plaintiffs were, when Munni Bibi died in 1906, her heirs, according to the Mohammedan law applicable to Sunnis. The family to which these Mohammedans belonged had, several centuries ago, been Thakurs professing the Hindu religion, who were converted to

(10) 1 L. R. 9 Bom. 86 (1884).

(11) 11 B. L. R. 46; 18 W. R. 160 (P. C.) (1872).

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Islam, and at one period of this suit it was contended by the Defendants, or some of them, that the family had always continued to be governed in matters of succession and inheritance by the rules of the Mitakshara and not by the Mohammedan law. That contention has been abandoned.

Niamat Ullah Khan lived in the village of Jalalpur and was a Taluqdar of Oudh. After the Mutiny of 1857 he received from the British Government the Taluqa of Agar Buzurg, which included, with many villages not now in question, all the immoveable property in question in this suit except the 4 annas 5 pies share in Mauza Gundhua, which was granted to Munni Bibi on the 15th November 1876, by the British Government absolutely in her own right. Although Niamat Ullah Khan had died in 1867, his name was entered as that of the Taluqdar of the Taluqa Agar Buzurg in Lists I and II, which were prepared under Act I of 1869. Instances of the names of other persons who had died before 1869 being entered in those Lists occur.

The British Government granted to Niamat Ullah Khan in his life-time a primogeniture *sanad* in which the Taluqa Buzurg is described as the estate of Jalalpur in Zillah Mohamdi. That *sanad* is as follows:—

“C. WINGFIELD,

Chief Commissioner of Oudh

“To

“NIAMAT ULLAH OF JALALPUR.”

“Know all men that whereas by the Proclamation of March, 1858, by His Excellency the Right Honourable the Viceroy and Governor-General of India, all proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, Charles John Wingfield, Chief Commissioner of Oudh, under the authority of His Excellency

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the Governor-General of India in Council do hereby confer on you the full proprietary right, title and possession of the estate of Jalalpur in Zillah Mohamdi consisting of the villages as per list attached to the *labuliyat* you have executed, of which the present Government revenue is Rs. 5,752 (five thousand seven hundred and fifty two).

“Therefore this *sanad* is given you in order that it may be known to all whom it may concern, that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms, destroying all forts, preventing and reporting crime, rendering any service you may be called upon to perform and of showing constant good faith, loyalty, zeal and attachment to the British Government according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs.

“It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate the estate shall descend to the nearest male heir, according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please.

“It is also a condition of this grant that you will so far as is in your power promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature.”

The *labuliyat*, mentioned in the *sanad*, related to more than 30 villages and included Mauza Mundha Misr and Mauza Agar Buzurg (Jalalpur), parts of which

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are claimed by the Plaintiffs in this suit. The Plaintiffs do not claim any interest in any of the other villages mentioned in the *kabuliyat*, and do not contend that Munni Bibi was not entitled to give or bequeath those other villages to whom she liked. As will be seen presently, her title to, and interest in, all the villages mentioned in the schedule to the *kabuliyat* was as the devisee of her husband Niamat Ullah Khan.

On the 20th May 1865, Niamat Ullah Khan made the following Will:—

"I am Mohammad Niamat Ullah Khan, Taluqdar of Jalalpur, Parganas Karanpur and Aliganj.

"Whereas the Government has asked for a Will from the declarant, and the declarant has no issue and is issueless up to this time, and it is necessary to appoint a legatee after me, I, while in the enjoyment of sound health and perfect intellect, during my life-time, having executed this Will, declare that, after me, my wedded wife shall be the owner and possessor of the moveable and immoveable property, like myself. If the heirs belonging to the brotherhood lay a claim, the same shall be invalid and unenforceable before the Government. Wherefore I have executed these few presents by way of a Will so that it may serve as an authority and be of use in time of need.

"Scribed by Najju Khan, General Agent
Dated 20th May 1865

"NIAMAT ULLAH KHAN,
"Taluqdar of Agai Buzurg"

Under the *sanad* Niamat Ullah Khan had power to bequeath the Taluq of Buzurg (the estate of Jalalpur) to whom he pleased, and under that Will the Taluq passed on his death on the 29th August 1867, to his widow Munni Bibi. At the date of the Will of Niamat Ullah Khan, there were living two younger brothers of Niamat Ullah Khan, of whom Lutf Ullah Khan was the elder, and Ibrahim Khan was the younger. Those younger brothers survived Munni Bibi. One question in

this case is whether Munni Bibi was a "successor" of Niamat Ullah Khan within the meaning of the *sanad*; if she was, she had power to make a gift of, or to bequeath, the whole Taluq or any part of it to whom she pleased. If she was not a "successor" of Niamat Ullah Khan within the meaning of the *sanad*, she had power to make such a gift as would be recognised as a valid gift by the Mohammedan law applicable to Sunnis, of the whole Taluq or of any part of it to whom she pleased.

On the 7th March 1884, Munni Bibi executed a document which has been construed by the Subordinate Judge as partly a deed of gift and in part a Will, and has been construed by the Judicial Commissioners as a deed of gift. As translated by the official translator it is, so far as is material, as follows:—

"I am Thakurain Musammat Munni Bibi, wife of Mohammad Niamat Ullah Khan, Taluqdar of Mirzapur and Jalalpur, Parganas Bhur and Paila, district Kheri

"Whereas my husband, during his life-time bequeathed the entire property of the aforesaid Ilaga to me, and I, in accordance with the said Will, am in possession and ownership of the same, now I, while in sound health and in possession of perfect intellect without force and reluctance, of my own free will, make a gift of the moveable and immoveable property, the entire *zamindari* and *lambardari* estate, &c., in favour of Mohammad Lutf Ullah Khan, son of Mohammad Ibad Ullah Khan, the brother of my husband, the detail whereof is being given below, with the exception of the villages and *sur* lands, &c., of the estates, specified below, which shall, during my life-time, remain in my and my relation's possession, free of rent and without payment of Government revenue: and I do hereby vest the donee with the power to have the mutation of names effected in his favour. Now I have nothing to do with the gifted property and estate. I shall keep the villages and *sur*

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lands, which have been exempted hereunder, for my life-time without the power of alienation by mortgage, sale and gift, and after me, the donee shall also be the owner of the said exempted property. The donee shall pay the Government revenue of the exempted estate from the Ilaga with the exception of the revenue of Patti village Gundhia, which I shall pay out of my own pocket. The donee shall pay all the debt with which the estate is encumbered,--I, the donor, having nothing to do therewith. Wherefore I have executed these few words by way of a deed of gift on a stamp of Rs. 6,008 by fixing the value of the property at Rs. 60,000 (sixty thousand), so that it may serve as an authority and be of use when required.

"Detail of the gifted immoveable property together with the amount of revenue and the boundaries

"Detail of the moveable property gifted.
Rs 2,610

"Detail of the property exempted, Rs 1,555

"Pargana Bhur, Pargana Paila, Rs 65
Rs 1,490

"Village Mundia "Su land at Jalal
Misir, standing in pur, measuring
the name of me, 135 acres Rs 65
the donor, during
life, rent and re-
venue free 855

"Patti Gundhia,
standing in the
name of me, the
donor 280

"Gungipur, includ-
ed in Hindolna,
standing in the
name of Moham-
mad Ibrahim
Khan ... 355

"Dated 7th March.
1884. Scrib'd by
the Registration
Clerk.

"Mark of the sig-

nature of the
*Thakurain Sa-
heba, wife of
Mohammad Nia-
mat Ullah Khan,
Taluqdar of Mir-
zapur, auto-
graph "

Mr. Kanhaiya Lal, in his judgment on the appeal to the Court of the Judicial Commissioner, gives a slightly different translation of part of the document of the 7th March 1884, as follows:—

"Now in sound health and full possession of my senses, without any persuasion or compulsion and of my own accord I have gifted my movable and immovable property, all my zamindari and lambdari estate, &c, to Mohammad Lutf Ullah Khan, son of Mohammad Ibad Ullah Khan, the brother of my husband, according to the details given below, with the exception of the villages and su land, &c, set out below, name by name, which will remain in my possession for the duration of my life and my dependent relatives (*sic*) free of rent and Government revenue, out of the aforesaid estate. At this time having exempted them I have made a gift, and by virtue of this deed have authorised the donor to get mutation of names made in his favour, and now I have nothing to do with the estate and property gifted, and such villages and su land aforesaid, as have been at this time for the duration of my life excepted (left out) will be kept by me without transfer by mortgage or sale or gift for my life-time, and after my death the donee will be the proprietor (*mulik*) of the aforesaid excepted property; and of the excepted property the donee will pay the revenue from the Ilaga except of the Patti Mauza Gundhia. Of the Patti Gundhia, I will pay the revenue from my own pocket and the donee will pay all the debts outstanding against the estate. I have nothing to do with them. Therefore these few words have been written by way of a deed of gift of inheritance and proprietorship on a stamp of Rs. 600,8,0 on a stated value of Rs 7,000 as a title deed which will be useful at the time of need."

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In the opinion of their Lordships there is no material difference between the two translations, they bear the same meaning. It should be mentioned that the punctuation in each translation is the punctuation of the person who made the translation. "Patti Mauza Gundhia" was the 4 annas 5 pies share in Mauza Gundhia which the Government had, subject to the payment of the Government Revenue, granted to Munni Bibi absolutely in 1876

On the execution of the document of the 7th March 1884, Lutf Ullah Khan got actual possession of all the property mentioned in it except Mauza Gungipur and the property now in question in this suit. Of the property now in question Lutf Ullah Khan did not obtain physical possession until Munni Bibi died in 1906

Lutf Ullah Khan mortgaged, on the 27th November 1907, the 4 annas 5 pies share in Mauza Gundhia for Rs. 11,000 to the Defendant Pandit Sheo Dayal. Lutf Ullah Khan died some years later, leaving him surviving his widow Musammat Chand Bibi and his son Hamid Ullah Khan. Hamid Ullah Khan, after his father's death, transferred to his wives, Musammat Fakhr Jahan Begam and Musammat Ashgari Begam, or to one of them, portions of the property now in question. On the 17th January 1913, there being then due to Pandit Sheo Dayal Rs. 20,000, under the mortgage of the 27th November 1907, Hamid Ullah Khan, Musammat Chand Bibi and Musammat Ashgari Begam sold the 4 annas 5 pies share in Mauza Gundhia to Pandit Sheo Dayal for Rs. 21,000

Before referring to the judgments of the trial Judge and in the Court of the Judicial Commissioner, it is advisable to mention some other matters. Niamat Ullah Khan's youngest brother was Ibrahim Khan, who died and left four sons sur-

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viving him, of whom Ehsan Ullah was the eldest. Ehsan Ullah and his three brothers on the 20th December 1910, brought a suit against Hamid Ullah Khan, his two wives, and Mohammad Abdul Gham Khan and Mohammad Abdul Rahman Khan, who are the Plaintiffs in the present suit, and in their plaint, alleging that Munni Bibi had by a Will of the 10th June 1906, bequeathed to their father, Ibrahim Khan, Mauza Mundia Misir, the 4 annas 5 pies share in Mauza Gundhia, and the two groves, the house and sir land in Mauza Jalalpur, all of which are claimed by the Plaintiffs-Appellants in the present suit, asked for a decree for possession. To that suit these Plaintiffs-Appellants offered no defence, and on the contrary the Plaintiff-Appellant here, Mohammad Abdul Ghani Khan, on the 4th November 1910, wrote to Ehsan Ullah as follows:—

"Claim for possession.

"My dear Mohammad Ehsan Ullah Khan and Abdullah Khan, *raiss* of Jalalpur

"After affectionate greetings, I write to say that as regards the property left and possessed by my deceased sister, Munni Bibi, the wife of Niamat Ullah Khan, Taluqdar and *raiss* of Jalalpur, you enquire about, I do not at all turn against the purport of her Will. You can obtain the said property under the Will by bringing a suit or otherwise, and I have no objection. You are quite free to take necessary steps. Abdul Rahman Khan too says the same thing. I have enquired from him also.

"With kindest regards.

"Yours affectionately,

"ABDUL GHANI KHAN,

"Taluqdar of Kukra.

"Dated 4th November, 1910."

Mohammad Abdul Ghani Khan was called as a witness for the Plaintiffs in the suit of 1910, and on being shown his letter of the 4th November 1910, said: "This letter I wrote with the permission of my brother Abdul Rahman Khan, who is joint

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with me," and "I never thought of the matter whether I am entitled to the assets of Munni Bibi or not. I disclaim a share in the property if I am entitled to it." When Abdul Ghani Khan gave his evidence in that suit he was 42 years of age, and it appears to their Lordships impossible to believe that he and his brother had never before 1910 considered the question as to whether they, as the heirs in Mohammedan law of Munni Bibi, had any claim to any part of the valuable property which had been hers. The Plaintiffs in the suit of 1910 failed to prove the execution of the alleged Will, and their suit was dismissed.

The learned Subordinate Judge, Mahmud Hasan, who tried the present suit, construed the document of the 7th March 1884, as a Will, so far as it related to the property in question here, and as a deed of gift so far as it related to the other property dealt with by it. He held that, sec 41 of the Transfer of Property Act, 1882, did not apply to the cases of Pandit Sheo Dayal and of the other transferees, and as he considered that it was not proved that Munni Bibi's heirs had assented to the bequest by her of the property in question, he gave the Plaintiffs a decree for the possession of a two-third share of that property. It should here be mentioned that it does not appear from the record that Pandit Sheo Dayal had given evidence in this suit or that he had made any enquiry as to the title of Lutf Ullah Khan to mortgage, or the title of Hamid Ullah Khan and his mother and wife to sell the 4 annas 5 pies share in Mauza Gundhia. From that decree the Defendants Musammat Fakhr Jahan Begam and Pandit Sheo Dayal appealed to the Court of the Judicial Commissioner. Their appeals raised the question as to the true construction of the document of the 7th March 1884, and consequently raised the

question as to the right of the Plaintiffs to maintain this suit. The Plaintiffs filed cross-objections.

The appeals and the cross-objections were heard by the learned Judicial Commissioners, Mr. Stuart and Mr. Kanhaiya Lal, and they delivered their very carefully considered judgments on the 19th December 1917. Mr. Stuart held that under the Taluqdari *sanad* Munni Bibi was a successor within the meaning of the terms "successors" in that *sanad*, and consequently had an absolute power to give or bequeath the Taluqdari property to whomsoever she pleased, a power of alienation which was not controlled by Mohammedan law. Mr. Kanhaiya Lal was of the contrary opinion: he rightly held that as Munni Bibi obtained her title to the Taluqdari property, not by right of inheritance under the *sanad* but under the Will of her husband Niamat Ullah Khan, she was not a successor within the meaning of the *sanad*.

In 1921, the Board in *Ghulam Abbas Khan v. Amatul Fatima* (1), which was an appeal from Oudh, held that the word "successors" in a similar primogeniture *sanad* meant those designated persons who would succeed in the event of an intestacy, and not persons who took by sale, gift or bequest. Had it not been for Niamat Ullah Khan's Will the Taluqdari property would, on his death, have vested by right of inheritance under the *sanad* in Lutf Ullah Khan, who was the elder of his two brothers. Under the circumstances, Munni Bibi's right to dispose by gift or by Will of the Taluqdari property was the right of an owner under the Mohammedan law, and was the same right which she had to dispose of the 4 annas 5 pies share in Mauza Gundhia.

The Judicial Commissioners agreed in
(1) L. R. 45 I, A 185 (1921).

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their construction of the document of the 7th March 1884, and held that it was, and operated as a deed of gift, and that all the property mentioned in it passed as a good and valid gift under the Sunni law to Lutf Ullah Khan. They held that Munni Bibi by that deed transferred the corpus of the property, the Taluqdari property and the 4 annas 5th pies share in Mauza Gundham, to Lutf Ullah Khan, reserving to herself for her life the usufruct of the property in question in this suit. Apparently they based their judgments on a decision of the Board in 1867, in *Nawab Umjad Ally Khan v. Mussummat Mohum-dee Begum* (2).

It had been contended on behalf of the Plaintiffs before the Judicial Commissioners that there had been no possession of this property now in question, given to or taken by Lutf Ullah Khan, and that, consequently the gift was void under the Mohammedan law, but they considered that the clear intention of Munni Bibi as shown by her deed was that the title to this property should immediately vest in Lutf Ullah Khan, and that she should have no right to sell, mortgage, or otherwise dispose of the property, and they found that as the usufruct was reserved for her life by Munni Bibi, it was not possible for physical possession of the property in the suit to be given to Lutf Ullah Khan in Munni Bibi's life-time. In the opinion of the Judicial Commissioners everything which was reasonably possible to make perfect the gift had been done and that nothing more was required to make the gift a good gift according to Mohammedan law. The Judicial Commissioners by the decrees of the 19th December 1917, set aside the decree of the Subordinate Judge, and dismissed the cross-objections and the

suit. From the decrees of the Judicial Commissioners these consolidated appeals have been brought.

Their Lordships will now consider whether the document of the 7th March 1884, may be regarded, so far as the property now in question is concerned, as a Mohammedan Will, and if it is not a Mohammedan Will, but is a deed of gift, then the question arises whether in the circumstances of this case the gift of this property to Lutf Ullah Khan became a valid gift under the Mohammedan law applicable to Sunnis.

In construing the document of the 7th March 1884, it has to be borne in mind that in Mohammedan law the broad distinction between a gift (*hiba*) and a bequest (*wasiat*) is that in the case of a gift the immediate right of property in the subject of the gift is conferred, and in the case of a bequest the vesting of the right of property is postponed. Owing to the fact that there is in India no uniform or accurate system of conveyancing, and to the fact that deeds and Wills are, in India, as a rule most inartificially drawn up, frequently by persons not possessed of legal knowledge, it is often difficult to ascertain with certainty what was precisely intended by the document, and in some cases to ascertain whether the document was intended to operate as a deed of gift or as a Will. Their Lordships have, for the following reasons, come to the conclusion that the document of the 7th March 1884, cannot be regarded in any respect as a Will.

On the 7th March 1884, Munni Bibi was, as she recited in the document, the owner in possession of the entire property of the Ilaga (the Taluqa of Agar Buzurg) which her husband had bequeathed to her, and she was also the owner in possession of the 4 annas 5th pies share in Mauza

(2) 11 M. L. A. 517 at pp. 547, 548; 10 W. R. P. O. 25 (1867).

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Gundhia; that 4 annas 5 pies sharé and the Taluqdari property constituted her zamindari estate. As their Lordships read the deed, Munni Bibi by it made a gift to Lutf Ullah Khan of "my movable and immovable property, all my zamindari and *lambardari* estate, etc.," reserving to herself for her life the usufruct of the property now in question, but making it clear that by that reservation of the usufruct she did not reserve to herself any right to transfer by mortgage or sale or gift any part of the property. As their Lordships read the deed it was intended to be and to operate as an immediate and irrevocable disposition of all Munni Bibi's movable and immovable property, and all her zamindari and *lambardari* estate mentioned in the deed and in the schedules to it, subject to the reservation for her own use during her life-time of the usufruct of the property in question here, and it must be construed as a deed of gift and not as a Will.

The reservation of the usufruct did not by itself make the gift of the property now in question void under Mohammedan law. So far as that is concerned there is the authority of the Board in *Nawab Umjad Ally Khan v. Mussummat Mohumdee Begum* (2) for that statement as to Mohammedan law, although the parties in that case were Shias and not Sunnis. But in the Courts below and in this appeal it has been contended that the deed of the 7th March 1884, is void so far as it purported to be a gift of the property in question in this suit on the ground that no possession was actually taken of this particular property, and no mutation of names in respect of this particular property was obtained, by

Lutf Ullah Khan until Munni Bibi had died in 1906.

That contention has raised a question by no means easy of solution. The solution of that question depends upon what are the facts here and upon what is the rule of Mohammedan law applicable to those facts. In considering what is the Mohammedan law on the subject of gifts *inter vivos* then Lordships have to bear in mind that when the old and admittedly authoritative texts of Mohammedan law were promulgated there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land, or any zamindari estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Mohammedan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

• For a valid gift *inter vivos* under the Mohammedan law applicable in this case, three conditions are necessary, which their Lordships consider have been correctly stated thus:—“(a) Manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly; and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively.” (“Mohammedan Law,” by Syed Ameer Ali, 4th Ed., Vol. I, p. 41). In their Lordships' opinion, the whole zamindari property mentioned in the deed,

(2) 11 M. I. A. 517; 10 W. R. P. C. 25 (1887)

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and not parts of it only, must, for the purposes of this case, be regarded as one property, the taking possession of any part of it being constructively a taking possession of the whole. The wish of Munni Bibi to give that property to Lutf Ullah Khan and his acceptance of it on the 7th March 1884, are clearly manifest from a perusal of the deed which he received and acted upon. The question is, did Lutf Ullah Khan actually or constructively take possession of the property in question in this suit? That he did not, until Munni Bibi's death in 1906, take physical possession of Mauza Mundia Musir, the 4 annas 5 pies share in Gundhia or the two groves, the house and *sir* land in Jalalpur, or apply for mutation of names in his favour in respect of these particular properties, is admitted. On the execution of the deed of gift in 1884, Lutf Ullah Khan did obtain mutation of names in his favour of all the other zamindari property, and from the 7th March 1884, until Munni Bibi died in 1906, he paid the Government Revenue which became due in respect of the Taluqdari part of the property now in question. If Lutf Ullah Khan had received after the 7th March 1884, and before Munni Bibi died in 1906, any of the rents or profits of the property now in question, he would be held to have received them as a trustee for Munni Bibi, although the title to the corpus of the property was in him. In their Lordships' opinion Lutf Ullah Khan must be regarded as having been constructively in possession, although not in physical possession of the corpus of the property now in question from 1884 until 1906, and the gift was a valid gift.

Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitors: Messrs. Watkins and Hunter for the Appellants

Solicitors: Messrs. Barrow, Rogers and Nevill for the Respondents.

G. D. M

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 125 of 1921.

NOGENDRA NATH
CHOUDHURI, Defend-
ant, Appellant,
v.

SANDERSON, C. J.
RICHARDSON, J.

1922,
11, January.

ERALIGOOL COMPANY
LIMITED, Plaintiff,
Respondent.

Letters Patent, cl. 12—"Suit for land"—High Court's jurisdiction to entertain suit for specific performance of a contract to purchase a tea estate in Assam—Appointment of Receiver, discretion of Judge—Construction of statute

A, carrying on the business of tea planters, owned a tea estate in Assam. B entered into an agreement with A in Calcutta to purchase the estate for a certain sum, but subsequently failed to do so, and A brought a suit on the Original Side of the Calcutta High Court for specific performance or in the alternative, for damages. On an application by the Plaintiff the Judge appointed a Receiver, against which order the Defendant appealed, urging that the suit being a "suit for land" the High Court on its Original Side had no jurisdiction to try the suit in view of the terms of cl. 12 of the Letters Patent and hence had no jurisdiction to appoint a Receiver.

Held per SANDERSON, C. J.—That if the words "suits for land" are given their natural meaning, the suit does not come within the meaning of those words.

SUDAMDHI COAL CO., LTD. v. EMPIRE COAL CO., LTD. (1) distinguished.

(1) I. L. R. 42 Cal. 942 (1915).

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LAND MORTGAGE BANK v. SUDURUDEEN AHMED (2) relied on.

In construing a statute, it is necessary for the Court to give the natural meaning to the words which are used, and if it is thought advisable to include cases which are not covered by the words of the statute in their natural meaning, it is not for the Court to strain the language of the statute so as to include them, but it is the function of the Legislature to amend the statute and the same principle applies to the construction of the Charter.

Having regard to the fact that the agreement, which it is sought to enforce, was made in Calcutta, the Court had jurisdiction to entertain the suit.

The appointment of a Receiver is a matter for the discretion of the Judge—a discretion which must be exercised judicially and upon well recognised principles.

GIBBS v. DAVID (3) referred to.

Per RICHARDSON, J.—That this is not a suit for land either within the natural meaning of those words or within the meaning which had been given to them in previous decisions of this Court. Nothing can be decided in this suit between vendor and purchaser which directly affects the land or binds third parties who may have or may claim rights therein. That being so, the suit does not appear to be a suit brought for the purpose of establishing title to or acquiring possession of or control over land. The agreement having been made in Calcutta, and the suit being not a suit for land, leave was properly given to institute it on the Original Side.

SREENATH ROY v. GALLY DAS GHOSH (4), LAND MORTGAGE BANK v. SUDURUDEEN (2)

(2) I. L. R. 19 Cal. 355 (1892).

(3) L. R. 20 Eq. Cas. 473 (1875).

(4) I. L. R. 5 Cal. 82 (1878).

and SUDAMDIN COAL CO., LTD. v. EMPIRE COAL CO., LTD. (1) referred to.

The learned Judge having seisin of the suit, it was open to him in the exercise of his discretion to appoint a Receiver.

This was an appeal from an interlocutory order appointing a Receiver in Suit No. 562 of 1921, passed by the Hon'ble Mr. Justice Greaves on the Original Side on the 11th July 1922.

The facts will fully appear from the judgment.

Mr. H. D. Bose and Mr. A. N. Chaudhuri, Counsel, appeared for the Appellant.

Mr. Langford James and Mr. T. Ameer Ali, Counsel, appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves whereby he appointed a Receiver in a suit, upon an application of the Plaintiff Company. The suit was brought by the Plaintiff Company praying that the Defendant might be ordered and decreed to carry out the agreement referred to in the plaint and to execute and register the conveyance and for a decree for the sum of Rs. 88,280 being the expenses incurred by the Plaintiff Company in carrying on the estate from the 1st January 1920 to the 14th January 1921 and for the sum of Rs. 1,500 per week from the 14th January 1921 until the Defendant would take possession of the said estate less the sum which is referred to in the prayer, and for the sum of Rs. 7,800 odd as interest or by way of damages, or, in the alternative, in the event of the Court deciding that the Plaintiff Company was not entitled to specific performance, for damages.

(1) I. L. R. 42 Cal. 942 (1915).

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It appears that the Company was carrying on the business of tea planters in Assam and owned and worked an estate in Assam known as the Erahgool Tea Estate. It was alleged in the plaint that the Defendant agreed to purchase the estate for Rs. 2,25,000, the purchase to date from the 1st January 1920, the work on the estate until the completion to be carried on by the Plaintiff Company which was to be reimbursed by the Defendant for all expenditure as from the 1st January 1920. It was agreed by the learned Counsel that the agreement was made in Calcutta. The plaint further alleged that on the 5th August 1920 the attorneys of the Defendant sent to the Plaintiff Company's Attorneys a deed of conveyance prepared from a draft which had been accepted by the Plaintiff Company duly stamped and engrossed and the Plaintiff Company approved the said deed and called upon the Defendant to complete the same. It was then alleged that inspite of repeated demands, although the Defendant admitted his liability to execute the said conveyance, he refused so to do. The plaint set out the amount of money which the Plaintiff Company expended in carrying on the work since the 1st January 1920.

The written statement amongst other matters referred to certain representations, which, it was alleged, had been made on behalf of the Plaintiff Company and which it was said induced the Defendant to send the conveyance to the Plaintiff's Attorneys, and stated that the Defendant had never intended to complete the transaction without a satisfactory investigation of title, that the Defendant believed that the Plaintiff Company was unable to convey about 100 acres of the entire land of the estate and that consequently by reason of such shortage the Plaintiff Company was

not entitled to specific performance or damages.

The main point, which was argued in this Court, was that this Court on its Original Side had no jurisdiction to try the suit and that consequently inasmuch as the learned Judge had no jurisdiction to entertain the suit he had no jurisdiction to appoint a Receiver. The learned Counsel for the Defendant argued that the learned Judge ought to have tried an issue as to whether this Court on its Original Side had jurisdiction to entertain the suit, before he decided to appoint a Receiver.

We have not the advantage of any judgment of the learned Judge and I cannot ascertain to what extent the learned Judge considered the question whether the Court had jurisdiction to entertain the suit. I agree with the learned Counsel that it would have been more satisfactory, to say the least, if the learned Judge had decided the question whether the Court had jurisdiction to entertain the suit before he made an order appointing a Receiver; I do not propose, however, to accede to the learned Counsel's application to remand this question to the learned Judge because, in my judgment, it would be an unnecessary waste of time and money. The matter has been fully argued and at considerable length in this Court by the learned Counsel for the Appellant and in view of that it seems to me that it would not be right for us to remand this matter to the learned Judge in order that he might try the issue which the learned Counsel argued ought to have been tried in the first instance.

The main question, therefore, is: Had this Court jurisdiction to entertain the suit? It is said that this is a "suit for land" and consequently inasmuch as the land in question is in Assam and outside the local limits of the Ordinary Original

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Jurisdiction of the High Court, the High Court had no jurisdiction to entertain the suit having regard to the terms of cl. 12 of the Letters Patent which provides that "The High Court in the exercise of its Ordinary Original Civil Jurisdiction shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated within the local limits of the Ordinary Original Jurisdiction of the said High Court." If we give to those words, "suits for land," then ordinary meaning in the English language, to my mind it is clear that this suit does not come within the meaning of those words. But the learned Counsel for the Appellant drew our attention to certain cases which have been decided by this Court which go to show that the words, to which I have referred, are not to be confined to suits for the recovery of land or for the recovery of possession of land, and, the latest case, to which our attention was drawn, was the case of *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.* (1). In that case the Plaintiff Company and the Defendant Company, who had their registered offices in Calcutta, were the owners of adjoining collieries situate in Sudamdih in the District of Manbhum in the Province of Behar and Orissa. The boundary between the Plaintiffs' and the Defendants' properties was demarcated superficially by pillars. It was alleged by the Plaintiffs, but denied by the Defendants, that the Plaintiffs had left as a protection a barrier of twenty-five feet along the eastern boundary of its property: and the suit was brought for damages for coal which the Plaintiffs alleged the Defendants had extracted; and the substantial question in dispute in that

case was whether the Plaintiffs or the Defendants were the owners of the coal in question. The learned Chief Justice Sir Lawrence Jenkins said this: "The matter in dispute here relates to a mining property outside the jurisdiction so defined. On behalf of the Plaintiffs it is contended that having regard to the pleadings it cannot be said that it is a suit for land or other immoveable property. The question is what was intended by that expression. It appears to me that it was not a mere formal test that was proposed—a test to be determined by the precise form in which a suit might be framed; but that regard was to be had to the substance of the suit, and I cannot help thinking that the particular expression was used, because there was its equivalent in the Civil Procedure Code of 1859, sec. 6." He then went on to say: "The course of decisions on the Charter shows that the description cannot be limited to suits for the recovery of land in its strict sense, and as to that there can be no dispute and, running on parallel lines with that, we find the Code of Civil Procedure of 1859 developed in 1877, so as to embrace a number of topics which perhaps would not in strictness be regarded as suits for land, and it is instructive to observe what they are." The learned Chief Justice then described the suits which are included in the section of the Civil Procedure Code which he was discussing and he concluded by saying: "Therefore, it seems to me that we are not giving a construction that is opposed to the general trend of legal thought, if we hold that suits for land at any rate extend to a suit of this kind, which is a suit for compensation for wrong to land, when, as I hold to be the case here, the substantial question is the right to the land." It is not necessary for me to express any opinion about that case

(1) J. L. R. 42 Cal. 942 (1915).

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because, in my judgment, that case does not cover the present one, for it is clear to me that the substantial question between the parties in this case is not the right to the land. The words in cl. 12, if we give to them their natural meaning, in my judgment cannot be said to cover this suit, which is a suit for specific performance of the agreement, which was made in Calcutta and to recover a sum of Rs. 88,000 odd said to be due from the Defendant to the Plaintiffs by reason of that agreement. Some decisions such as those referred to by the learned Chief Justice in his judgment in the above-mentioned case seem to have extended the operation of the clause in question beyond the natural meaning of the words "suits for land," but I am not prepared to put an interpretation upon these words, which as far as I know, has never been given to them hitherto and which, in my judgment, having regard to the natural meaning of the words, is not justified. The case of *Land Mortgage Bank v Sudurudeen Ahmed* (2) is an authority against the contention of the learned Counsel for the Appellant. In my judgment, it cannot be too clearly laid down that in construing a statute it is necessary for the Court to give the natural meaning to the words which are used, and if it is thought advisable to include cases which are not covered by the words of the statute in their natural meaning, it is not for the Court to strain the language of the statute so as to include them, but it is the function of the legislature to amend the statute and the same principle applies to the construction of the Charter. In my judgment, this is not a suit for land within the meaning of cl. 12 of the Letters Patent and the Court had jurisdiction to entertain the suit having regard to the fact that

the agreement, which it is sought to enforce, was made in Calcutta. To my mind that really disposes of this case.

The other point, to which the learned Counsel for the Appellant referred, was that the learned Judge ought not to have appointed a Receiver inasmuch as the Plaintiffs were themselves in possession of the land and could go on managing the property as they had in the past. But this was a matter for the discretion of the learned Judge—a discretion, which, no doubt, must be exercised judicially and upon well recognised principles. Having regard to the facts of the case, and especially having regard to the alleged liability of the Defendant under the agreement to reimburse the Plaintiffs for the money which the Plaintiffs had to expend upon the estate after the 1st January 1920, the fact that the Defendant is alleged to have recognized his liability by paying a sum of Rs. 5,000 on or about the 26th August 1920 and to the fact that the Defendant's attorneys sent the conveyance to the Plaintiff's attorneys, it cannot be said that the learned Judge was wrong in exercising his discretion in the appointment of a Receiver. The case of *Gibbs v. David* (3) may be referred to in this connection. I do not mean to say that the facts in that case are on all fours with the facts in this case, but it is useful for ascertaining the principles upon which a Receiver may be appointed.

For these reasons, in my judgment, the learned Judge's order should be upheld and the appeal should be dismissed with costs.

RICHARDSON, J.—I agree

The suit is brought by the vendors for specific performance of an agreement made in Calcutta to sell a tea estate in Assam known as Eraligool, and the main

(2) I. L. R. 19 Cal. 358 (1909).

(3) I. L. R. 20 Eq. Cas. 373 (1875).

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question which now arises is whether the suit is a suit for land within the meaning of cl. 12 of the Letters Patent. If so, the land being outside the local limits of the Ordinary Original Jurisdiction, the Court had no power to entertain the suit in that jurisdiction and therefore no power to make the interlocutory order appointing a Receiver of the property, from which this appeal has been preferred by the Defendant. The question perhaps assumes more importance now than it may originally have done because we are informed that a learned Judge, other than the learned Judge who made the order, has in the meanwhile given the Receiver leave to sell the property.

To the best of my judgment, on the materials before us this is not a suit for land either within the natural meaning of those words or within the meaning which has been given to them in previous decisions of this Court. It has been held that a suit in the nature of a suit by a purchaser for specific performance is a suit for land [*Sicenath Roy v Cally Das Ghose* (4)]. On the other hand, in *Land Mortgage Bank v Sudurudeen Ahmed* (2) it was held in reference to a vendor's suit that it was not a suit for land. It is sought to distinguish that case on the ground that at the beginning of the judgment where the facts are set out, it was expressly stated that the title was not in dispute. Mr. H. D. Bose, appearing for the Defendant referred us to the plaint in the present case, where the Plaintiffs describe themselves as the owners and workers of this tea estate. He also referred us to paras 4-13 of the written statement where a question is raised as to the title of the Plaintiffs in respect of about 100 acres out of the 1500 which

form the subject-matter of the agreement. But nothing can be decided in this suit between vendor and purchaser which will directly affect the land or bind third parties who may have or may claim rights therein. That being so, the suit does not appear to be a suit brought for the purpose of establishing title to or acquiring possession of or control over land. The title, if it comes in question will come in question incidentally with reference to the main issue whether the Defendant should or should not be held to his bargain, but whatever the result of the suit may be as between the Plaintiffs and the Defendant, as against third parties, the title of the Plaintiffs whether it remains in them or passes to the Defendant will remain precisely what it now is. We were asked to apply the test indicated by Sir Lawrence Jenkins, C. J., in *Sudamdih Coal Co., Ltd v Empire Coal Co., Ltd.* (1), but in my opinion the suit cannot be regarded as being in substance a suit for land within that test.

I have said that the agreement was made in Calcutta and I gather that the agreed price was to be paid in Calcutta. There is no dispute, therefore, that if the suit is not a suit for land, leave was properly given to institute it on the Original Side.

On the other point which was argued, I agree with my Lord that the learned Judge having seisin of the suit it was open to him in the exercise of his discretion to appoint a Receiver.

In the result the appeal should, in my opinion, be dismissed.

Messrs. Leslie and Hinds, Solicitors for the Appellant.

Messrs. Morgan & Co., Solicitors for the Respondent.

J. N. R.

Appeal dismissed.

(1) I. L. R. 42 Cal. 942 (1915).

(2) I. L. R. 19 Cal. 358 (1892).

(4) I. L. R. 5 Cal. 62 (1879).

(CIVIL APPELLATE JURISDICTION).

APPEAL FROM ORIGINAL DECREE

No. 191 of 1919.

MOOKERJEE, J.

CHOTZNER, J.

1922,

Heard, 24 and

27, March.

Judgment,

7, June.

NOWRANG SINGH,

Defendant, Appellant,

v.

JANARDAN KISHORLAL

SINGH and anr., Plain-

tiffs, Respondents.

Transfer of Property Act (IV of 1882), sec. 108 (c), lessee is entitled to suspend payment of rent on account of unauthorized and unlawful interruption by another lessee of the same lessor - "Without interruption," what it signifies - Lessee is protected against tortious acts of other lessees or strangers - "Person claiming under the lessor," significance of.

P leased out two contiguous mines to D and M. Subsequently M joined his mine to D's mine by galleries encroaching upon the latter's coal land, as a result of which a portion of D's mine was flooded and submerged. The said act of M was unauthorized by the terms of his lease. In a suit by P against D for royalty and other dues, D pleaded that his possession having been interrupted by a lessee of P the entire rent was suspended:

Held - That M's act was, as between him and his landlord, entirely unauthorized by the terms of his lease and must be regarded as unlawful.

In the absence of a contract or local usage to the contrary, sec. 108 (c) of the Transfer of Property Act secures for the lessee the benefit of an unqualified covenant for quiet enjoyment, which protects the lessee against interruption by the lessor, his heirs and assigns or by any other person or persons whatsoever (including the superior landlord or other person claiming by title paramount, exercising a power of re-entry or otherwise dispossessing the lessee). But even such a covenant does not include a case of disturbance by persons having no lawful

title or right of entry, for against such tortious acts the lessee has his proper remedy against the wrong-doers and does not require a covenant, nor can he, on account of being evicted by such persons, be relieved of his liability to pay rent.

HAYES v. BICKERSTAFF (1) and VITHILINGA v. VITHILINGA (2) discussed and followed.

Under such a covenant, the lessee is protected against all disturbance by the lessor whether lawful or not, save under a right of re-entry, but as against other persons, it protects the lessee only against lawful disturbance.

TAYAMA v. GURSHUDAPPA (3), WOTTON v. HELE (5), DUDBY v. FOLLIOT (7), SRINIVASA v. RANGASWAMI (21) and several other cases referred to.

Held - That the wrongful interference by M could not be treated as an interruption by "a person claiming under the lessor," as the latter expression means a person claiming under the lessor the right to do the particular act complained of.

HARRISON v. MUNCASTER (22), SANDERSON v. BERWICK (12), LUDWELL v. NEWMANS (25), KALI PRASANNA v. MATILURANATH (32) and other cases referred to.

This was an appeal preferred on the 1st of August 1919 against the decision of Babu Phonindra Mohan Chatterjee, Subordinate Judge, 2nd Court of Zillah Burdwan, dated the 30th of April 1919 and from findings recorded by Babu Probode Chandra Bose, Subordinate Judge, Assansol, dated the 24th June 1921.

The facts of the case are briefly as fol-

(1) [1669] Vaughan 118.

(2) 1 L. R. 15 Mad. 111, 121 (1891).

(3) 1 L. R. 25 Bom. 269 (1900).

(5) [1670] 2 Wms Sand. 178 (b).

(7) [1790] 3 T. R. 584; 1 R. R. 772.

(12) 18 Q. B. D. 547 (1884).

(21) 1 Mad. L. W. 858 (1914).

(22) [1891] 2 Q. B. 680.

(25) [1795] 6 T. R. 658; 3 R. R. 231.

(32) 1 L. R. 84 Cal. 191 (1907).

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lows :—The predecessor of the Plaintiffs in 1897 granted a lease of a coal mine to Myer & Co. and in 1901 granted a lease of an adjoining mine to the Defendant. A considerable portion of the mine of the Defendant was flooded and submerged by reason of the act of Myer & Co. in joining their mine to the Defendant's mine by galleries encroaching upon the Defendant's coal land. Further, the removal of some pillars in the mine of Myer & Co. caused subsidence in their mine, thereby creating a passage for rush of a large volume of rain and flood water into the mine of the Defendant. The terms of the grant in favour of Myer & Co. did not, however, authorize such acts. Subsequently when the Plaintiff brought the present suit for recovery of minimum royalty and other dues under the mining lease the Defendant resisted the claim substantially on two grounds, *e.g.*, that he was entitled to abatement inasmuch as a portion of the land had been acquired under the Land Acquisition Act, and secondly, that as his possession of the mine had been interrupted by Myer & Co., who were the lessees of the adjoining mine, the rent was suspended. The lower Court gave effect to the first contention and overruled the second, with the result that the claim was decreed in part. Against the said decree the Defendant preferred the present appeal to the High Court.

Dr. Dwarka Nath Mitter and Babus Satindra Nath Mookerjee and Rama Prasad Mookerjee for the Appellant.

Babus Ramcharan Mitra and Atul Chandra Dutta for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the first Defendant in a suit for recovery of minimum royalty and other dues under

a mining lease granted by the predecessor of the Plaintiffs on the 28th September 1901. The suit was instituted on the 6th July 1917, and the claim covered the period of six years between the 14th April 1911 and the 13th April 1917. The Defendant resisted the claim substantially on two grounds, namely, first, that he was entitled to abatement, inasmuch as six bighas out of the thirty two bighas of coal land included in the lease had been acquired under the Land Acquisition Act; and, secondly, that as his possession of the mine had been interrupted by Myer & Co., who were lessees of an adjoining mine under a grant made by the predecessor of the Plaintiffs on the 22nd April 1897 the entire rent was suspended. The Subordinate Judge gave effect to the first contention and overruled the second, with the result that on the 30th April 1919, the claim was decreed in part. The present appeal, preferred by the Defendant against this decree, was heard on the 17th January 1921. In support of the appeal it was urged that in view of the provision of sec. 108 (c) of the Transfer of Property Act, the Appellant was entitled to reduction of the rent payable by him, as a considerable portion of the mine let out to him had been flooded by reason of the act of Myer & Co., who held the adjoining mine under the Plaintiffs. The Court held that before the question of the true construction of sec. 108 could be usefully discussed, it was necessary to ascertain facts which had not been investigated by the Court below. The Court accordingly directed the lower Court under Or. 41, r. 25, of the Civil Procedure Code to try the following issues on additional evidence and to return the evidence to this Court together with the findings thereon and the reasons therefor: first, was there in fact an interruption of the

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possession of the Defendant during the years in suit within the meaning of cl. (c) of sec. 108 of the Transfer of Property Act; secondly, if there was such an interruption, was it attributable to any act on the part of Myer & Co., as alleged by the Defendant; thirdly, what were the terms of the grant made by Plaintiffs in favour of Myer & Co. The Subordinate Judge has held a local enquiry, taken the additional evidence required and submitted his findings. We have now to determine the appeal under Or. 41, r. 26, sub-r. (2).

The findings of the Subordinate Judge have been accepted by both the parties before us and may be summarised as follows :—

First, that during the period from the 14th June 1911 to the 13th April 1917, there was interruption of the possession of the Defendant in respect of an area of ten bighas fifteen cottas and twelve chattaks, approximately in the top seam, while the balance, fifteen bighas four cottas and eight chattaks, remained in fully workable condition and had during this period a shaft pit by which the first Defendant extracted coal;

Secondly, that this interruption of possession was due to the unlawful act of Myer & Co. in joining their mine to the Defendant's mine by galleries encroaching upon the Defendant's coal land;

Thirdly, that the terms of the grant in favour of Myer & Co. were set out in the lease granted by the predecessors of the Plaintiffs on the 22nd April 1897 to Hari Charan Singh.

The Subordinate Judge has found that if Myer & Co. had not driven galleries by encroaching into the coal land of the Defendant and had not thus joined their mine to his mine, no water from their mine could have entered his mine which was thereby flooded and submerged. The

immediate cause was the destruction of the barrier by Myer & Co., the ulterior cause was the robbing of pillars in the mine of Myer & Co. and also in a natural channel which carried the surplus rain water of the locality into a neighbouring river. This removal of pillars naturally caused subsidence in their mine and also in the channel, thereby creating a passage for rush of a large volume of rain water and flood water into the mine of the Defendant. There can be no doubt that the act of Myer & Co. was, as between them and their landlords, entirely unauthorized by the terms of their lease and must be regarded as unlawful. In these circumstances, we have to decide whether such unauthorized act on the part of the lessees of the Plaintiffs absolves the Defendant from liability to pay rent in accordance with his lease. The solution of this question depends upon the true construction of sec. 108.

Cl. (c) of sec. 108 provides that, in the absence of a contract or local usage to the contrary, the lessor of immoveable property shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. This provision secures for the lessee the benefit of an unqualified covenant for quiet enjoyment. A qualified covenant for quiet enjoyment protects the lessee against interruption by the lessor, his heirs and assigns, or any other person claiming by or under him, them or any of them, whereas an unqualified covenant protects the lessee against interruption by the lessor, his heirs and assigns or by any other person or persons whomsoever. The covenant, in the unqualified form, covers the case of interruption by the superior land-

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lord or other person claiming by title paramount, exercising a power of re-entry, or otherwise dispossessing the lessee. But even such a covenant does not include a case of disturbance by persons having no lawful title or right of entry; for, against them the lessee has his proper remedy and does not require a covenant, nor can he, on account of being evicted by such persons, be relieved of his liability to pay rent. Reference may be made in this connection to the exposition contained in the classical judgment of Sir John Vaughan, Chief Justice of the Court of Common Pleas, in the case of *Hayes v. Bickerstaff* (1), where he shows that the express covenant, like the implied covenant, protects the lessee only against lawful disturbance of strangers, and then summarises the "inconveniences if the law should be otherwise:"

"1. A man's covenant without necessary words to make it such, is strained, to be unreasonable, and therefore improbable to be so intended, for, it is unreasonable a man should covenant against the tortious acts of strangers, impossible for him to prevent or probably to attempt preventing.

2. The covenantor, who is innocent, shall be charged, when the lessee hath his natural remedy against the wrong-doer. and the covenantor made to defend a man from that from which the law defends every man, that is, from wrong.

3. A man shall have double remedy for the same injury against the covenantor, and also against the wrong-doer. :

4. A way is opened to damage a third person (that is, the covenantor) by undiscoverable practice between the lessee and a stranger, for there is no difficulty for the lessee secretly to procure a stranger to make a tortious entry, that he may

therefor charge the covenantor with an action."

This principle was recognised by Mr. Justice Subramaniya Iyer in *Vithilinga v. Vithilinga* (2), when he observed that by a covenant for quiet enjoyment, the lessee is to enjoy his lease against the lawful entry, eviction or interruption of any man, but not against tortious entries, evictions or interruptions, and the reason for the law is solid and clear, because against tortious acts the lessee has his proper remedy against the wrong-doers. The decision of Mr. Justice Ranade in *Tayama v. Gurshidappa* (3) takes substantially the same view, when it lays down that the words "without interruption," in sec. 108 (c), give a lessee in India the same rights as he would have under what is known in England as a covenant for quiet enjoyment in an unqualified form. The case then before the Court, was as in *Gopanund v. Lala Gobind* (4), decided by Sir Barnes Peacock, C. J. and Jackson, J., that of interruption caused by paramount owner of the property, and although it is stated that "the lessee is protected against interruption from any person whomsoever," it is made abundantly clear by the observations which follow that the lessee must protect himself against interruption by a person without lawful right or against wrongful disturbance by a stranger. The rule is thus now firmly settled that, like the express covenant, the implied covenant protects the lessee against all disturbance by the lessor whether lawful or not, save under a right of re-entry, but, as against other persons, it protects the lessee only against lawful disturbance; *Wotton v. Hele* (5), *Anon*

(2) I. L. R. 15 Mad. 111, 121 (1891).

(3) I. L. R. 25 Bom 269 (1900).

(4) 12 W. R. 109 (1889).

(5) [1670] 2 Wms. Sand. 178 (b).

(1) [1669] Vaughan 118.

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(6), *Dudby v. Folliot* (7), *Nash v. Palmer* (8), *Granger v. Collins* (9), *Young v. Raincock* (10), *Jeffryes v. Evans* (11), *Sanderson v. Berwick* (12), *Wallis v. Hands* (13), *Mukhtar v. Sunder* (14) and *Udai v. Katyani* (15). It may be pointed out that, before the Transfer of Property Act, it had been maintained in a long series of decisions that if the lessee were evicted by title paramount to that of the lessor or by a person to whom he had given the land on lease, the lessee was discharged from the payment of rent and might claim abatement or suspension: *Munee v. Campbell* (16), *Munee v. Campbell* (17), *Gopanund v. Lala Gobind* (4), *Kadambini v. Kashinath* (18) and *Kristosundar v. Kumarchunder* (19). To the same effect was the decision in *Donzelle v. Girdhari* (20), which held that, in the absence of express agreement to the contrary, a landlord is bound by an implied obligation to indemnify the tenant against disturbance by his own act or by the acts of those who claim under him or by right paramount to him, but not against the wrongful acts of strangers. The same view is reflected in the judgment of Sir John Wallis, C. J., in *Srinivasa v. Rangaswami* (21), where he states that a

covenant for quiet enjoyment, as between lessor and lessee even in its more extended form, is only a covenant against disturbance by somebody claiming under a lawful title and does not extend to disturbance by a trespasser.

In view of what must thus be recognised as settled law, the Appellant has been driven to contend, as a last resort that Myer & Co., who hold under a lease granted by the Plaintiffs, may rightly be treated as included within the category of persons claiming under them. This argument is attractive but fallacious. Lord Esher M. R., when pressed with the identical argument in *Harrison v. Muncaster* (22) on the authority of Fry, L. J. in *Sanderson v. Berwick* (12) made an important observation which may be usefully recalled here: "the expression in that judgment, claiming under him, must be restricted in its meaning to claiming a right under him to do the particular act complained of." This interpretation led to the result that where a lessee of a mine was interrupted, not by any act which the lessor had authorised, but by a flow of water which he had not authorised, the lessor was not liable under his covenant for quiet enjoyment; see also *Jones v. Consolidated Anthracite Collieries* (23). The same construction was placed upon the expression, "claiming under him," by Bray, J., in *Williams v. Gabriel* (24), when he ruled that a person claiming under the lessor means a person claiming under him the right to do the act complained of, so that if a lessor parts with the property or any adjoining property to a third person, and that person is in a position to rightfully claim, under his

(4) 12 W. R. 109 (1889).

(6) [1774] Loft 460.

(7) [1790] 3 T. R. 584, 1 R. R. 772.

(8) [1816] 5 M. & S. 374; 17 R. R. 364.

(9) [1840] 6 M. & W. 458; 55 E. R. 687.

(10) [1849] 7 C. B. 810; 78 R. R. 652.

(11) [1865] 19 C. B. N. S. 246; 147 R. R. 577.

(12) 13 Q. B. D. 547 (1884).

(13) [1893] 2 Ch. 75 (83).

(14) 17 C. W. N. 960 (1913).

(15) 35 C. L. J. 392 (1922).

(16) 11 W. R. 278 (1889).

(17) 12 W. R. 149 (1889).

(18) 13 W. R. 888 (1870).

(19) 15 W. R. 230 (1871).

(20) 23 W. R. 131 (1874).

(21) 1 Mad. L. W. 858 (1914).

(12) 13 Q. B. D. 547 (1884).

(22) [1891] 2 Q. B. 680.

(23) [1916] 1 K. B. 129 (136).

(24) [1906] 1 K. B. 155.

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title from the lessor, that he is authorised to do those acts, the lessor will be responsible. If this interpretation were not adopted, the lessor would be responsible for all interruptions by any person claiming title through him, whether assignee or under-tenant, however, wilful or negligent the interruption. There must clearly be some limit, and we are of opinion that the limit indicated by Lord Esher is reasonable. It comes to this, that the lessor becomes bound for any act of interruption by himself or by any person whom he has expressly or impliedly authorised to do the act. This is good sense and fits in with what the parties might well have contemplated, because the lessor has really authorised the acts to be done; but to hold that the parties contemplated that the lessor was to be responsible for wrongful and negligent acts which he had not authorised, would plainly be beyond reason. This principle explains the decision in *Sanderson v. Berwick* (12), where the Court of Appeal held a lessor responsible, because his tenant of adjoining land had, in the proper and contemplated use of certain drains, damaged the Plaintiff (another tenant of his) but refused to hold the lessor responsible for excessive user of those drains. The test formulated by Lord Esher, it will be found, renders intelligible the decisions in *Ludwell v. Newmans* (25), *Evans v. Vaughan* (26), *Calvert v. Sebright* (27), *Carpenter v. Parker* (28), *Jeffryes v. Evans* (11), *Rolph v. Crouch* (29) and *White v. Jameson* (30), where the interference with

the lessee was by a person whose title arose by a prior act or procurement of the lessor; see also *Harmer v. Jumbil Tin Areas* (31). The same principle appears to have been recognised in *Kali Prasanna v. Mathuranath* (32), where it was ruled that a lessee, who may have lost possession of a portion of the lands covered by his lease, was not entitled to suspend the payment of rent, if the dispossession had been effected, not by the landlord, but by other persons who were subsequent lessees under him in respect of different lands and had no authority to interfere with the possession of the prior lessee. In the case before us, there was no express covenant for quiet enjoyment in the lease granted to the Defendant, and his rights must be determined with reference to sec. 108 alone; on the other hand, there was an express engagement by the Defendant to pay the prescribed royalty even if no coal could be raised on account of difficulties in working. In these circumstances, we hold that the remedy of the Defendant, if any, lay against Myer & Co.; their wrongful interference could not be treated as an interruption by persons claiming under the lessors, such as could be successfully set up in answer to the claim for rent made by the lessors in the present action. We hold further that there was no covenant for quiet enjoyment, either contractual or statutory, as against tortious interruption by wrong-doers.

The result is that the decree made by the Subordinate Judge on the 30th April 1919 is affirmed and this appeal dismissed with costs. There will be one hearing fee only, Rs. 160, and each party will bear his own costs of the further enquiry by the lower Court.

J. N. R.

Appeal dismissed.

(11) [1865] 19 C. B. N. S. 246; 147 R. R. 5

(12) 13 Q. B. D. 547 (1884).

(25) [1795] 6 T. R. 658; 3 R. R. 231.

(26) [1825] 4 B. & C. 261; 28 R. R. 250.

(27) [1852] 15 Beav. 156; 92 R. R. 361.

(28) [1857] 3 C. B. N. S. 206; 111 R. R. 622.

(29) L. R. 3 Exch. 44 (1867).

(30) L. R. 15 Eq. 303 (1874).

(31) [1921] 1 Ch. 200.

(32) 1 L. R. 34 Cal. 191 (1907).

PRIVY COUNCIL.
[APPEAL FROM BENGAL.]

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMER ALI.

1922,

Heard, 14 and

16, March.

Judgment,

10, April.

BANKU BEHARI

DHUR, Appellant,

v.

J. C. GALSTAUN and

anr., Respondents.

Indian Contract Act (IX of 1872), sec. 74—Penalty, provision in the nature of—Loss or damage not proved—Right to relief—Failure of purchaser to complete contract within stipulated time by reason of vendor's default—Purchaser liable.

Where an intending purchaser of property failed to complete the purchase within the stipulated period by reason of the vendor not having taken steps to make out, as he had undertaken to do, a marketable title in respect of the property, the latter was not entitled to ask for the enforcement of a provision in the nature of penalty which the purchaser was to incur in case of such failure.

The vendor having failed to prove that he had suffered any loss in consequence:

Held—That even if he had not been in default, the vendor was not (in view of sec. 74 of the Contract Act) entitled to any relief on account of the purchaser's default.

This was an appeal from an order, dated the 11th December 1918, of the High Court of Judicature at Fort William in Bengal, in its Appellate Jurisdiction, varying an order of the same High Court, dated the 26th July 1918, made in its Ordinary Original Civil Jurisdiction.

The main question for determination on the present appeal related to the meaning and effect of the terms of a consent decree, dated the 1st May 1918, which was passed in a suit (No. 744 of 1915) for sale instituted by the Plaintiff in the said High Court in 1915.

The Plaintiff (J. C. Galstaun) sought to recover a sum of Rs. 3,50,000 advanced by him on a mortgage of (*inter alia*) 21, Strand Road, Calcutta, and secured by an indenture of mortgage and two further charges, all dated the 2nd August 1906. One Madhab Mohini Dasi was a puisne encumbrancer, and the Appellant, Banku Behari Dhur, and the Defendant-Respondent, Radharani Dasi, were interested in the equity of redemption, the former as trustee for Radharani Dasi, and the latter as his *cestui que trust*.

There were some second mortgages upon the property. The parties compromised the suit, and the terms of settlement were recorded on the 28th April 1918, and were embodied in a decree of the High Court, dated the 1st May 1918. The Plaintiff's solicitors received the draft decree on the 14th May, the draft was settled on the 23rd May, and the minutes were mentioned before the Judge on the 27th May at the instance of the said Madhab Mohini Dasi, and the decree was completed and filed on the 31st May 1918.

In consideration of the Plaintiff agreeing to the terms of settlement, the said Banku Behari Dhur and Radharani Dasi covenanted to sell and convey to the Plaintiff or his nominee 21, Strand Road, Calcutta, free from all encumbrances for the price of Rs. 2,90,000. The remaining terms of settlement which are material were the following:—

(c) That Mr. Galstaun will, at the request and by the direction of Babu Banku Behari Dhur, pay off the moneys due to other mortgagees not exceeding Rs. 60,000 and the amount paid will be added to this mortgage claim and carry interest at 7 per cent. per annum with quarterly rests in account and the said Mr. Galstaun will not under any circumstances whatsoever be able to call for or take any steps for

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realisation thereof until the expiration of four years from the date hereof.

(g) That the title should be accepted by Mr. Galstaun upon the said Babu Banku Behari Dhur making out a marketable title thereto and that the purchase should be completed within one month from the date hereof. If such purchase be not completed within the aforesaid period, then the interest on part of the principal money secured by the said mortgage and further charges, namely, Rs. 2,90,000, should cease to run and Mr. Galstaun shall be deemed to be the owner of the above premises subject to the charge and mortgage mentioned in the cl. (a) as well as all existing encumbrances on the property herein and the whole of the said consideration money of Rs. 2,90,000 should *ipso facto* be set off against his claims under his mortgage and further charges.

Before the expiry of one month from the date of the said decree, the Plaintiff paid and satisfied the claims of the Defendants Mathura Nath Mitter and others. The said Madhab Mohini Dasi made delays in furnishing an account of what was due to her under her puisne encumbrance. On the 31st May 1918, the Plaintiff tendered to Madhab Mohini Dasi's attorney two Government Promissory Notes of the value of Rs. 20,000, and Rs. 12,760-2-0 in cash, with an undertaking to pay any sum due in excess of the amount of the tender, but the tender was refused as being short of the amount due. In the absence of an exact amount which the puisne encumbrancer repeatedly refused to furnish, the Plaintiff had calculated the amount in the best way he could, and he filed the present application on the 17th June 1918, praying that the said Madhab Mohini Dasi might be directed to accept from the Plaintiff Government securities of the nominal value of Rs. 20,000 with interest at 12 per

cent, and costs in full satisfaction of her claim in the suit and that upon such payment being made she might be directed to execute and register a proper reconveyance of her mortgage or that in default of her acceptance the said amount might be deposited in Court to her credit, and a reconveyance executed and registered by the Registrar of the High Court on her behalf.

Mr. Justice Greaves who heard the said application delivered judgment on the 8th July 1918. He made the order prayed for, and observed as follows:—

"The present case seems to me to be one in which an even stronger duty was cast on the mortgagee to state what was due, and assist in the redemption. She was party to a consent decree whereby she agreed that the mortgagor should redeem her on certain terms by a certain date, and yet she has taken up an attitude which has prevented this being done, by asserting that she was under no obligation even to formulate her claim, she was tendered Rs 10-11-3 less than the sum she now claims for interest, with an undertaking to pay any sum that might be due in excess of the amount tendered, and I do not think that any reasonable person can doubt that if she had said on the 31st May and the 1st June, you have tendered me Rs 10-11-3 too little, that the full amount of her claim would have been forthcoming."

In accordance with the terms of settlement the Appellant, Banku Behari Dhur, was bound to make out a marketable title to the property in dispute, but he failed to do so. He did not send copies of the mortgages upon the property, subsequent to the Plaintiff's mortgage, nor did he furnish an account of the moneys due under those mortgages, nor did he arrange for proper reconveyances being

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executed and registered by those mortgagees. After waiting in vain the Plaintiff submitted to the applicant a draft conveyance on the 31st May 1918. The Appellant contended before the High Court that the Plaintiff had failed to complete the purchase "within one month," as provided in cl. G of the terms of settlement, and that by way of penalty the Court ought to give effect to the terms contained in that clause.

Mr. Justice Greaves delivered judgment on the 26th July 1918, rejecting the contention of the Appellant. He concluded as follows:—

"Now, I think it is evident that, reading the terms as a whole, it was never contemplated that the conveyance by Banku Behari Dhur and Radharani to Mr. Galstaun should be subject to the mortgages subsequent in date to Mr. Galstaun's mortgage. That being so, I think certainly that Banku Behari Dhur owes, under the terms of cl. G, a duty to Mr. Galstaun to send him copies of these mortgages, and either satisfy him that they had been discharged, or at any rate facilitate the discharge of these mortgages, by Mr. Galstaun under the provisions of cl. E, although it is true that no time was mentioned for the discharge of the mortgages. This he has not done, and that being so, I do not think that he is entitled to insist on the strict letter of cl. G in so much as he has not complied with the obligation which I hold lay upon him thereunder.

"The result is that I think Mr. Galstaun's contention is correct, and that the conveyance should be executed without any reference to cl. G at all. Banku Behari Dhur and Radharani are to execute the conveyance in that form, *i.e.*, omitting all references to cl. G within a week from to-day, and in default of their

executing the conveyance within a week from to-day, then the Registrar will execute it on their behalf settling the form, if necessary. No order as to costs."

The Appellant appealed from the said judgment, dated 26th July 1918, of Mr. Justice Greaves, and the appeal was heard by Sir Lancelot Sanderson, C. J., and Woodroffe, J. The learned Chief Justice delivered judgment on the 11th December 1918, Woodroffe, J., concurring. The Appellate Court came to the conclusion that in submitting the draft conveyance on the 31st May 1918, the Plaintiff had committed a breach of the contract contained in cl. G, of the terms of settlement which is

"That the title should be accepted by Mr. Galstaun upon the said Babu Banku Behari Dhur making out a marketable title thereto, and that the purchase should be completed *within one month from the date hereof.*"

The Appellate Court therefore held that under sec. 74 of the Indian Contract Act, the Appellant was entitled to receive some "reasonable compensation" for breach of the contract, and summed up its decision in terms following:—

"Now, it has not been suggested by anybody that the Appellant suffered any money loss through the draft conveyance being presented on the 31st May instead of some days previous, in order that the matter might be completed within one month; and, when asked, the learned Advocate-General was unable to assist us as regards the amount of compensation which ought to be awarded to the Appellant. As far as I can see, the Appellant has suffered no loss from the few days' delay that occurred in Mr. Galstaun presenting the draft conveyance. Therefore I am unable to award the Appellant any actual monetary compensation. But at the same time I

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have held that Mr. Galstaun was out of time and did commit a breach of the contract, and by reason thereof I am of opinion that these proceedings have been rendered necessary.

"We think that Mr. Galstaun should pay two sets of costs in each Court, *i.e.*, the costs of the Appellant and the cost of the Defendants-Respondents, and the Appellant, being a trustee, his costs being between solicitor and client, and in that respect the order of Mr. Justice Greaves will be varied. In other respects the order of Mr. Justice Greaves will stand."

The Appellant appealed from the above order of the High Court to His Majesty in Council.

The facts are fully set out in the judgment of the Board.

Messrs. DeGruyther, K. C., Ramsay and Kalimwallah for the Appellant.

Sir George Lowndes, K. C. and Mr. Dubé for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMBER ALI.—This is an appeal from an order of the High Court of Calcutta, dated the 11th December 1918, which, with a variation as to costs, affirmed an order made by Mr. Justice Greaves in the exercise of the Ordinary Original Civil Jurisdiction of the Court on the 26th July 1918, in a matter which came before him upon an application arising out of a case to which reference will be made presently.

It appears that a Hindu inhabitant of Calcutta named Nanda Lal Mullick, who died on the 22nd February 1901, owned considerable house property in that city. He left surviving him a widow and an adopted son, Prem Lal Mullick. The estate of Nanda Lal Mullick appears to have been

at the time of his death burdened with debts, which increased in the hands of Prem Lal Mullick. In order to save the property from sale in execution of decrees, Prem Lal, with the consent of the Administrator-General, executed on the 2nd October 1895, a document by which he conveyed his entire estate inherited by him from Nanda Lal Mullick to the present Appellant, Banku Behari Dhur, as trustee for the liquidation of his debts. Prem Lal died intestate on the 20th March 1907, leaving a widow, Srimati Radharani Dasi.

In order to liquidate the debts of the deceased Prem Lal Mullick, and other liabilities on the estate, Banku Behari Dhur had, in conjunction with Prem Lal, who was then alive, obtained considerable sums of money from the Respondent Galstaun on three mortgages in respect of several properties owned by Prem Lal Mullick, among them being 21, Strand Road, to which the present dispute relates. On the 26th June 1915, Galstaun brought a suit in the High Court of Calcutta upon the several mortgages held by him for the usual mortgage decree.

Beside Banku Behari Dhur, the trustee aforesaid, Srimati Radharani Dasi, the widow of Prem Lal, as the heiress of her husband, was made a party along with a number of puisne mortgagees. One of these puisne mortgagees was a lady named Madhab Mohini Dasi.

This suit was compromised, and the agreement of compromise was incorporated in the decree which was made by Mr. Justice Greaves in the High Court in its Ordinary Original Civil Jurisdiction on the 1st May 1918. The terms of the agreement material to this judgment are as follows:—

"(c) That Mr. Galstaun will at the request of the direction of Babu Banku Behari

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Dhur pay off the moneys due to other mortgagees not exceeding Rs. 60,000 and the amount paid will be added to this mortgage claim and carry interest at 7 per cent. per annum with quarterly rests in account and the said Mr. Galstaun will not under any circumstances whatsoever be able to call for or take any steps for realisation thereof until the expiration of four years from the date hereof.

"(g) That the title should be accepted by Mr. Galstaun upon the said Babu Banku Behari Dhur making out a marketable title thereto and that the purchase should be completed within one month from the date hereof. If such purchase be not completed within the aforesaid period then the interest on the part of the principal moneys secured by the said mortgage and further charges, namely, Rs. 2,90,000, should cease to run and Mr. Galstaun shall be deemed to be the owner of the above premises subject to the charge and mortgage mentioned in cl. (a) as well as all existing encumbrances on the property herein and the whole of the said consideration money of Rs. 2,90,000 should *ipso facto* be set off against his claims under his mortgage and further charges."

Madhab Mohini Dasi, the puisne mortgagee referred to above, appears to have made some delay in furnishing an account of her claim, and when the money was tendered to her by the Plaintiff, on behalf of Banku Behari Dhur in the terms of the decree, she refused to accept it, making the delay the reason of her refusal. The matter had to go before the Court, and the learned Judge had to make a peremptory order directing that what was due to her should be paid within one week from the date of his order in certain shape set out therein, and that on her failure to accept the payment the money due should be paid into Court to the credit of the suit, and the Registrar should thereupon approve of the reconveyance on her behalf. Thereafter Mr. Galstaun tendered to Banku Behari Dhur, the Appellant, the conveyance in respect of 21, Strand Road in the

terms of the agreement embodied in the decree in the mortgage suit. The date of the agreement was the 28th April 1918, and it was provided under the agreement that the purchase by Mr. Galstaun should be completed "within one month from the date hereof." The conveyance was apparently tendered by Mr. Galstaun three days later, *viz.*, on the 31st May 1918. It was in the usual form, but Banku Behari Dhur refused to accept it on the ground that Mr. Galstaun was, under the terms of the agreement, bound to complete the purchase within one month from its date and had failed to carry it out; his contention being that Galstaun must consequently bear himself the burden of all outstanding incumbrances, and was not entitled to add them to his own security, which was to form the consideration for the conveyance.

On the objection of Banku Behari Dhur to accept the conveyance as tendered by Mr. Galstaun, the matter had to go again before Mr. Justice Greaves, and he came to the conclusion that the delay in the completion of the purchase was due principally to the default of the Appellant himself; that, as a matter of fact, he did not deliver copies of the mortgages to the Respondent, and did not make out a marketable title; that is that he did not send to the mortgagee (Galstaun) copies of the mortgages upon the properties other than the mortgages in his favour, which were with him; that he did not send or cause to be sent within one month from the date of the settlement, account of the dues to the several subsequent mortgagees; and that he did not arrange for proper reconveyances being executed and registered by the mortgagees on receipt of their actual claims. It also appears that he did not take proper steps to expedite the reconveyance from Madhab Mohini Dasi. The

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learned Judge accordingly considered that the Respondent was not in default in respect of the delay in tendering the conveyance under the terms of the settlement as embodied in the decree, and he accordingly overruled the objection of Banku Behari Dhur, and directed that he and Radharani Dasi were to execute it in the form tendered by Galstaun, omitting all reference to cl. (g), within a week from the date of his order.

Banku Behari Dhur preferred an appeal to the High Court from the order of the learned Judge sitting on the Original Side of the Court, and the learned Chief Justice and Mr. Justice Woodroffe, who heard the appeal, came to the conclusion that Galstaun was actually in default; but they were also of opinion that the provision in cl. (g) relating to his default was by way of a penalty, and that as, under sec. 74 of the Contract Act, it was not established that he had suffered any loss from the delay in the actual tender, Banku Behari was not entitled to any relief on account of Galstaun's default. They accordingly affirmed the order of Mr. Justice Greaves in so far as the execution of the conveyance was concerned, but varied his order relating to costs, and made Galstaun liable for all the costs incurred in the course of the proceedings. Banku Behari Dhur has now appealed to His Majesty in Council, and his contention is that as Galstaun has been found to be in default, he must be held subject to the condition embodied in cl. (g) of the terms of settlement and ought to bear himself the burden of whatever charges or encumbrances may be outstanding in respect of the property in question, viz., 21, Strand Road.

Their Lordships, after having fully heard Counsel in support of Banku Behari's contention, are of opinion that

the position taken up by him is wholly untenable. They agree with Mr. Justice Greaves that there was a duty imposed on him in relation to the conveyance he had to execute in favour of Galstaun; that he was bound to make out a marketable title in respect of the property, and, as the learned Judge points out, he did not take any steps to do so; and that consequently he is not in a position to ask for the enforcement of the provision on which he takes his stand in cl. (g). Further, their Lordships think that even if he had not been in default, and the provision in cl. (g) might be regarded as one in the nature of a penalty, he has not made out any loss—as the Appellate Court find—and is therefore not entitled to refuse the conveyance tendered.

Their Lordships are therefore of opinion that this appeal should be dismissed with costs, and that the order of the High Court on appeal should be varied by striking out the order as to costs, and that in respect of costs the order of the first Judge should be restored. And their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs Watkins and Hunter* for the Appellant

Solicitors: *Barrow, Rogers and Nevill* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL
JURISDICTION

No. 104 of 1921.

THE BENGAL & NORTH-
WOODROFFE, J. WESTERN RAILWAY
RICHARDSON, J. Co., Ltd.

1922,

17, February.

v.

SADARAM BHAIRODAN
and anr.

Civil Procedure Code (Act V of 1908), Or. 1, r. 3
-Joinder of parties—Parties, if can be joined as

THE BENGAL & NORTH-WESTERN RAILWAY CO., LD. v. SADARAM BHAIRODAN.

Defendants in one suit when cause of action against one of them was outside jurisdiction.

Where X had distinct and separate causes of action against A and B and the cause of action against A arose within, and that against B outside, the jurisdiction of the Court, and X brought a suit against A and B claiming relief against both:

Held—That the joinder of A and B as Defendants in one suit in the circumstances stated is not contemplated by Or. 1, r. 3 of the Civil Procedure Code and that the cause of action against B having arisen outside jurisdiction, the Court was not competent to try the suit as against him on the ground that it was competent to try the suit as against A.

Per WOODROFFE, J.—Or. 1, r. 3 is a provision which relates to joinder of parties; and it assumes the existence of a suit in a proper forum, the Court having jurisdiction to try the suit. If the Court has such jurisdiction, then Or. 1, r. 3 may come into play.

Per RICHARDSON, J.—Rules defining the jurisdiction of the Court must be distinguished from rules regulating the procedure of the Court in respect of causes of action within jurisdiction.

Argument from convenience might be of assistance if the relevant statutory provision is of doubtful or ambiguous import, but not where no such doubt or ambiguity exists.

This was an appeal preferred on the 30th July 1921 from the judgment of Ghose, J., dated the 30th June 1921 passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case were as follows:—

The Plaintiff firm delivered to the River Steam Navigation Company, Ltd. (referred to as the Steamer Company) at its station at Jagannath Ghat two bales of

piece goods for carriage, despatch and delivery by transmission to Bhuptiahi—a station on the Bengal & North-Western Railway line, owned by the Bengal & North-Western Railway Co., Ltd. (referred to as the Railway Company) which has its place of business at Gorakhpur. The Plaintiff firm did not get delivery of the bales they had delivered to the Steamer Company from the Railway Company at Bhuptiahi. Thereupon they instituted this suit against both the Steamer Company and the Railway Company for recovery of the value of the bales on the Original Side of the High Court. The Steamer Company pleaded *inter alia* that they had delivered the bales to the Railway Company at a station called Paleeza Ghat and denied liability. The Railway Company pleaded, *inter alia*, that no part of the cause of action as against them having arisen within jurisdiction, the Court had no jurisdiction to try the suit as against them. On the evidence the lower Court found that there was no through booking of goods between Jagannath Ghat and Bhuptiahi, that goods were carried from Jagannath Ghat to Paleeza Ghat by the Steamer Co. and thence to Bhuptiahi by the Railway Company, that the Steamer Company delivered the bales they had received from the Plaintiff firm to the Railway Company at Paleeza Ghat, and that the Railway Company had offered for delivery certain goods to the Plaintiff firm at Bhuptiahi, but that these were not the goods which had been delivered to the Steamer Company by the Plaintiff firm and which had been delivered by the Steamer Company to the Railway Company at Paleeza Ghat. On these facts, Ghose, J., dismissed the suit as against the Steamer Company and decreed it as against the Railway Company. The Railway Company appealed on the

THE BENGAL & NORTH-WESTERN RAILWAY Co., LD. v. SADARAM BHAIRODAN.

ground, among others, that the Court had no jurisdiction to try the suit as against them.

Messrs. N. N. Sircar and C. O. Remfry, Counsel, for the Defendant-Appellant.

Messrs. Zorab and N. N. Bose, Counsel, for the Plaintiff-Respondent.

Messrs. Langford James and Punkridge, Counsel, for the Defendants-Respondents.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—This is a suit for the recovery of the value of two bales of piece goods alleged to have been delivered on the 7th April 1918 at Jagannath Ghat in Calcutta to the River Steam Navigation Co., Ltd., and the India General Steam Navigation and Railway Co., Ltd., for carriage, despatch and delivery by transmission to Bhuptiahi, a station on the Bengal and North-Western Railway, and which, it is said, have not been delivered to the consignee at Bhuptiahi.

I need not go into the facts of the case so far as they affect the merits, because the point which has been argued before us is a question of jurisdiction and, in the view I take of the case, it is unnecessary to deal with the question of merits.

There is no question that the Court had jurisdiction as against the River Steamer Company. The question before us is whether it had jurisdiction against the Bengal and North-Western Railway Co., Ltd., the Defendant-Appellant, to whom I will refer as the Railway Company.

The learned Judge has held upon this point of jurisdiction that there is no doubt that when the goods were delivered in Calcutta for transmission to Bhuptiahi, there was so far as the Plaintiff firm was concerned, only one transaction: and, he says that that being so and this Court having undoubted jurisdiction to enquire

into all the matters relating to the carriage of the goods to Paleeza Ghat, Or. 1, r. 3, C. P. C., comes into play, so far as the Railway Company are concerned. He was, therefore, of opinion that the Railway Company were properly joined as Defendants in this suit. He has dismissed the suit against the Steamer Company and given judgment against the Railway Company for a sum of Rs. 3,627.

The argument on behalf of the Plaintiff-Respondent has been that as the Court has jurisdiction over the suit, because it has jurisdiction as regards the Steamer Company, it must be taken that there is no longer any question of jurisdiction but one of procedure only and Or. 1, r. 3, justifies the decision which has been passed, namely, a decree against the Railway Co., the cause of action against which arose out of the jurisdiction. To this argument I cannot agree. There is no doubt that the cause of action against the Railway Company arose out of the jurisdiction, from whatever point of view we may regard it: this is admittedly so if the Steamer Company were regarded as the agent of the Plaintiff to hand over the goods to the Railway Company at Paleeza Ghat outside the jurisdiction. This is also admittedly so if the action were regarded as an action in tort to recover the Plaintiff's goods from the Railway Company to whom they had been delivered and, I think the cause of action equally arises out of the jurisdiction on the argument that the course of business in carrying the goods throughout constituted a cause of action arising in Calcutta. This, I think, cannot be maintained. The fact that the Court has jurisdiction against the Steamer Company does not give jurisdiction against the Railway Company. The fallacy of the argument, it appears to me, lies in the use of the words "the Court has

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jurisdiction over the suit,"—such jurisdiction the Court has over the suit as regards the Steamer Company. This does not give jurisdiction over the Railway Company, and in my opinion Or. 1, r. 3 has no bearing on the case. That rule of the Order is a provision which relates to a joinder of parties: and, it assumes the existence of a suit in a proper *forum*, the Court having jurisdiction to try the suit. If the Court has such jurisdiction, then Or. 1, r. 3 may come into play.

No case has been cited to us in support of the Plaintiff-Respondent's contention: and, so far as it goes, the decision in *Krishna Kishore De v. Amar Nath Khattri* (1) appears to be against that contention.

It is said that to hold otherwise, *i.e.*, to say, that there was no jurisdiction would place the Plaintiff in a position of great difficulty, and, indeed it is suggested that it would be impossible for him to bring two separate suits. I am not sure at all that the difficulty alleged actually in fact exists. But even if it did, that would not affect the question before us, namely, whether in fact or in law this Court had jurisdiction in the suit as against the Railway Company.

In my opinion the issue whether this Court had jurisdiction to try this case against the Railway Company should be decided in the negative.

The appeal, therefore, succeeds on this question, and it is unnecessary to go into the merits.

The Appellant, who has succeeded in this appeal will get the costs of this appeal as also his costs in the first Court from the Plaintiff-Respondent. The Appellant will pay the costs of the Steamer Company, Respondent of the appeal. We

do not make the order which we have been asked to make by the Appellant that he do recover the costs, so paid to the Steamer Company, from the Plaintiff-Respondent. As regards the cross-objections, they are not pressed and are dismissed, and the Plaintiff-Respondent who took them must pay the costs both of the Appellant and of the other Respondent. The order made by the first Court as regards the costs of the Steamer Company will stand.

RICHARDSON, J.—I agree. The goods were carried from Calcutta to Paleeza Ghat by the Steamer Company and then by the Railway Company from Paleeza Ghat to Bhuptiahi.

There is no course of business or agreement established between the two carrying Companies under which it would be possible to treat the Steamer Company as Agents in Calcutta of the Railway Company so that the contract to carry the goods to their ultimate destination at Bhuptiahi would be a contract entered into in Calcutta by the Steamer Company on its own behalf and on behalf of the Railway Company. The forwarding notes of the Steamer Company show that the goods were accepted by the Steamer Company to be carried from Jagannath Ghat to Paleeza Ghat for Bhuptiahi. The notes, however, contain two clauses or instructions to which our attention has been drawn, as follows:—

(1) "If goods refused by Railway, to remain at River Terminus at shipper's entire risk as regards damage or deterioration."

(2) "Please forward by rail from Paleeza Ghat at shipper's and consignee's risk and expense. Steamer Agent to sign Railway notes and necessary risk notes on my behalf," (*i.e.*, on behalf of the consignor).

The oral evidence is that the Railway

(1) I. L. R. 47 Cal. 770, s. c. 24 C. W. N. 693 (1920).

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Co. treat the Steamer Company as they would any other member of the public. It appears therefore that the contract with the Steamer Company was to carry the goods to Paleeza Ghat and then as agents of the consignor to make them over to the Railway Company to be carried to Bhuptiahi.

That being so, on the materials placed before us in this case, I am unable to say that the cause of action against the Railway Company arose in Calcutta within the local limits of the Original Jurisdiction of this Court.

Mr. Zorab's main argument, as I understand it, is that once you have a suit properly instituted on the Original Side on a cause of action arising within the local limits of the jurisdiction, then the Court having jurisdiction over that suit would also have jurisdiction to exercise such powers as those conferred by Or. 1, r 3 of the Civil Procedure Code relating to the joinder of Defendants, even though the cause of action against Defendants joined, as here, in the alternative, might be an entirely distinct and separate cause of action arising wholly outside the jurisdiction. No authorities were cited in support of this contention: and, though the contention seems to have found favour with the learned Judge at the trial, with much respect, I am unable to accede to it. Rules defining the jurisdiction of the Court must be distinguished from rules regulating the procedure of the Court in respect of causes of action within the jurisdiction.

Mr. Zorab endeavoured to re-inforce his position on the ground of convenience. No doubt, if the relevant statutory provision was of doubtful or ambiguous import, the argument from convenience might be of assistance. But in the present case no doubt or ambiguity exists with regard to the meaning of the language of cl. 12 of

the Letters Patent, such as would justify a recourse to this argument. Nor am I satisfied that the inconvenience suggested might not in some way be obviated. The resources of pleading would not seem to be unequal to the framing of separate claims in separate suits against the two Companies, and no doubt some procedure is available by which an order could be obtained for the trial of both suits by the same Court.

In the result, I agree that the appeal of the Railway Company succeeds on the preliminary ground that, as the suit was framed, the Court had no jurisdiction to try the claim against that Company.

Messrs. Morgan & Co., Solicitors, for the Defendant-Appellant.

Mr. M. N. Dutt, Solicitor, for the Plaintiff-Respondent.

Messrs. Orr, Dignam & Co., Solicitors, for the Defendants-Respondents.

P. K. C.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1680 OF 1919.

ARMAN PEADA,	
CHATTERJEA, J.	Defendant, Appellant,
SUHNARWARDY, J.	v.
1921,	MANIK SARKAR and
15, March.	ors., Plaintiffs,
	Respondents.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, limitation for suit for recovery of possession when the dispossession at the instigation of the landlord by two of his peons, to whom the landlord granted a settlement.

Certain raiyats were forcibly dispossessed of their raiyati holding at the instigation of their landlord by two of his peons to whom he had granted a settlement, and his barkandazes assisted in the dispossession. The dispossessed raiyats brought a suit for

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recovery of possession more than two years after the dispossession :

Held—That where a person has been dispossessed by another who subsequently takes settlement from or is recognized as tenant by the landlord and the landlord has had no hand in the ouster, such dispossession does not amount to dispossession by the landlord and in such a case the Plaintiff will not be barred by Art 3 of Sch 3, nor in a case where the landlord simply favoured the dispossession* by a third party.

RANIJULLA v. ISHAB DHALI (1) and BASANTO KUMARI v. NANDA RAM (2) distinguished.

KEDAR NATH v. MOHESH CHANDRA (3), SUEIKH ERADUT v. DALOO SHEIKH (4), RUDRA NARAIN v. NATABAR (5) and KRISHNA CHANDRA BAGDI v. SATISH CHANDRA BANERJEE (6) referred to.

But where the landlord, as in the present case, granted a settlement to some of his peons and the dispossession was effected by them with the help of his barkandazes, and at the instigation of the landlord, all of them acting in concert, the case comes under Art. 3 of Sch. III of the Bengal Tenancy Act.

This was an appeal against the decree of Babu Banamali Sen, Officiating Subordinate Judge, 1st Court of Zillah Mymensingh, dated the 16th of May 1919, affirming the decree of Babu Atul Chandra Banerjee, Munsif, 3rd Court at that place, dated the 27th of July 1918.

The facts of the case will appear from the judgment.

Babus Joges' Ch. Boy and Satis Ch. Bhattacharjee for the Appellant.

Babu Annada Ch. Karkoon for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The main question involved in this appeal is whether the suit out of which this appeal arises is barred by the special limitation under Art. 3, Sch. III, of the Bengal Tenancy Act. The Plaintiffs alleged that they had been dispossessed in Pous 1323 of their raiyat land by Defendants Nos. 1 and 2, at the instigation of the Raja, the Defendant No. 3, and with the help of Defendants Nos. 4 to 7. The suit has been decreed by the Courts below overruling the objection that the suit was barred. The lower Appellate Court held that the special law of limitation had no application to the case as the dispossession was by Defendant No. 1 after the settlement by the Raja and after the execution of the *kabuliyat* in favour of the Raja. It is found, however, that the dispossession took place in 1317 and not in 1323 as alleged in the plaint.

As stated above the Plaintiffs came to Court on the allegation that the Defendants Nos. 1 and 2 with the assistance of the Defendants Nos. 4 to 7 who have been found to be the *barkandazes* of the Raja, and instigated by the Raja (Defendant No. 3), forcibly and wrongfully dispossessed the Plaintiffs from the land.

There is no doubt that where a person has been dispossessed by another who subsequently takes settlement from or is recognised as tenant by the landlord, and the landlord has had no hand in the ouster, such dispossession does not amount to dispossession by the landlord, and in such a case the Plaintiff will not be

(1) 1 L. R. 20 Cal. 610 : s. c. 6 C. W. N. 703 (F. B.) (1902).

(2) 16 C. L. J. 99 (1912).

(3) 25 C. L. J. 219 (1913).

(4) 1 C. W. N. 572 (1902).

(5) 18 C. L. J. 89 (1912).

(6) 20 C. W. N. 572 (1905).

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barred by Art. 3 of Sch. III. See *Ranjulla v. Ishab Dhali* (1), nor in a case where the landlord simply favoured the dispossession by a third party [see *Basanto Kumari v. Nanda Ram* (2)]. In the case of *Kedar Nath v. Mohesh Chandra* (3), the learned Judges were inclined to hold on the authority of the above case that the article does not apply where the dispossession was by a person under an authority from the landlord. And where the landlord himself had no hand in the ouster and some person on his behalf, without having any authority to do so, gives an *amaluamah* to a person who dispossesses the raiyat, it has been held that the case does not come under Art. 3. See *Sheikh Eradut v. Daloo Sheikh* (4).

The doctrine of constructive dispossession should not be extended, as was observed by Sir Lawrence Jenkins, C. J. in *Basanto Kumari v. Nanda Ram* (2) and *Rudra Narain v. Natabar* (5) and as was pointed out by him in the case of *Krishna Chandra Bagdi v. Satish Chandra Banerjee* (6), in determining what Art. 3 of Sch. III of the Bengal Tenancy Act means, the purpose and the scope of the Act, which governs the relation of landlord and tenant only, must not be left out of sight, and that it was not the design of the Act to deprive a tenant of the rights that he otherwise possesses against a third person between whom and himself there was no relationship of landlord and tenant, and that it was only intended to deal with such rights as existed between landlord and tenant. The learn-

ed pleader for the Respondent relied upon this case, and also the other cases mentioned above. But in the present case the Raja, the landlord, granted a settlement to Defendants Nos. 1 and 2 who were his peons and the dispossession was effected by them with the help of the Raja's *barkandazes* (Defendants Nos. 4 to 7), and at the instigation of the Raja, the principal Defendant No. 3, all of them acting in concert. We think, under the circumstances, that it is a case which comes under Art. 3 of Sch. III of the Limitation Act. That being so, it is not necessary to consider the other points raised in the case.

The decrees of the Court below will be set aside and the Plaintiffs' suit will be dismissed with costs in all Courts.

J N R.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION]

REF. No. 6 OF 1922.

SANDERSON, C. J.

RICHARDSON, J.

1922,

Hearl, 7 and

8, August.

Judgment,

16, August.

Re MAHENDRA LAL
ROY and ors.

Legal Practitioners Act (XVIII of 1879), sec. 13, cl. (c) and (f)—Sec 14—Unfounded and gratuitous imputation against impartiality of trying Court by pleader, if professional misconduct—Duty of pleader to client and Court—Independence of Bar—Additional District Magistrate, if may refer to High Court misconduct of pleader in Deputy Magistrate's Court—High Court, if may adopt report fairly made by Court not competent.

Mr. G., who was appointed Additional District Magistrate at Dacca with all the powers of a District Magistrate under the Criminal Procedure Code and was in charge of the criminal work of the District, hearing crimi-

(1) I. L. R. 29 Cal. 610 s. c. 6 C. W. N. 702 (F. B.) (1902).

(2) 18 C. L. J. 86 (1913).

(3) 28 C. L. J. 216 (1913).

(4) 1 C. W. N. 678 (1893).

(5) 18 C. L. J. 89 (1913).

(6) 20 C. W. N. 872 (1915).

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nal appeals and reporting the progress of criminal work to the High Court, called for a report of an incident which took place during the trial of a criminal case in the Court of a Deputy Magistrate at Dacca and upon receiving such report framed charges under secs 13 (b) and 13 (f) of the Legal Practitioners Act against three pleaders and a muktear. The latter having showed cause, Mr. G reported against them under sec. 14 of the Act through the Sessions Judge who having heard counsel on their behalf upon the matter of the report forwarded it with his own opinion thereon to the High Court. They were both of opinion that one of them, Mr. M, on retiring from the case in which he was appearing for the accused, had made gratuitous imputations against the fairness and impartiality of the trying Deputy Magistrate.

Held—That the Additional District Magistrate was a Court subordinate to the High Court within the meaning of sec. 14 of the Act and was competent to draw up the charge and report the matter to the High Court.

That he followed the correct procedure as laid down in sec. 14 (c) in forwarding his report through the Sessions Judge.

That even if he was incompetent the High Court would adopt the enquiry and report when it appeared that the charge was framed with particularity and precision and there was a full inquiry in which the legal practitioners in question showed cause and appeared by counsel or pleaders.

The High Court is competent and ought, in a proper case, to take action even without the intervention of a subordinate Court.

RASIK LAL NAG (1) referred to.

(1) I L. R. 44 Cal. 639 at p. 617; s. c. 20 C. W. N. 1284 (1916).

A pleader making gratuitous and unfounded imputations in open Court against the fairness and impartiality of the tribunal in the trial of the case in which the pleader is appearing is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of sec. 13 (b) of the Legal Practitioners Act and also of such misconduct as would come under sec. 13 (f) of that Act.

Pleaders have a duty not only towards their clients but also towards the Court of which they are pleaders, and it is part of their duty to co-operate with the Court in the orderly and pure administration of justice.

The independence of the Bar can and ought to be maintained without making gratuitous and unfounded imputations upon the fairness and impartiality of the tribunal.

Per RICHARDSON, J.—The independence of the Bar is recognised as a valuable asset in the civil life of a community and is a corollary of that independence which appertains in the same sense to the Bench. Independence in this connection means freedom to do one's individual duty without fear or favour of any man.

This was a Reference by the Additional District Magistrate of Dacca under sec. 14 of the Legal Practitioners Act in connection with the alleged misconduct of three pleaders and a muktear practising in the Courts at Dacca.

The facts of the case fully appear from the judgment of his Lordship the Chief Justice.

Babus Dasarathi Sanyal, Upendra Lal Roy and Jitendra Kumar Sen Gupta for the Pleader Mahendra Lal Roy.

Babus Manmatha Nath Mukerjee, Debendra Nath Bhattacharjee, Asita Ranjan Ghose and Lal Mohan Sanyal for the other Pleaders and the Muktear.

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The JUDGMENT OF THE COURT was as follows :—

This is a report under sec. 14 of the Legal Practitioners Act by the Additional District Magistrate of Dacca with respect to charges of misconduct under secs. 13 (b) and 13 (f) against three pleaders and one muktear practising in the Courts of and subordinate to the District Magistrate of Dacca. The report has been forwarded through the learned Sessions Judge of Dacca.

There were two other pleaders against whom charges were framed, but the Additional District Magistrate came to the conclusion that there was no ground for reporting against these two pleaders.

At the beginning of the hearing in this Court, a preliminary point was taken by the learned vakil, appearing for Mahendra Lal Roy, that the reference was invalid by reason of the procedure adopted.

It was contended that the proceedings, if any, should have been instituted by the Deputy Magistrate, who was trying the case, during the hearing of which the incident, which is the basis of these proceedings, occurred. That his report, if any, should have been submitted through the District Magistrate and the learned Sessions Judge as provided by sec. 14 (b) of the Legal Practitioners Act. It was further contended that the Additional District Magistrate had no jurisdiction to institute the proceedings.

The facts, which it is necessary to state for the consideration of this point, are as follows :— It appears from the Gazette, that Mr. Gurner was appointed on the 15th October 1921 as Additional District Magistrate at Dacca with all the powers of a District Magistrate under the Criminal Procedure Code.

It appears from the report of the Additional District Magistrate, that at the time

in question he was in charge of the Criminal work of the District, hearing criminal appeals, and reporting the progress of criminal work to the High Court.

The incident, which is the basis of these proceedings, occurred on the 4th February 1922 in the Court of the Deputy Magistrate, Mr. S. P. Ghose, who was trying the case [*A. Das Gupta v. Purna Chandra Ghose and another*], in which the accused were charged with offences under secs. 500 and 501, Indian Penal Code.

It seems that an account of the incident appeared in a newspaper, on the 5th February 1922. The Additional District Magistrate on that day wrote to the Deputy Magistrate, calling for a report of the circumstances relating to that incident. The Deputy Magistrate made a report on the 6th February 1922 and a further one on the 7th February 1922.

The result was that on the 9th February 1922, the Additional District Magistrate drew up a charge under the Legal Practitioners Act alleging misconduct within the terms of secs. 13 (b) and 13 (f). Notice was duly given to the pleaders and muktear concerned, and cause was shown before the Additional District Magistrate by them on the 6th March 1922.

The report of the Additional District Magistrate, dated 6th May 1922, was forwarded by him to the High Court through the learned Sessions Judge of Dacca.

The learned Judge heard learned counsel on behalf of those concerned in the report, drew up his opinion on the matter and sent it together with the report of the Additional District Magistrate to the High Court.

The Additional District Magistrate's Court was a Court subordinate to the High Court within the meaning of sec. 14 of the Legal Practitioners Act and in my

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judgment the Additional District Magistrate was competent to draw up the charge. He was the presiding officer of the Court in which the pleaders and the muktear were charged with the alleged misconduct and he was competent to report the matter to the High Court.

There is no mention of an Additional District Magistrate in sec. 14 of the Legal Practitioners Act. This is explained by the fact that the power to appoint Additional District Magistrates was not vested in the Local Government until after the passing of the Legal Practitioners Act.

It was argued by the learned Standing Counsel that the Additional District Magistrate being a Court subordinate to the High Court, might have reported direct to the High Court. In my judgment, however, the Additional District Magistrate very properly followed the procedure laid down in sec. 14 (c) with reference to a report by a District Magistrate and forwarded the report through the learned Sessions Judge.

In my judgment, therefore, the preliminary point has no substance in it and must fail.

But even if the Court had felt constrained to adopt the argument of the learned vakil for Mahendra Lal Roy, his client would not have been benefited thereby.

In *Rasik Lal Nag* (1), it was held by the learned Judges as follows:—"It cannot be disputed that this Court is competent to take action under sec. 13, cl. (f) after such enquiry as it thinks fit. The section does not require that the enquiry should be conducted directly by the High Court, the enquiry may well be made by a subordinate Court under the direction of the High Court. The only essential is, as pointed out by the Full

Bench in *In the matter of Ganapathi Sastri* (2), that notice must be given to the legal practitioner concerned to show cause against suspension or dismissal, and the notice must formulate the charges, with great particularity and precision, so as to enable the practitioner to know the charges he is called upon to meet. That condition has been amply fulfilled in this case. There is, thus, no reason why the enquiry by the Munsif, though not conducted under the orders of this Court, should not be adopted for the purpose of a proceeding under sec. 13, if we took the view that this Court could proceed only under sec. 13 and not on a report by the subordinate Court under sec. 14."

In this case there was due notice, the charge was framed with particularity and precision, there was a full enquiry in which those concerned showed cause, and appeared by counsel or pleaders, and this Court has the opinion, not only of the Additional District Magistrate but also of the Sessions Judge. Even if this Court considered that the preliminary objection should be sustained, there could be no possible reason for directing a further enquiry, and the Court would adopt the enquiry and reports already made.

As regards the merits of the case, it appears that the three pleaders concerned in the report, Babus M. L. Roy, P. M. Ghosh, S. Mohon Mukherjee and two other pleaders and P. K. Basu, muktear, were representing the accused in the case hereinbefore mentioned which was in the Court of the Deputy Magistrate. It appears from the judgment of Mr. Justice Wainman in connection with the Rule to which I will refer presently, that on 25th October 1921, the accused persons filed a petition in the Court of the trying Magistrate intimating that for special reasons

(1) I. L. R. 44 Cal. 682 at p. 647 : s. c. 20 O. W. N. 1284 (1916).

(2) 19 Mad. L. J. 504 (F. B.) (1909).

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it was not proper that the case should be tried by him, and that they intended to apply to the High Court for a transfer. The trying Magistrate gave them six weeks' time to make the application to the High Court but no steps were taken. The case accordingly proceeded before the Deputy Magistrate and evidence was taken. A charge was framed and the complainant was cross-examined for three days, 25th to 27th January 1922. The cross-examination lasted from 12 to 5 on the first (two) days and from 12 to about 2-30 on the third.

On 27th January 1922, the Deputy Magistrate disallowed certain questions. This in the exercise of his judicial discretion he was entitled to do; and if he regarded the questions as irrelevant, as the Deputy Magistrate said he did, he was bound to disallow them. After this decision the cross-examination of the complainant went on for some time. It was then closed and the case was adjourned until 4th February. On that day the pleaders on both sides and the other witnesses who still had to be cross-examined were present.

The learned pleader, Mr. M. L. Roy, then presented and read a petition, Ex. 4, on behalf of the accused.

The petition set out reasons which were alleged to show that the above-mentioned questions were relevant and should not have been disallowed and the Deputy Magistrate was therein asked to reconsider the matter and to allow the further cross-examination of the complainant in this respect. The pleader for the complainant was then heard upon this matter and after hearing the pleader for the accused the Deputy Magistrate made the following order:—

"I consider these questions to be irrele-

vant and I therefore refuse to allow further cross-examination on that point."

Thereupon the pleader for the accused, Babu M. L. Roy, presented another petition which was already prepared asking for an adjournment of three weeks in order that an application might be made to the High Court for a transfer of the case from the file of the Deputy Magistrate to some other Court of competent jurisdiction. The petition alleged as the ground of the application "that your Petitioners now apprehend for reasons not necessary to disclose here that they cannot expect to have a fair and impartial trial in this Court."

The Deputy Magistrate refused this application making the following order:—
"An adjournment under sec. 526, C. P. C. was allowed before; this petition which is filed again under sec. 526, C. P. C., at a late stage of the trial is rejected." The Deputy Magistrate no doubt was referring in that order to the adjournment which had been previously granted in October 1921.

He might have added, what was the fact, that no steps had then been taken by the accused to apply to the High Court for a transfer of the case to another Court.

Then occurred the incident which is the basis of the proceedings under the Legal Practitioners Act. The account given by the Deputy Magistrate is as follows:—
"Then Babu M. L. Roy said that they would retire from the case because they could not expect a fair and impartial trial in this Court. As far as I remember I told them that I did not know what they would do but their clients could not retire from the case. After this Mahendra Babu addressed the accused persons in Bengali. He told them to sit quietly and not to cross-examine the witnesses and added that they could not expect a fair and impartial trial in this Court. Saying this

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they went away. As far as I remember when they left the Rai Bahadur said: "It seems that the pleaders are non-co-operating with the Court." After the pleaders left I asked the accused if they would cross-examine the witnesses. They said they could not as their pleaders had gone away. Neither Mahendra Babu nor any other of the pleaders told me that they were retiring as the accused had previously agreed on their doing so. The pleaders did not before retiring take the permission of the accused in Court, nor did the accused in my presence tell them to retire. Mahendra Babu did not ask or receive my permission to retire. The statement that Mahendra Babu asked the accused whether they wished them to cross-examine, to which the accused answered in the negative, is untrue."

The explanation given by Mr. M. L. Roy is that in consequence of a ruling given on the 27th January by the Deputy Magistrate disallowing the questions, a consultation was held some time before the date of the next hearing.

Paras. 15 and 16 of the explanation are as follows:—

"That in consequence of the attitude taken up by the learned Magistrate a consultation was held some time before the date for the next hearing amongst the defence pleaders in which both the accused were present. After a most careful consideration of the matter the defence pleaders including your Petitioner were of opinion, that, with all respect to the trying Magistrate the points on which the cross-examination was not allowed were not only relevant but most material and essential and went to the very root of the defence and if cross-examination on those points was not allowed, it would seriously hamper the defence and in fact no proper defence of the accused would be possible

and would amount to a virtual denial of the right of the accused to prove their defence and that it would be useless for the pleaders to further appear in the case as they would not be able to render any effective service to the accused.

That it was then decided in consultation with both the accused:—

(a) That on the next date of hearing, i.e., on 4th February 1922, a petition should be put in fully explaining the relevancy of the questions which had been disallowed and praying that the complainant might be recalled for further cross-examination on those points and other relevant points.

(b) That if the said petition be rejected then a petition for adjournment should be submitted to enable the accused to move the Hon'ble High Court for the transfer of the case to some other Court as it was apprehended by the accused that they would not get a fair and impartial trial in that Court.

(c) That if the latter petition too were rejected the accused would not defend themselves in the said Court and the services of their lawyers would no longer be necessary for the purpose of the defence in the case in that Court and the accused would move the Hon'ble High Court for a transfer of the case whether an adjournment were granted for the purpose or not; your Petitioner further submits that both the accused fully agreed to this."

The learned pleader's account of what took place in Court, after the petition for adjournment was rejected on the 4th February, is contained in paras. 20, 21 and 22 of the explanation, which are as follows:—

"That thereupon your Petitioner submitted to the Court that as in their humble opinion the trial would under the circumstances be void and illegal and as the

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accused did not expect a fair and impartial trial in that case in that Court they thought they would retire to which the Court observed that they might retire but their clients could not.

That the Petitioner and the lawyers for the defence including your Petitioner who were present there at the time were then about to retire from the Court when Babu Parbati Charan Bose, mukhtear for the defence, suggested that under the circumstances the accused should be questioned as to whether they would stick to the course they had already decided upon.

That your Petitioner told the accused in Bengali that as they (the accused) did not expect a fair and impartial trial in that Court and as under the circumstances no useful purpose could be served by cross-examining the other witnesses and your Petitioner advised both accused not to cross-examine the remaining witnesses and asked them if they desired him to cross-examine them to which they answered in the negative "

The Additional District Magistrate came to the following conclusions : —

" Between these two accounts one has to accept one or the other and on that decision rests the answer to the question whether Babu Mahendra Lal Roy, as spokesman of the pleaders, was engaged in necessary and legitimate consultation with the accused or, under cover of remarks to the accused, unnecessarily unpairing public confidence in the Court. After carefully weighing the two accounts I cannot believe that the Magistrate, and two pleaders called for the proceedings are so completely wrong in their recollection as one must believe if accepting the truth of the opposite account. I find it the more difficult to believe this when the general circumstances already noticed are so far out of keeping with a *bond fide*

consultation between the pleaders and their clients.

My conclusion is that the words used by Babu Mahendra Lal Roy to his client did not amount to a *bond fide* consultation, but that cover was taken of an address to the client for a parting fling at the fairness of the Court. In making this second and quite gratuitous rally to impair confidence in the Court, it seems to me, that Babu Mahendra Lal Roy was guilty of grossly improper conduct as a pleader, and that those who associated themselves with him in retiring in these circumstances participated in the impropriety.

The conclusions I have come to on the four main issues stated are then that the pleaders retired probably by previous arrangement with the leading accused on the Court giving a judicial ruling rejecting the application under sec 526 and that Babu Mahendra Lal Roy marked that retirement by words addressed first to the Court, and then to the accused accentuating the idea that this retirement took place as justice was not to be obtained in the Court."

The Additional District Magistrate concluded .—" In fact, the whole affair takes, in my view, the appearance of a forensic manoeuvre designed to accentuate the difficulties of the Court in the event of its rejecting the petition under sec. 526, Cr. P. C. and to make the most in the Court room of the idea that justice was not to be had in this Court."

The learned Sessions Judge in giving his opinion said, " If it be a fact that the pleaders had previously arranged with their clients that they should retire from the case in the event of the Magistrate refusing their application for an adjournment under sec. 526 of the Criminal Procedure Code, the moment chosen by them for the retirement and the manner in which it

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was effected showed great disrespect for the Court. They retired immediately after the Magistrate refused their application for an adjournment, and they effected it in such a manner that it amounted to a demonstration against the order made by the Court in the exercise of its judicial discretion."

In my judgment there can be no doubt that the learned pleaders had arranged with their clients that they should retire from the case in the event of the Deputy Magistrate refusing the two petitions above referred to. I am not however satisfied that it had been previously arranged among the pleaders that their retirement should be marked by statements in open Court making imputations against the fairness and impartiality of the Deputy Magistrate.

I am satisfied that the findings of the Additional District Magistrate and the learned Sessions Judge as to what took place after the petition for adjournment was refused are justified by the evidence that the learned pleader Babu M. L. Roy made two statements—the first addressed to the Deputy Magistrate and the second to the accused—in such a way that they were heard by those in Court and that both such statements involved imputations upon the fairness and impartiality of the Deputy Magistrate. In my judgment both these statements were gratuitous and unjustifiable. These statements were not made in the course of argument or in support of the application for adjournment. That application for adjournment so that the High Court could be moved had been discussed and rejected. There was no reason why the learned pleader should have done anything more than retire from the case in accordance with the instructions of his clients, which he alleged he had already received, without making any

imputation against the Court. The High Court could have been moved for an order of transfer. It is to be noted that on 13th February 1922, an application for transfer of the case to some other competent Court was in fact made to the High Court, and on the ground that the accused reasonably apprehended that they would not get a fair and impartial trial before the Deputy Magistrate and a rule was obtained. When however the rule was heard by the High Court it was discharged, and it must therefore be assumed for the purpose of these proceedings that there was no substantial reason, if any, for the alleged apprehension of the accused. Similarly there was no reason or necessity for the learned Pleader to address the accused in such a way that all could hear and advise them that "as they did not expect a fair and impartial trial in that Court" they should take a certain course.

The course which was to be taken apparently had been agreed beforehand. But even if it was necessary for the learned pleader to communicate with his clients again upon the matter that should have been done in the usual way, and not by addressing the accused from one side of the Court to the other as described in the opinion of the learned Sessions Judge.

It is not necessary for me to deal with the evidence in detail. I agree with the Additional District Magistrate that the evidence of Purna Chandra Ghosh, one of the accused, who was the first witness for the pleaders, was obviously unreliable, and as regards the evidence of the only other witness who gave evidence on behalf of the learned pleader it was stated by him that he had told no one what he knew about the case until he went into the witness-box and that he had no note of what occurred. The incident occurred on 4th February and he was giving his evi-

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dence on 10th March—two months after the event. It is quite possible to conclude that the witness had not remembered all that occurred, without making any reflection upon his veracity. The evidence on the other hand against the learned pleader, which has been adopted by the Additional District Magistrate, is confirmed by documents which came into existence on or about the time of the incident. I refer to the petition filed on behalf of Ashutosh Das-Gupta, the complainant, and the reports of the Deputy Magistrate, dated 6th and 7th February.

I have no doubt that the petition of the complainant was drawn on 4th February 1922, the very day of the occurrence, though there is a dispute as to the date of filing. The pleader who drafted the petition was called in as a witness and proved that he attached his signature to it and made it over to Jadu Babu about 4-30 P.M. on 4th February for the purpose of filing.

It was argued on behalf of the learned pleader that nothing would have been heard of this matter but for the action of the Additional District Magistrate in calling for a report from the Deputy Magistrate. In my judgment that is not correct. The Deputy Magistrate said in his evidence, "On the 6th I went to see the District Magistrate on my own account, to report the incident to him. My idea, at that time, was to report to the Additional District Magistrate what had happened. My intention at that time was to see what remedy could be taken and I wanted to consult the District Magistrate about it. He asked me to report to the Additional District Magistrate, and on coming to my room to do so I found a note from the Additional District Magistrate enquiring about the incident as reported in the *Dacca Herald*."

He further said that the Court was crowded when the incident took place and he considered himself much humiliated.

It is clear therefore, from the above passage, that the Deputy Magistrate went of his own accord to the District Magistrate to report the incident to him and to consult him as to what should be done, before he received the letter from the Additional District Magistrate enquiring about the incident.

In any event, the final determination in these cases rests with the High Court and with the High Court alone, as was pointed out by the learned Judges in *Russick Lal Nag* (1) and even if the alleged misconduct had been brought to the notice of the High Court, without the intervention of the Subordinate Court, this Court is competent and ought, in a proper case, to take necessary action.

Having carefully considered the matter I regret that I am bound to come to the conclusion that the learned pleader, M. L. Roy, gratuitously and unnecessarily made in open Court statements which contained imputations against the fairness and impartiality of the Deputy Magistrate, imputations which, as already mentioned, we must assume for the purpose of this case were without any foundation. Such statements, impugning the fairness and impartiality of a judicial tribunal, would be, in any event, a grave matter, but when they emanate from a learned pleader, such as M. L. Roy, occupying a leading position at the Bar, they assume a still more serious character and are calculated to have an effect, which is far-reaching and detrimental to the due administration of justice.

During the argument reference was made by the learned vakil, appearing for

(1) *F. L. R.* 44 Cal. 637 at p. 646; *a. c.* 20 C. W. N. 1284 1916.

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the learned pleader, to the "independence of the Bar."

I yield to none in my desire to see the independence of the Bar maintained. It is necessary, however, to note that, in the case now before us, the Deputy Magistrate had in no way interfered with the independence of the Bar. He merely gave a judicial ruling as to the relevancy of certain questions: in consequence of which the pleaders chose to take the action, which has been referred to. Further, I am glad to think that the independence of the Bar has been, in the past, and I hope will be, in the future, maintained without making gratuitous and unfounded imputations upon the fairness and impartiality of the tribunal.

In my judgment the learned pleader, M. L. Roy, in making such statements, was guilty of grossly improper conduct in the discharge of his professional duty within the meaning of sec. 13 (b) and of such misconduct as would come under sec. 13 (f) of the Legal Practitioners Act.

As regards the case of the other pleaders and the mukhtear, there is no suggestion that any of them made any such statements as those to which I have referred.

By leaving the Court in company with their leader, M. L. Roy, after he had made the above-mentioned statements, they, in a sense, associated themselves with his misconduct.

I am not satisfied however that the statements of M. L. Roy were made in pursuance of any previous arrangement with the other pleaders or the mukhtear, although no doubt it was arranged that they should retire from the case in the event of the petition for the adjournment being rejected.

It was also argued on their behalf that they may not at the time have realised

the serious nature of the statements made by their leader, M. L. Roy, and that they went out of Court with him merely because of the previous arrangement to take no further part in the case.

I am not prepared to hold that from their conduct and by the sequence of events they must be taken to have associated themselves with their leader's statements and I am willing to accept the view of this case put before the Court by the learned vakil, who appeared for them, *viz.*, that they may not have realised the nature of the statements made by M. L. Roy and the serious position which must naturally arise in consequence of such statements being made by a learned pleader. I therefore come to the conclusion that this Court should not hold that the learned pleaders, P. M. Ghosh, S. M. Mookerjee and the mukhtear—P. K. Basu—were guilty of such misconduct as is contemplated by sec. 13 (b) and (f) of the Legal Practitioners Act.

We have carefully considered what course should be adopted in the case of the learned pleader, M. L. Roy.

The Deputy Magistrate said that he was on intimate terms with the learned pleader and that out of Court he is an amiable gentleman.

He stated, however, that the learned pleader was very impulsive, that he had recently insulted a pleader in his Court, and that he had apologised a few days after in open Court. It appears also that the learned pleader is the secretary of the Local Bar Association and therefore I assume that he enjoys the confidence of his brother pleaders and that he is a man of position at the Bar of Dacca. These considerations are in one sense in his favour.

On the other hand the very fact that the learned pleader occupies such a lead-

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ing position, in my judgment, makes his misconduct all the more serious and inexcusable. Further it is to be noted that there has been no sign of any apology or expression of regret for his conduct, although it must have been obvious to him shortly after the incident of 4th February 1922 that what he had done had inflicted humiliation on the Deputy Magistrate and was calculated to bring the administration of justice into disrepute.

It is to be remembered that pleaders have a duty not only towards their clients but also towards the Court of which they are pleaders, and it is part of their duty to co-operate with the Court in the orderly and pure administration of justice.

The learned Sessions Judge in his report referred to an occasion when the learned pleader is alleged to have made an offensive remark with regard to a learned Subordinate Judge. We refer to this, only for the purpose of making it clear that we have not taken this matter into consideration and we have not been influenced by it in any way. We confine our judgment to the report and evidence relating to the incident of 4th February 1922.

We regard this case as a serious one, and we cannot help regretting that the learned pleader has not been fit to express his regret.

Under these circumstances it is impossible, in our judgment, to dispose of the case merely by passing censure on the conduct of the learned pleader and we consider it our unpleasant duty to direct that the learned pleader, M. L. Roy, be suspended for the period of one month.

M. L. Roy, therefore, is suspended for the period of one month from to-day.

RICHARDSON, J.—There is really nothing for me to add to my Lord's exhaus-

tive judgment which I have had the opportunity of reading and with which I agree throughout. I desire, however, to associate myself especially with what my Lord has said as to the independence of the Bar. I wish that gentlemen belonging to the learned profession of the law would get it out of their heads that any one desires to curtail the privileges of the Bar or interfere with its independence. I take it that independence in this connection means 'freedom to do one's individual duty without fear or favour of any man'. The independence of the Bar is recognised as a valuable asset in the civil life of the community and is, as I regard the matter, a corollary of that independence which appertains in the same sense to the Bench. I know of no quarter from which the independence of the Bar in that sense is in any way menaced unless there be a hint of danger arising from Associations formed by members of the Bar themselves. There may be a tendency on the part of such Associations unduly to restrict the liberty of individuals in matters not strictly pertaining to professional practice. But if there be such a danger, or such a tendency, the members of the profession have the remedy in their own hands. Incidents will, of course, occur from time to time which had better not have occurred. After all men are human, whether on the Bench or at the Bar, and in the heat of the moment or on the impulse of the moment, expressions may be used on one side or the other which are not within the bounds of propriety but in the great majority of such cases an apology or an expression of regret for over-hastiness in speech, tendered and accepted in the right spirit, would be sufficient to terminate the incident. Relations between Bench and Bar can be adjusted only on a basis of

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mutual respect and mutual anxiety that justice should be duly administered.

With these few observations, I concur in the judgment which has just been delivered.

N. G.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 562 OF 1922.

SANDERSON, (C. J.) MAZAHUR ALI,
CHOTZNER, J. Petitioner,
1922, v.
1, August. KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 342 (1)—Examination of the accused after the close of the prosecution case, if imperative—Failure to comply with this provision, if initiates trial—"After the witnesses for the prosecution have been examined," meaning of—Practice of taking depositions in one case and having them copied and used in a connected case, propriety of—Examination of several witnesses by one Magistrate and completion of the trial by another Magistrate, propriety of.

In certain connected criminal cases the prosecution witnesses were examined and some of them cross-examined before the District Magistrate, and the accused was examined once before all the prosecution witnesses had been examined and again after all the prosecution witnesses had been examined but before all of them had been cross-examined. The cases were then made over to another Magistrate before whom the remaining prosecution witnesses were cross-examined and who convicted the accused. The depositions were taken in one of the cases and they were copied and used in the other cases:

Held—That sec. 342 (1) of the Criminal Procedure Code requires that the Magistrate shall question the accused generally on the case after the witnesses for the prosecution have been examined, cross-examined, and re-examined, if necessary. The provision is mandatory, and

not having been complied with, the conviction was illegal.

That it was improper to take depositions in one case and have them copied out and used in another case, and such a course should not be adopted in trials of criminal cases.

Held, further—That a Magistrate who undertakes the trial of a criminal case and who also hears the witnesses give their evidence should, if possible, finish it. Examination of some witnesses by one Magistrate and completion of the trial by another Magistrate is an undesirable proceeding.

This was a Rule granted on the 10th July 1922 against an order of the District Magistrate of Rungpur, dated the 4th March 1922, convicting the Petitioner under sec. 420, I. P. C. and sentencing him to four months' rigorous imprisonment, which order was, on appeal, affirmed by the Sessions Judge of Rungpur on 17th June 1922.

The facts material to this report are as follows.—In three sets of criminal cases before the District Magistrate of Rungpur, the first part of the proceedings was heard by himself and when the cases were before him the witnesses for the prosecution were examined and some of them were cross-examined. The accused was examined twice by the District Magistrate, once before all the prosecution witnesses had been examined and again after all the prosecution witnesses had been examined but before all the witnesses had been cross-examined. The cases were then made over to another Magistrate, Mr. J. C. Sen, some of the witnesses for the prosecution were cross-examined before him, and the accused put in a written statement of defence, but the accused was not examined generally on

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case any further. Mr. Sen then finished the trial and convicted the accused. The depositions of some of the witnesses taken in one case were copied and used in the other cases. On appeal, the Sessions Judge acquitted one of the accused and also acquitted the Petitioner of the charges against him in two of the cases. He, however, upheld the conviction of the Petitioner in one case only and against that conviction the present Rule was obtained.

Babus Dasarathi Sanyal and Debendra Narayan Bhattacharjee for the Petitioner
Mr. Orr for the Crown

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is a Rule calling upon the District Magistrate to show cause why the conviction of the Petitioner and the sentence passed upon him should not be set aside.

The learned Sessions Judge who heard the appeal commented upon the procedure which had been adopted at the trial and said that "the three sets of cases had a checkered life," and it is impossible for this Court to view the procedure adopted at the trial with approval. The matter, however, has been simplified by reason of the judgment of the lower Appellate Court, and it is not now necessary for me to deal with the question of the joint trial or whether it was proper to take the depositions in one case and have them copied and used in another case. Speaking generally, in my judgment, that is not a course which should be adopted in trials of criminal cases. The learned Judge in the appeal Court acquitted one of the accused of all the charges and he acquitted the accused Mazahur Ali of two of the charges against him. He the conviction of Mazahur Ali in

case only; that is the case in which Hufi Dass was the complainant. In that case there is now only one matter, which it is necessary for this Court to consider, viz., whether the provisions of sec. 342 (1) of the Code of Criminal Procedure were complied with in the trial Court.

The first part of the proceedings was heard by the District Magistrate and when the case was before him the witnesses for the prosecution were examined, and some of them were cross-examined.

The accused was examined twice by the District Magistrate, once before all the prosecution witnesses had been examined, and again after all the prosecution witnesses had been examined but before all the witnesses had been cross-examined.

The case was then made over to another Magistrate, Mr. J. C. Sen; some of the witnesses for the prosecution were cross-examined before him, the accused put in a written statement of defence and Mr. Sen finished the trial and convicted the Petitioner. This in itself was, in my judgment, an undesirable proceeding. The Magistrate who undertakes the trial of a criminal case, and who also hears the witnesses give their evidence should, if possible, finish it.

It appears that although, as already stated, some of the prosecution witnesses were cross-examined before Mr. Sen, the accused was not examined generally, on the case by Mr. Sen in accordance with the provisions of sec. 342 (1) of the Code of Criminal Procedure. In my judgment, under these circumstances the provisions of sec. 342 (1) of the Code of Criminal Procedure were not complied with.

The object of the examination referred to in the section is to enable the accused to explain any circumstances appearing in the evidence against him and the last

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part of that section runs as follows:—The Court “shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.” In my judgment it is clearly indicated in that part of the section that the time, at which the Court shall question the accused generally on the case, is, after the prosecution case is completed and before the accused person is called on for his defence.

In this case I have not the least doubt that the accused person was able to put before the Court every thing that he wanted to say about his case. He was examined on two occasions by the District Magistrate. The accused said that he would put in a written statement and he did put in a written statement. On the merits, as far as I can see, there is nothing to be said in support of this application, but there are the words of the section which, in my judgment, expressly provide that the Magistrate shall question the accused generally on the case at a certain stage in the proceedings. That stage is “after the witnesses for the prosecution have been examined and before he is called on for the defence.” That must mean after the witnesses for the prosecution have been examined, and after the cross-examination and re-examination, if any, of such witnesses, for ordinarily the accused is not called on for his defence until the case for the prosecution is closed.

I am not now considering exceptional cases, where it may be necessary for the prosecution, with the sanction of the Court to recall witnesses, or to give rebutting evidence.

The above-mentioned provision in the sanction is mandatory and it has not been complied with in this case.

The result is that we are compelled to make this Rule absolute.

It remains to be considered whether the case should be remitted in order that it may be retried. It appears from the learned Sessions Judge's judgment that the proceedings were started so long ago as August 1920. There were partial trials before three Magistrates, the Petitioner was in jail for two weeks. Having regard to these matters, we do not consider it right that the Petitioner should be again put on his trial and the result is that the conviction and sentence will be set aside, and the bail bond will be cancelled.

I hope that in future the Courts will observe the provisions of sec. 342 (1) of the Code of Criminal Procedure. If they will do so, they will save the High Court an immense amount of time, because, in my experience, the point, herein considered, is frequently arising, and Rules have to be issued by reason of the fact that the trial Court has not observed the provisions of the section.

CHOTZNER, J.—I agree.

J. N. R.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

VISCOUNT CAVR.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

1922,

Heard, 30, 31, January and 2, 3, 6 and 9, February.

Judgment,

2, March.

KHAJER SOLEHMAN

QUADIR and anr.,

Appellants,

v.

NAWAB SIR SALIM-

ULLAH BAHADUR

since deceased, and

ors, Respondents.

Mahomedan Law—Wakf—Property settled in perpetuity for aggrandisement of family under colour of charity—Wakf, illusory—Remote gift to the poor, if validates wakf—Wakf Validating Act (VI of 1913), not retrospective—Suit to set aside wakf as

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invalid—Compromise—Agreement confirming the wakf and stipulating for payment by mutwali of allowances to members of the family out of the income of settled properties, how far binding—Contract for valuable consideration creating charge on property, not accompanied by delivery, validity of.

Held—That two deeds of 1846 and 1868 which purported to create by gift a perpetual succession of interests for the aggrandisement of the family of the donors were invalid by the Mahomedan law and were not validated by the use of the term wakf or by the insertion of a remote trust to the poor.

That the Mussulman Wakf Validating Act, 1913, cannot be construed as validating deeds executed before its date.

A suit brought in 1880 to set aside the deeds as invalid was compromised in 1881 by two agreements made and concluded between the members of the family on the one hand and the then mutwali on the other which whilst purporting to confirm the wakfnamas provided for the payment by the mutwali of fixed allowances to living and named members of the family out of the income of the settled properties, in consideration of which stipulation the mutwali was confirmed in his possession of those properties. The allowances were made payable to the persons named immediately and were to be continued to their heirs:

Held—That the purpose of the agreements was quite different from that of the wakfs and the agreements were enforceable though the wakfs were invalid. The allowances payable under the former were intended to take effect as immediate and heritable charges on the income of the properties, taking priority of all the limitations contained in the settlements.

That the direction in the agreements to the allowances "out of the income" the settled properties showed an inten-

tion to create a charge and this intention was not frustrated by the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlements.

That the agreements were not gifts but being contracts for valuable consideration were not required to be accompanied by delivery; and the charges on land created by them could be enforced like other charges by the Courts.

That the fiduciary character of the mutwali's possession and the conditions on which it was given could not be repudiated by his heirs and the latter allowed to keep the properties in their own hands free from all charges.

That the provision in the agreements that the distribution of an annuity among the heirs of the annutant should be in proportions to be determined by the family panchayet (if it was intended to do more than to authorise the panchayet to settle disputes as to heirship) was inoperative and could be disregarded.

This was an appeal against the decree of the High Court of Judicature at Fort William in Bengal, dated the 6th June 1919, which reversed the decree of the Subordinate Judge of Dacca, dated the 16th April 1917, and made in Suit No. 70 of 1914.

The said suit was brought by the present Appellants to recover Rs. 45,000 as arrears of certain allowances claimed by them on the footing of two agreements of 1881, together with other relief. The Subordinate Judge delivered judgment for the arrears claimed but refused the other relief. Against this refusal no appeal was preferred by the Plaintiffs.

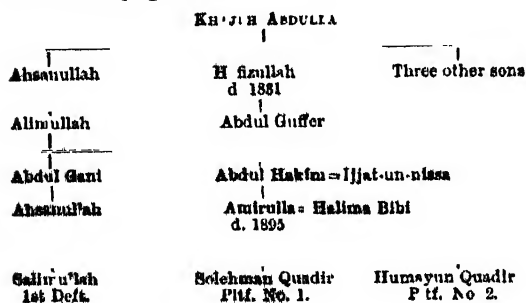
On an appeal preferred by the Defendants the High Court held that the Plaintiffs were not entitled to the allowances and passed a decree dismissing the suit.

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The present appeal was preferred by the Plaintiffs against the said decree of the High Court.

The original Defendant, now represented by the present Respondents, was the Appellants' cousin and the son of Nawab Ahsanullah, the executant of the agreements above-mentioned dated 1881. The Plaintiffs, *viz.*, the present Appellants, who were born subsequently to that date, were the sons of Amirulla and Halima Bibi who received under the said documents certain monthly allowances until the dates of their respective deaths in 1895 and 1896. The Appellants' case was that they as their heirs were entitled to the said allowances and they claimed payment of arrears thereof.

The relationship of the persons named appears from the following extract from the family pedigree.



Khajeh Abdullah, who came from Cashmere, set up an extensive trading business in the town of Dacca, and settled there towards the end of the eighteenth century. On his death his second son Hafizullah became the head of the family, and he died about the year 1831. He was succeeded by his son Abdul Gaffer who was followed by his cousin Alimullah, the ancestor of the Respondents.

On the 20th September 1835, Alimullah made a gift of a sum of two lacs of rupees to his son Abdul Gani, followed on the 26th December 1845 by a deed of

gift of valuable immoveable properties. On the 8th May 1846, the other members of the family created a "*wakf*," of which Abdul Gani was made the *mutwali*. This document recited that the custom of the family had been to appoint one of the members as the head who granted allowances to the others and was accepted by them as the leader of the family; it was stated explicitly that the object of the *wakf* was the maintenance of the members of the family. It was also provided that the *mutwali* would not be liable to be removed and would have authority to appoint his successor.

On the 11th September 1868, Abdul Gani executed a *touliatnama* whereby he transferred the *mutwaliship* to his son Ahsanullah and also executed a deed of "*wakf*" (of his own property) whereof he appointed his son Ahsanullah as the *mutwali*. The *wakf* was created in favour of all his sons, offspring and all the members and relatives descended from his grandfather, and was descendible to children in the male and female lines, and, on their failure, in favour of the *fakirs* and the poor indigent of Dacca. There can be no doubt as to the purpose of the *wakf*, because it was, expressly recited that the *wakf* was created for the maintenance of the members of the family, generation after generation. To remove the possibility of all doubt on this point the founder added.

"The object of the *wakf* of the properties is this that they be protected from injury and ruin and that the name and dignity of the family be maintained and that the profits of the estate be, according to the practice and usage of the family, spent for the improvement of the position and dignity of the family, for the comfort and benefit of the persons in whose favour the *wakf* is made, and for the per-

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formance of worldly and religious affairs and of charitable acts "

Rules were laid down for the management of the *wakf* properties for succession to the office of *mutwali* and for other like matters, and there was a somewhat remarkable provision that none of the beneficiaries would be competent to demand accounts from the *mutwali*. The *mutwali* appears to have carried out the directions of the founder for many years.

On the 2nd September 1880, certain members of the family including Amrullah (the father of the Appellants) who was the 35th Plaintiff, brought a suit against Abdul Gani and Ahsanullah above-mentioned, claiming proprietary rights in respect of the property comprised in the deed of 1816, of which they impugned the validity as a deed of *wakf*. In the defences put in on behalf of Abdul Gani and Ahsanullah (with whom other members of the family were joined as co-Defendants) it was pleaded as follows:—

"The Plaintiffs have no *maliki* right with regard to the said *wakf* properties. The Plaintiffs' present claim cannot be admitted unless they first establish by a suit their said *maliki* right and that they are not bound by the said *towliatnama*.

"From over 30 years Plaintiffs or their predecessors never have or had any possession of, or *maliki* right to, the disputed properties. The right alleged by the Plaintiffs is barred by limitation "

The suit was brought to trial but before judgment was delivered an agreement was arrived at between the parties in accordance with which all the Defendants other than Abdul Gani and Ahsanullah were made Plaintiffs and an application was made by the Plaintiffs collectively "that this suit be allowed to be withdrawn without any right of instituting any fresh suit on any causes of action which form the

subject-matter of this suit." This application was granted on the 26th August 1881. On the same day the agreement between the parties was drawn up which was supplemented by a subsequent deed, dated 17th September 1881.

The documents just referred to were the agreements on which the Appellants' claim in the present litigation was founded. The first of these agreements declared who were the persons who should receive allowances payable out of the income of the properties held under the deeds of 1846 and 1868 respectively; and it was thereby provided that the particular amounts to be paid to each individual should be fixed by a family committee or *panchayet* therein provided for. The second agreement dated the 17th September 1881 was drawn up after the said committee had fixed the amounts; and to it was annexed a schedule of the persons to whom monthly allowances were to be paid at various rates. Among them was Amirullah the present Appellants' father; it seemed to be admitted that he and also his wife were fully paid till their respective deaths in 1895 and 1896. The Appellants' claim was that their late parents' allowances should have been paid to them as then heirs by the *mutwalis* from time to time under the terms of the said agreement.

In or about 1894 Abdul Gani was advised on the strength of certain decisions of the High Court and the Privy Council that the so-called *wakf* of 1868 was not a true *wakf* enforceable at law, and that consequently it and the agreements of 1881 were invalid and unenforceable and he instituted Suit No. 29 of 1894, in the Subordinate Court of Dacca, praying for declarations to that effect together with consequential relief. Written statements were put in by various members of the

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family including the present Appellants' father, who *inter alia* pleaded that the compromise of 1881 was fraudulent. In the following year Abdul Gani applied to be allowed to withdraw the suit and he was permitted to do so, liberty being reserved to him to sue again for the same subject-matter.

In the interval, *viz.*, on the 17th September 1894, other members of the family brought a suit against, among others, Abdul Gani, who after his death was represented by Ahsanullah. This suit was No. 136 of 1894, and the Plaintiffs' claim therein was for certain shares of the property comprised in the *wakf* deeds and for accounts and possession. This suit remained pending until 9th September 1907, when it was declared to have abated.

Meanwhile in 1895 Abdul Gani conveyed his rights in the lands to his son Ahsanullah, and subsequently Ahsanullah issued notices to the persons concerned stating that he was advised that his father's supposed *wakf* of 1868 was invalid, but that he intended for the present to continue to pay the allowances stated in Sch. D of the agreement of 1881 to the various persons who were parties to the said agreement.

A further suit No. 96 of 1895 was instituted by other members of the family against Abdul Gani and Ahsanullah for relief of the same general character as that sought in Suit No. 156 of 1894. Amirullah, the Appellants' father, and his wife Hahma were parties to this litigation until the dates of their respective deaths. Some of the Plaintiffs withdrew without liberty to sue again, others died, and though numerous written statements of defence were put in and issues were framed, the case had not been brought on for trial when the present litigation commenced.

On the 30th June 1914, the present suit was instituted in the Subordinate Court, Dacca, by the present Appellants (the sons of Amirullah above referred to) against Salmullah, the heir of Ahsanullah, and other Defendants. Salmullah died shortly afterwards and his heirs who are wards of the Court of Wards were brought on to the record to represent him.

The plaint dealt at length with the history of the family and in para. 22 the Plaintiffs referred to the "*wakf*" of 1868, and the two agreements of 1881 on which they based their present claim. Their claim *inter alia* was for Rs. 32,725 being arrears of their father's allowance at the rate of Rs. 148-10-0 a month and for Rs. 12,967 being arrears of their mother's allowance at the rate of Rs. 60-5-0 a month. And they said in para. 24 of their plaint "the Defendants are liable and bound to pay the said amount either from the profits of the properties of the *wakf* of 1869 which are in their possession or from their personal funds."

In the written statement of defence it was *inter alia* pleaded that the properties included in the "*wakf*" deed of 1868 were properties belonging to Abdul Gani; that the *wakf* deed was invalid; that the allowances referred to in the agreement of 1881 were personal only and the Plaintiffs had not then been born and were not entitled to sue on the agreement and had no right to the arrears claimed; that no decision by the family *panchayet* had been given in the Plaintiffs' favour and that their claim was time barred. Objection was also taken to the form of the suit on the ground that all the necessary parties were not before the Court. Further it was pleaded that the suit as brought was barred by the result of the previous litigation and the pendency of the suit of 1895.

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On these pleadings numerous issues were framed of which the following are material.

(3) Is this suit barred under sec. 10, Civil Procedure Code, by reason of Suit No. 96 of 1895 pending in this Court?

(9) Have the Plaintiffs any right or title to the allowances claimed in the plaint; was any right created in their favour by the memorandum of agreement and the deed of agreement referred to in the plaint as well as by the withdrawal of Suit No. 189 of 1880?

(11) Are the Defendants precluded and estopped from questioning the validity of the said deed of agreement, without restoring the Plaintiffs or their representatives of the said Suit No. 189 of 1880, and the signatories or their representatives of the said memorandum of agreement to their original position in which they were during the pendency of the said suit before its withdrawal, and without revival of the said suit; does the question arise?

(12) Were the grants of allowances mentioned in the aforesaid memorandum of agreement and the deed of agreement in the nature of voluntary, charitable and compassionate gifts to specific individuals for life only, as is alleged in the written statement?

(13) Have the Plaintiffs inherited any of the allowances claimed in the plaint; are the allowances claimed in the plaint heritable; did the persons named in paras. 14 and 16 of the plaint inherit any allowance?

(14) Is the *wakf* of 1868 a valid document enforceable in law; if not is the claim of the Plaintiffs maintainable; can the Defendants question the validity of the *wakf* of 1868; has the said *wakf* been set aside by Nawab Abdul Gani as invalid; whether he had authority to set it aside after the agreement of 1881; does

the question of the validity or otherwise of the said *wakf* at all arise in the present suit?

The Subordinate Judge delivered his judgment in the suit on 16th April 1917. He said "the question of the validity or otherwise of the *wakf* does not properly arise in this suit which is based on the agreement the consideration of which was lawful and good," and consequently he expressed no opinion on this question. He adds: "the admission as to title of Sir Abdul Gani in the memorandum of agreement could not make the *wakf* valid, if it was in law an invalid one, and the admission was the result of compromise; but the present case is based on the memorandum of agreement and the agreement notwithstanding the admission."

On the construction of the agreement (regarded apart from the above question) he said "the Plaintiffs are entitled to their parents' allowances not by heirship but under the covenant in para. 11 of the memorandum of agreement; the fact that they are the heirs of their parents who were in receipt of allowances from the 1868 properties as mentioned in the schedule of the deed entitles the Plaintiffs to receive the allowance under the said covenant . . . It is to be observed that the Plaintiffs' parents were in existence at the time of the memorandum of agreement, and that at the termination of the first life-estate of the Plaintiffs' parents the allowance would not and did not remain in abeyance, and the Plaintiffs stepped into their rights on their parents' death; and thus the covenant in the memorandum of agreement does not in so far as the present Plaintiffs are concerned militate against the rules of remoteness involved in the law of perpetuities."

The Subordinate Judge deemed it im-

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material that the family *panchayat* contemplated by the agreement had not decided that the Plaintiffs were entitled to the relief which they claimed. Further he considered that the previous litigation above referred to and the pendency of the suit of 1895 mentioned above in para. 12 were immaterial to the question whether the Plaintiffs were entitled to make their present claim, which he further held was not affected by the law of limitation. He accordingly passed a decree in their favour for Rs. 45,692 on account of arrears of the allowances. The further claim made in the plaint for Rs. 15,000 as a provision for the construction of a house for them he disallowed.

Against the said decree of the Subordinate Judge the Defendants preferred an appeal to the High Court which was allowed with costs by a decree, dated the 6th June 1919. The Plaintiffs preferred no appeal against the disallowance of their further claim for Rs. 15,000.

In their judgment the learned Judges (Mookerjee and Walmsley, JJ.), pointed out that the Plaintiffs' claim was reduced to a claim for arrears of maintenance based on the two agreements dated respectively the 26th August and 17th September 1881. They said "The substantial matter in controversy thus is, whether there is a valid agreement enforceable at the instance of the Plaintiffs. For the determination of this question it is necessary to investigate two preliminary points, namely, first, are the *wakfs* valid in law, and secondly, if not valid in their inception have they been validated by the Mussalman Wakf Validating Act 1913." On these preliminary questions the judgment of the Court was that the alleged *wakfs* were not valid in law and had not been validated by the Act referred to, and they added:—

"It is manifest that the scheme is

founded on, and is inseparably associated with the *wakfs* of 1846 and 1868; consequently, as soon as these *wakfs* are pronounced to be invalid and inoperative in law, the entire scheme must of necessity be shattered to pieces. The assertion of the parties or of their representatives cannot validate illegal *wakfs*, and the Court cannot be utilised for the enforcement of a scheme elaborately devised to carry out a plan of family aggrandisement in contravention of the whole policy of law. In this view a desperate effort has been made on behalf of the Respondents to support the scheme as if it were not based on the *wakfs* of 1846 and 1868; but plainly it is not the function of the Court to reconstruct for the parties a plan of maintenance allowance out of the wreckage of the scheme they themselves had ingeniously, but unsuccessfully, devised. Besides even if such an attempt were made it could not possibly succeed as the Court would have to support what was in disguise a scheme of family settlement which had failed because it was based on illegal *wakfs*. In our opinion there is good ground for the contention of the Appellant that a scheme for family allowances so framed would itself be contrary to law."

Further on the learned Judges said: "We cannot hold accordingly that the 11th paragraph of the memorandum of the 26th August 1881, created heritable interests" and the conclusion of their judgment was as follows: "In our opinion there is no escape possible from the position that, as the *wakfs* have failed, the entire scheme for grant of maintenance allowances by the *mutwali* from the income of *wakf* properties has been completely demolished."

The present appeal was preferred against the said decree of the High Court.

Messrs. DeGruyther, K. C., Ramsay and

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Palat for Appellants.—Assuming that the *wakfs* were invalid the ownership of the property was never parted with. A trust was formed, and whether Abdul Gani was or was not a valid *mutwali* is immaterial, he was put into possession purely as a trustee and has held the property only in that capacity. Being a trustee he cannot retain the property for himself.

Muhammad Rustam Ali v. Mushtaq Husain (9) and *Vidya Varuthi Thirtha v. Balusami Ayyar* (10).

I am also “*persona designata*” under the compromise agreement. That agreement is separate from the *wakfs* and its terms must be carried out.

Inasmuch as the agreement charges immoveable property with allowances in favour of certain members of the family, any person entitled to the allowance may proceed in equity to enforce his claim, whether he were a party to the original agreement or not.

Kwaja Muhammad Khan v. Husaini Begum (7), *Raja of Ramnad v. Sundara Pandiyasami* (8) and *Nawab Umjad Ally Khan v. Mohumdee Begum* (6).

Moreover the parties were Mahomedans and knew when they made the provision of payment to the heirs that the heirs must succeed under Mohammedan Law to their parents' shares.

Lakshmi Narayana Ananga v. Madhava Deo (5).

Under the Hindu law it has been held

- (5) L. R. 20 J. A. 9 (1892).
- (6) 11 M. I. A. 517 at p. 548 (1887).
- (7) L. R. 57 I. A. 152 : s. c. 14 C. W. N. 865 (1910).
- (8) L. R. 46 I. A. 64 : s. c. 23 C. W. N. 549 (1912).
- (9) L. R. 47 I. A. 224 : s. c. 25 C. W. N. 122 (1920).
- (10) L. R. 48 I. A. 302 at pp. 312 & 315 : s. c. 26 C. W. N. 537 (1921).

in similar circumstances that a similar agreement is enforceable by the heirs.

Debnarayan Dutt v. Chuni Lal Ghose (11).

In Hindu and Mahomedan Law you must have a transfer of possession and so it is said there cannot be a transfer to an unborn person, but that is not the case here

Here there is no gift.

Further you can have a gift to A with a condition that part of the property be given to B and his heirs, whereupon B's heirs would take an interest because they are the heirs of B and not merely under the gift.

Ameer Ali's Mahomedan Law, 4th Ed., Vol I, p. 132, sec 3

Tyabji's Mahomedan Law, 2nd Ed., p. 383.

Ameeroonissa Khatoon v. Abedoonissa Khatoon (12), *Tavakalbhai v. Imatiyaji Begam* (13) and *Lali Jan v. Muhammad Shafi Khan* (14).

Reference was also made to :—

Jotindra Mohan Tagore v. Ganendra Mohan Tagore (15), *Chundi Churn Barua v. Rani Sidheswari Devi* (16), *Amtul Nissa v. Mir Nurudin* (17), *Moosabhai v. Yacoub-bhai* (18), *Jainabai v. R. D. Sethna* (19), *Mahomed Ibrahim v. Abdul Latiff* (20) and *Umes Chunder Sircar v. Zahoor Fatima* (21).

- (11) I L R. 41 Cal 137 (1913).
- (12) L. R. 2 I. A. 87; 23 W. R. (P. C.) 208; 15 B. L. R. 67 (1875).
- (13) I. L. R. 41 Bom. 372 (1916).
- (14) I. L. R. 34 All. 478 (1912).
- (15) L. R. (Sup. Vol.) I. A. 47 at p. 70; 18 W. R. 359; 9 B. L. R. 377 (1872).
- (16) L. R. 15 I. A. 149 : s. c. I. L. R. 16 Cal. 71 (1888).
- (17) I. L. R. 22 Bom. 489 (1896).
- (18) I. L. R. 29 Bom. 267 (1904).
- (19) I. L. R. 34 Bom. 604 (1910).
- (20) I. L. R. 37 Bom. 447 (1912).
- (21) L. R. 17 I. A. 201 : s. c. I. L. R. 18 Cal. 164 (1890).

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Messrs. Dunn & K. C. and Kenworthy Brown for the Respondents.—The whole intention of the compromise was to re-establish the *wakf*. You have in it a direct assertion that the *wakfs* are valid and a list of the properties comprised in each.

In 1894 it was laid down by the Privy Council that the *wakfs* were bad and the agreement which was really a re-enactment of the *wakfs* falls with them.

The claim here is a claim under the compromise, and the compromise is invalid whether you construe it as a gift or as a settlement.

The only method by which a Mahomedan could create this type of settlement was by *wakf*.

In no other way could he create a settlement giving a life interest and a heritable interest in the heirs.

To do so by *wakf* having been held invalid the alternative is gift—and in the present case no valid gift can be made because there is no donee who takes possession.

Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry (3), *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (22), *Abdul Gafur v. Nizamudin* (2), *Maulvi Saiyid Muhammad Munawwar Ali v. Razia Bibi* (4) and *Mutu Ramanadan Chettiar v. Veva Levvai Marakayar* (23).

Under Mahomedan law, it is impossible to create a life-estate with remainder to a person who is not a party to the original transaction.

In *Nawab Umjad Ali Khan v. Mohumdee Begum* (6), the question was whether a donor could make a valid gift coupled with a condition to defeat the heirs and it was held that it was compatible with such a gift that the property should pass to the donee.

It is doubtful whether that judgment really illustrates Mahomedan law and in any case the reservation there by the donor is in himself.

Roland Wilson's *Anglo-Mahomedan Law*, 3rd Edn, p. 335.

Mr. DeGruyther, K. C. replied.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVE—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal dated the 6th June 1919, which reversed a judgment and decree of the Court of the Subordinate Judge of Dacca dated the 16th April 1917. The facts giving rise to the dispute may be stated as follows:—

Early in the 19th century one Khajeh Abdullah, a Mahomedan trader of Dacca, died intestate, possessed of the property in dispute and leaving among other heirs four sons named Ahsanullah, Hafizullah, Abdul Azim and Abdul Karim.

On the 5th May 1846, certain members of the family executed a deed whereby they purported to "make *wakf* of" certain family properties therein described for the benefit of themselves and their descendants, generation after generation, and relatives, and then for the poor and destitute; and they thereby appointed Abdul Gani (grandson of Ahsanullah) to be *mutwali* of the properties, and directed him to pay to the heirs of Hafizullah, Abdul Azim and Abdul Karim, certain monthly allowances men-

(6) 11 M. I. A. 517 at p. 549 (1867).

(2) L. R. 19 I. A. 170; s. c. L. R. 17 Bom. 1 (1893).

(3) L. R. 22 I. A. 76; s. c. I. L. R. 22 Cal. 619 (1894).

(4) L. R. 23 I. A. 96; s. c. I. L. R. 27 All. 320; 9 C. W. N. 625 (1906).

(22) I. L. R. 18 Cal. 399 (1891).

(23) I. L. R. 44 I. A. 21; s. c. I. L. R. 40 Mad. 116; 21 C. W. N. 521 (1916).

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tioned in the schedule and to keep the balance in deposit. On the 11th September 1868, Abdul Gani appointed his son Ahsanullah to be *mutwali* of this deed in his place.

On the same date, namely, the 11th September 1868, Abdul Gani executed a deed whereby he purported to "make perpetual *wakf* of" certain other properties of which he claimed to be the owner by inheritance or purchase in favour of his sons and offspring and all the members and relatives descended from his grandfather, the *wakf* being descendible to children both in the male and female lines, and on their failure, in favour of the fakirs and the poor indigent of Dacca; and he thereby appointed his son Ahsanullah to be *mutwali* of the *wakf* so created, and directed him to spend money befitting his *reasat* and to pay allowances to the parties in whose favour the *wakf* was made, with power to increase or reduce such allowances. This deed contained the following clause:—

The object of the *wakf* of the properties is this, that they be protected from injury and ruin, and that the name and dignity of the family be maintained, and that the profits of the estate be, according to the practice and usage of the family, spent for the improvement of the position and dignity of the family, for the comfort and benefit of the persons in whose favour the *wakf* is made, and for the performance of the worldly and religious affairs and of charitable acts

The purpose of these two deeds is plain. The intention of the donors in each case was to make perpetual provision for the members of their family by settling the the properties upon such members generation after generation so long as the family should last; and as such a settlement was not recognised by Mahomedan law, they sought to validate it by calling it a *wakf* and by inserting a distant and contingent provision for charitable purposes.

In the year 1880 some members of the family descended from the donors of 1846, being dissatisfied with the allowances paid to them out of the income of the settled properties (which had greatly increased), brought a suit in the Court of the Subordinate Judge at Dacca against Abdul Gani and Ahsanullah his son, alleging that the deed of 1846 was not valid as a *wakf* and that the deed of 1868 comprised properties purchased by the *mutwali* out of income accrued under the deed of 1846 and claiming accounts upon that footing and payment of their share. Among the parties to this suit were Amirullah (the father of the Appellants), his mother Izzatennessa Bibi, his wife Halima Bibi, and her mother Ayesha Khanum. The precise interests of these persons in the properties comprised in the two deeds of *wakf* are not clear on the record, and it is not now material to ascertain them, but it is plain that they had or claimed interests in the properties comprised in both deeds

The suit was heard, but before judgment was pronounced some friends of the family (including the then Lieutenant-Governor, Sir Ashley Eden, and the District Judge, Mr Rampini) intervened in the interests of peace, and ultimately a compromise was effected and the suit was stayed upon the terms of two agreements dated the 26th August 1881, and the 17th September 1881.

By the agreement of the 26th August 1881, which was signed by or on behalf of all the parties to the suit of 1880, it was agreed that all the persons entitled to receive allowances under the deed of 1846, and all the Defendants to the suit except Abdul Gani and his son Ahsanullah, should be made Plaintiffs in the suit, and that the suit should be withdrawn without power to bring any fresh suit for the same subject-matter. The principal terms of

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the agreement were contained in the following clauses :—

4. The persons signing this Memorandum of Agreement admit that the two deeds of 1253 B. E. and 1275 B. E. [1846 and 1868] are valid and binding deeds of *wakf*.

5. The persons signing this Memorandum of Agreement admit that the properties held as *wakf* by the Nawab Ahsanullah under the deed of 1253 B. E. now consist of the properties entered in Sch. A appended to this Memorandum of Agreement and of no other properties, and that the properties held as *wakf* by the Nawab Ahsanullah under the deed of 1275 B. E. now consist of the properties entered in Sch. B appended to this Memorandum of Agreement and of no other properties.

6. The Nawab Ahsanullah consents, by virtue of the power vested in him as *mutwali* by the said two deeds, to increase the allowances of the various members of the family whose names are entered in the Schs. C and D appended to this Memorandum of Agreement to an aggregate or total amount of Rupees one lac thirty-three thousand and eighty-four and eleven annas only per annum. And it is declared that the persons whose names are entered in the Sch. C appended to this Memorandum of Agreement are the persons entitled to allowances payable out of the income of the properties held as *wakf* under the deed of 1253 B. E. And the persons whose names are entered in the Sch. D appended to this Memorandum of Agreement are the persons entitled to allowances payable out of the income of the properties held as *wakf* under the deed of 1275 B. E. And it is agreed that the particular amount to be paid to each individual person shall be fixed hereafter by a Committee consisting of four male members of the family who shall be lineal descendants of the original proprietors of the estates entered in the said Schs. A and B, two of the said four male members being nominated by the Nawab Ahsanullah and two by the Plaintiffs of the Suit No. 189 of 1880, and the said four members having power to select an umpire with a casting vote from amongst their number or to select one other member of the family

to be an additional member of their Committee, but who shall have one vote only.

7. On the amounts of the allowances to be paid to each individual member of the family being fixed by the said Committee, the Nawab Ahsanullah shall within two weeks' time execute an agreement on stamped paper agreeing to pay to each individual member the amount of the allowance fixed for him or for her by the said Committee, and stipulating that such allowance shall not be stopped except as hereinafter provided in this Memorandum of Agreement.

11. On the death of any member of the family in receipt of an allowance his or her allowance shall be distributed amongst his or her heirs and residuaries in proportions to be determined by the family *panchayat* to be appointed as hereinafter provided.

18. The family *panchayat* referred to in cls. 8, 11, 12, 13, 14, 15 and 17, and which shall consider and determine all the aforesaid family arrangements shall consist of the *mutwali* for the time being, if he chooses to sit, and four male members of the family being lineal descendants of the original proprietors of the estates mentioned in the said Schs. A and B, which four members shall be elected biennially by such adult male and female members of the family as choose to vote at the election, after having received due notice.

The agreement of the 17th September 1881, which was signed by Ahsanullah only, after a recital to the effect that a Committee, selected in accordance with cl. 6 of the agreement of the 26th August 1881, had fixed the amounts entered in the schedule given below as the amounts of the monthly allowances to be paid to the members of the family, whose names were entered in the same schedule, proceeded as follows :—

I, the Nawab Ahsanullah Khan Bahadur, as *mutwali* of the deeds of *wakf* of 1253 B. E. and 1275 B. E., referred to in the said Memorandum of Agreement, do hereby execute this agreement and agree, firstly, that within seven days after the beginning of each month

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of the Bengali calendar I and all future *mutualis* shall pay to each member of the family whose name is entered in the Schedule appended to this agreement the amount of the allowances entered against his or her name; secondly, that neither I nor any future *mutwali* shall stop or withhold payment of the allowances entered in the Schedule given below without just cause, such cause to be first declared just by the family *panchayet* to be elected biennially in accordance with Clause eighteen of the said Memorandum of Agreement; thirdly, that on the allowance of any member of the family being so stopped, I and all future *mutualis*, after deduction of any compassionate allowance which I or any future *mutwali* may make to the said offending member, shall pay the balance of the allowance so stopped to his or her family or relatives dependent on him or her; fourthly, that on the said biennially elected family *panchayet* determining on sufficient cause being shown to it that the allowance so stopped should be restored to the offending member, I or any future *mutualis* shall accordingly restore and continue it; and fifthly, on the death of any member of the family in receipt of an allowance, I and all future *mutualis* shall distribute the amount of his or her allowance amongst his or her heirs and residuaries in proportions to be determined by the said biennially elected family *panchayet*.

The schedule contained a list of the monthly allowances to be paid to the several members of the family out of the income arising from each of the two deeds, and included allowances under the deed of 1868 of Rs. 20 a month to Izzatennessa, Rs. 150 a month to Ayesha Khanum, and Rs. 150 a month to Amirullah. The suit was duly withdrawn in accordance with the agreements.

For some years after the execution of these agreements peace reigned in the family and the allowances secured by the agreements were duly paid. On the death of Izzatennessa her son Amirullah became entitled to a share of her estate, and a pro-

portionate part of her monthly allowance of Rs. 20 was thenceforth paid to him; and on the death of Ayesha Khanum her daughter Halima (the wife of Amirullah) succeeded to a share of her estate, and a proportionate part of her monthly allowance of Rs. 150 was thenceforth paid to her. But in the year 1889 and the following years a series of decisions of this Board established that a settlement of property upon successive generations of a Mahomedan family, such as was attempted to be made by the deeds of 1846 and 1868, was void by Mahomedan law and was not validated by the use of the term "*wakf*" and the insertion of a remote and illusory provision for charitable purposes [See *Sheik Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1), *Abdul Gafur v. Nizamuddin* (2) and *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (3)]. In consequence of these decisions the Nawab Ahsanullah and his father (then Sir Abdul Gani, K.C.S.I.) appear to have taken advice as to the legal effect of the two deeds of *wakf* and the agreements of 1881, with the results to be now stated.

On the 18th January 1895, Sir Abdul Gani executed a Heba-Bilwaz (or deed of gift) whereby, after referring to the decisions of the Board and reciting that he was convinced and had been advised by lawyers that the *wakfnama* executed by him on the 11th September 1868, was not legally valid, he purported to make a gift in favour of his son Ahsanullah and his heirs of the properties therein described, being the greater part of those comprised in the deed of 1868; and he added:—

As I am a party to the said Memorandum

(1) L. R. 17 L. A. 28; s. c. I. L. R. 17 Cal. 498 (1889).

(2) L. R. 19 L. A. 170; s. c. I. L. R. 17 Bom. 1 (1892).

(3) L. R. 22 L. A. 76; s. c. I. L. R. 22 Cal. 619 (1894).

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of Agreement executed on the 26th of August 1881, and as the legal effect, construction and force thereof are therefore binding upon me, you shall as the malik in possession hold and enjoy the properties which I make over to you by this Heba-Bilwaz, subject to the legal effect and construction of the said Memorandum of Agreement.

Shortly afterwards Ahsanullah gave notice to the heirs of such of the persons entitled to allowances under the agreements of 1881 as had died since the execution of those agreements, that he had been advised that the effect of the agreements of 1881 was that he was liable to pay allowances from the income of the properties covered by the *wakf* of 1868 to such persons only as were parties to the agreement of the 26th August 1881, and whose names were given in Sch. D of that agreement, but that he was not liable to pay such allowances to the heirs of such persons in perpetuity. Accordingly on the death of Amirullah (who died on the 3rd December 1895) and of his wife Halima (who died on the 29th April 1896) Ahsanullah stopped payment of the allowances under the deed of 1868 to which they had been entitled under the agreements either personally or as heirs of Izzatennessa and Ayesha Khanum, and refused to continue those allowances to their heirs. The heirs of Amirullah and Halima, who are the present Appellants, were then minors of the age of four and three years respectively; but shortly after attaining their majority they instituted the present suit against Salimullah Bahadur (the heir of Ahsanullah, who had then died) claiming arrears of their allowances, amounting to Rs. 45,692 and a declaration that the allowances were a charge on the properties comprised in the deed of 1868. They also claimed that a residence should be provided for them.

The suit was heard by the Subordinate

Judge of Dacca, who on the 16th April, 1917, gave judgment for the Plaintiffs (the present Appellants) for the arrears of maintenance allowances and costs, but disallowed the claim for a residence.

On Appeal by the Defendants to the High Court at Calcutta, that Court, on the 6th June 1919, gave judgment allowing the appeal and dismissing the Appellants' suit with costs. The reasons given by the Court for their decision were briefly:—

(1) that on the authority of the cases above cited [to which may be added *Maulvi Sayid Muhammad Munawar Ali v. Razia Bibi* (4)], the *wakfs* of 1846 and 1868 were invalid;

(2) that they were not validated by the Mussulman Wakf Validating Act, 1913, which is not retrospective; and

(3) that the agreements of 1881, being founded upon and inseparably associated with the *wakfs* of 1846 and 1868, fell with those *wakfs*.

Against this judgment the present appeal was brought.

In the argument before their Lordships there was no serious dispute as to the above propositions numbered (1) and (2). There can be no doubt that, having regard to the decisions of the Board above referred to, the deeds of 1846 and 1868, which purported to create by gift a perpetual succession of interests for the aggrandisement of the family of the donors, were invalid by the Mahomedan law and were not validated by the use of the term "*wakf*" or by the insertion of a remote trust for the poor; nor can the Act of 1913 be construed as validating deeds executed before its date. The real question to be determined, therefore, is whether the High Court was right in holding that, the deeds of *wakf* being invalid, the scheme of maintenance allow-

(4) L. R. 32 I. A. 56; A. C. I. L. R. 27 All. 320; 9 C. W. N. 625 (1905).

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ances contained in the agreements of 1881 also fell to the ground. The conclusion of the learned Judges of the High Court to that effect appears to have been based upon the view that the scheme of 1881 was founded upon and inseparable from the illegal *wakfnamas* and could not be supported by the Court without also supporting a family settlement which is contrary to Mahomedan law. They appear to have assumed, on the authority of the decision of the Board in *Lakshmi Narayana Ananga Garu v. Madhawa Deo Garu* (5), that if the maintenance allowances had been charged on the property they might have been upheld as heritable allowances; but they held that the parties to the agreements could not have intended to create a charge on property which they were dedicating to religious purposes, and accordingly that no charge was created.

With great respect to the learned Judges who came to that conclusion, it appears to their Lordships to give too little weight to the essential differences between the two deeds of *wakf* on the one hand and the agreements of 1881 on the other. The deeds of *wakf* were invalid because they attempted to create a perpetual succession of estates contrary to Mahomedan law, and the attempt was not validated by giving to the settlements a colour of charity; but the main purpose of the agreements of 1881 was quite different. The principal purpose of those agreements was to secure to living and named persons certain fixed allowances which were to become payable immediately and were to be continued to their heirs. It is true that the agreements purported to confirm the *wakfnamas*, and that the allowances were made payable by the hand of the *mutwali* of the *wakfnamas* out of the income accruing to him from the properties

thereby settled; but the allowances were intended to take effect as immediate and heritable charges on such incomes taking priority of all the limitations contained in the settlement, and they may, therefore, be supported although those limitations fail. The direction to pay the allowances "out of the income" of the settled properties, which appears in both agreements, shows an intention to create a charge, and this intention was not frustrated by the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlements.

There is a further difference between the two sets of documents which is also of importance. The *wakfnamas* were gifts and were, therefore, subject to the rule of Mahomedan law which requires that a gift shall be accompanied by delivery; but the agreements of 1881 are not gifts, but contracts for valuable consideration. By those agreements the members of the family other than Sir Abdul Gani and his son Ahsanullah surrendered their claims to property of considerable value and stayed their suit in consideration of a firm contract securing to them annuities to an amount exceeding Rs 1,30,000, and continuing such annuities to their heirs. Such an agreement if made for valuable consideration is not subject to the restrictions affecting gifts among Mahomedans, but is a contract creating a charge on lands, which may be enforced like other charges by the Courts. The provision contained in the agreements that the distribution of an annuity among the heirs of the annuitant should be in proportions to be determined by the family *panchayet* (if it was intended to do more than to authorize the *panchayet* to settle disputes as to heirship) may be disregarded, the more so as no *panchayet* has functioned for many years past. This view is in accord-

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ance with the decisions of the Board in *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum* (6), *Lakshmi Narayana Ananga Garu v. Madhawa Deo Garu* (5), *Khwaja Muhammad Khan v. Husaini Begum* (7) and *Raja of Ramnad v. Sundara Pandiyasami Tevar* (8); and it appears to their Lordships that it should prevail.

It is satisfactory that the above conclusion as to the law applicable to the case corresponds with the justice of the matter. It would be lamentable if the heirs of Ahsanullah, who in 1881 were confirmed in the possession of valuable properties as *mutual* only and on a clear agreement for the payment out of the income of such property of annuities to the members of the family and their heirs, were now at liberty to repudiate the fiduciary character of that possession and the conditions on which it was given and to keep the property in their own hands free from all charges. It is consistent not only with law, but with "equity, justice and good conscience," that the agreements should be observed.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and that the judgment of the Subordinate Judge should be restored, the Respondents to pay the costs in both Courts and the costs of this appeal.

Solicitors: Messrs. T. L. Wilson & Co. for the Appellants.

Solicitors: Messrs. Morgan, Price, Gordon and Marley for the Respondents.

G. D. M.

(5) L. R. 20 I. A. 9 (1892).

(6) 11 M. I. A. 517 at p. 548 (1887).

(7) L. R. 37 I. A. 152; s. o. 14 C. W. N. 365 (1910).

(8) L. R. 46 I. A. 64; s. o. 23 C. W. N. 549 (1913).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 2108 TO 2113 OF 1920.

	DINA NATH PAL and
MOOKERJEE, J.	ors., Plaintiffs,
CHOTZNER, J.	Appellants,
1922,	v.
Heard, 13, July.	RAJA SATI PROSAD
Judgment,	GARGA BAHADUR and
7, August.	ors., Defendants,
	Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 50, 3, cl. (5), 106—Rent in kind—Firmity of rent—Presumption under sec. 50, if applies in case of produce rent—"Rent" in sec. 50, if restricted to "money rent"—Reference to Report of Select Committee and proceedings of Legislature, if permissible to interpret statute.

Where tenants paying rent in kind having been recorded as settled raiyats instituted suits under sec. 106 of the Bengal Tenancy Act to have them entered as raiyats at fixed rents, and proved uniform payment of rent for over 20 years, but the suits were dismissed on the ground that the presumption under sec. 50 of the Act was not applicable to cases of rent in kind:

Held—That sec. 50 of the Bengal Tenancy Act applied and the tenants were raiyats at fixed rents.

The presumption under sec. 50 is applicable to a tenure-holder or a raiyat holding at a rent payable partly in cash and partly in kind or entirely in kind.

The term "rent" in the said section is not restricted to "money rent" and bears the meaning attributed to it in sec. 3, cl. (5), of that Act.

Reference to the Report of Select Committee and proceedings of Legislature is not permissible in aid of the interpretation of a statutory provision.

These were appeals preferred on the 16th of August 1920 against the decree of

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Babu Parada Kinkar Mukerjee, First Additional Special Judge of Zillah Midnapur, dated the 5th of February 1920, affirming the decree of Babu Hari Har Banerjee, Revenue Officer of Midnapur, dated the 22nd of April 1918.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy and Pearl Mohan Chatterjee for the Plaintiffs-Appellants.

Dr. Dwarka Nath Mitter and Babu Probodh Chandra Chatterji for the Defendants-Respondents.

THE JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—These six appeals have arisen out of as many suits, instituted by tenants, under sec. 106 of the Bengal Tenancy Act, against their landlords, for the decision of disputes regarding entries which had been made in a finally published record-of-rights. The Plaintiffs had been recorded as settled raiyats under the Defendants; they claimed that they were raiyats at fixed rents. In support of their contention, they produced rent receipts which showed that each of them had held at a uniform rent for over 20 years. In each case, however, the rent consisted partly of cash and partly of the money value of a fixed quantity of paddy. To take one illustration: in the case of one tenancy, the amount of rent as shown in the rent receipts was Rs. 20-1 anna 12 gandas 2 karas; this amount is made up of Rs. 18-13 annas 18 gandas 2 karas as cash rent and Re. 1-3 annas 14 gandas as the money value of 2 kuris 3 mans 1 khupi of paddy. These two items are shown separately in the receipts up to the year 1902, and, thereafter, the consolidated sum is shown as cash rent. Similar observations apply to each of the other cases.

In these circumstances, the Revenue Officer who tried the suits in the Court of first instance held that sec. 50 of the Bengal Tenancy Act was not applicable. In his opinion, the term "rent" in that section did not include rent in kind. The result was that the suits were dismissed. On appeal, the Special Judge adopted the same construction of sec. 50 and confirmed the decision of the Revenue Officer. In this Court, the tenants have urged that sec. 50 has not been correctly interpreted by the Courts below.

Sec. 50 of the Bengal Tenancy Act provides as follows :—

"50 (1) Where a tenure-holder or raiyat and his predecessors-in-interest have held at a rent or rate of rent which has not been changed from the time of the permanent settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alternation in the area of the tenure or holding.

(2) If it is proved in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the permanent settlement."

This section must be read along with sec. 3 (5) which provides that, unless there is something repugnant in the subject or context, rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. This definition is in no way repugnant to the subject or context of sec. 50, and the term "rent" in that section may well be replaced by its equivalent

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as given in sec. 3 (5). This leads inevitably to the conclusion that the substantive rule formulated in sec. 50 (1) and the presumption embodied in sec. 50 (2) do not become inapplicable because a tenureholder or raiyat holds at a rent payable partly in cash and partly in kind or entirely in kind.

A determined effort was successfully made in the Courts below on behalf of the landlords—and the attempt has been resolutely repeated here—to place a restricted construction on sec. 50, by reference to the report of the Select Committee of the Legislative Council of the Governor-General which considered the draft of the Bengal Tenancy Bill at the final stage. It is well-known that there was, at one time, some divergence of judicial opinion on the question, whether produce rent, which, though varying annually with the varying amount of the yearly produce, was yet fixed as to the proportion it was to bear to such produce, was a fixed rent for the purposes of secs. 4 and 16 of Act X of 1859 and secs. 4 and 17 of Act VIII of 1859, B. C. The question was answered in the affirmative in a long series of decisions. *Thakooranee Dossee v. Biscwar Mookerjee* (1), *Mitrajit Singh v. Tumdan Singh* (2), *Ramadayal v. Lachmi Narain* (3), *Jutto Moar v. Basmuttee Kooer* (4) and *Hanuman Parshad v. Kaulcshwar Pandey* (5). The contrary opinion, however was maintained in *Yacoob Hossein v. Wahid Ali* (6) and *Thakur Pershad v. Syed Mahommed Baker* (7). But the decision in *Yacoob v. Wahid Ali* (6) was

disapproved in *Mitrajit v. Tumdan* (2) and in *Ramadayal v. Lachmi Narain* (3). Jackson, J., when pressed with the decisions in *Yacoob v. Wahid* (6) and *Thakur Pershad v. Syed Mahommed Baker* (7), described in graphic terms the injustice of the rule favoured therein: "I confess I would have considerable difficulty in assenting to the rulings in these cases; because if the rulings are correct, the Legislature must have intended that raiyats who have held land upon one principle, that is to say, upon one fixed ratio of division of the produce of their land with the landlord, from the time of the permanent settlement, would be entitled to no protection whatever, but would after these 80 or 90 years be subject to a suit for enhancement or for commutation of their rent at such money rates as the landlord might be enabled to prove. I cannot believe that the Legislature could have intended any such injustice to raiyats in those parts of the country where the *bhaobe* system is prevalent, as it is in many parts of Behar. In those parts of the country, there being no such thing as a rate of rent in money, raiyats holding from the time of the permanent settlement would have no protection whatever, unless the Legislature meant to include under the words "rate of rent" the mode or principle of *bhaobe* payment. But it is not necessary for us to determine the case upon this point; if it had been so, I should have been inclined to propose a reference to a Full Bench."

There can thus be no doubt that there was a marked preponderance of judicial opinion in favour of the view that raiyats who paid their rent in kind, partially or

(1) 3 W. R. Act X Rulings, p. 29; B. L. R. Sup. Vol. 202, 326 (1865).

(2) 12 W. R. 14; 3 B. L. R. App. 68 (1869).

(3) 14 W. R. 388; 6 B. L. R. App. 25 (1870).

(4) 15 W. R. 479 (1871).

(5) I. L. R. 1 All. 301 (F. B.) (1876).

(6) 4 W. R. Act X Rulings 33 (1865).

(7) 8 W. R. 170 (1867).

(2) 12 W. R. 14; 3 B. L. R. App. 68 (1869).

(3) 14 W. R. 388; 6 B. L. R. App. 25 (1870).

(6) 4 W. R. Act X Rulings 33 (1865).

(7) 8 W. R. 170 (1867).

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entirely, were not disentitled to the benefit of the statutory presumption corresponding to the rule now embodied in sec. 50 of the Bengal Tenancy Act.

But the Respondents have invited our attention to the fact that while legislation, which ultimately culminated in the present Bengal Tenancy Act, was in hand, an attempt made to insert the following clause, so as to give effect to the view adopted in the majority of judicial opinions, was abandoned :—

“ When a raiyat has paid as rent a fixed share or the value of a fixed share of the produce of the land, the rent or rate of rent shall not be deemed to have been changed within the meaning of this section, merely by reason of the amount paid having varied from year to year, or by reason of the rent having been commuted, with the consent of both the raiyat and his landlord, to a fixed money rent ” [Digest of the Law of Landlord and Tenant prepared by C. D. Field, sec. 38; Bill prepared by the Rent Commission, 1880, sec. 16, Exp. I, Bill submitted by the Bengal Government, 1881, sec. 15, Exp. I, Bill as introduced in the Legislative Council, 1883, sec. 16, Bill as amended by the Select Committee of the Legislative Council, 1884, sec. 64 (3)]

This provision was omitted at the final stage, as appears from the following passage from the Report of the Select Committee :

“ We have omitted from the section, which enacts the well-known presumption arising from holding at a rent unchanged for twenty years, the sub-section which made the presumption applicable to produce rents, as opinion generally was opposed to it ” (Gazette of India, dated 21st February 1885, Part. V, p. 64).

We shall presently consider whether reference is permissible to the report of a

Select Committee in aid of the interpretation of a statutory provision. But, even if we assume for a moment that such reference is legitimate, it is plainly of no assistance in the present case. The omission of the clause left the Bill as it was, and that Bill, it cannot be overlooked, contained a comprehensive definition of the term “ rent ” Act X of 1859 did not contain a definition of the term “ rent ” and thus opened up, as is well-known, various opportunities for controversies of a recedite character. The Legislature remedied this defect by the insertion of a definition of the term “ rent ” in sec. 3 (5) of the Bengal Tenancy Act—a definition which, as Sir Arthur Wilson observed in *Jatindia Mahan v Jaro Kumari* (8), “ seems to express very clearly the meaning of the word ‘ rent ’ as it would be understood without any statutory definition.” We need not speculate, whether the members of the Select Committee fully realised the effect of this definition on the other provisions of the Bill they had then under consideration. But this much is clear, if they intended to alter the current of judicial opinion under the old law, they unquestionably failed to achieve their purpose by the mere omission of the clause we have mentioned. The result might have been different, if the term “ rent ” in sec. 50 had been replaced by the phrase “ money rate ” which makes its appearance in secs. 28, 29, 30, 53 and 61. We may add that the decision of Jenkins, C. J., in *Baneswar v. Umesh Chandra* (9), which was mentioned in the course of argument, does not assist us in the solution of the question raised before us. That case turned upon the construction of a document then before the Court, though,

(8) I. L. R. 33 Cal. 140, 149 s. c. 10 C. W. N. 201 (P. C.) (1905).

(9) I. L. R. 37 Cal. 626 (1910).

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no doubt, it implies the opinion that rent payable partly in money and partly in kind cannot be regarded as fixed in amount. It may further be pointed out that the actual decision in that case has not been accepted in later decisions, which will be found reviewed in *Nilmadhab v. Sitanath* (10), *Asutosh v. Hara Chandra* (11), *Gurudas v. Gobinda Chandra* (12) and *Basiruddin v. Afsarunnessa* (13).

We are, however, of opinion that reference is not permissible to the report of Select Committee. The Judicial Committee ruled in *Administrator-General v. Premlal Mullick* (14), which reversed the decision of this Court in *Administrator-General v. Premlal Mullick* (15), that reference is not permissible to the proceedings of the Legislature which result in the provisions of an Act as legitimate aids to its construction, and Lord Watson observed that the same reasons which exclude their consideration when the clauses of an Act of the British Legislature are under construction, are equally cogent in the case of an Indian Statute. In that case, reference had been made by Petheram, C. J., and Pimsep, J., to the report of a Select Committee when the Bill which subsequently became the *Administrators-Generals Act*, was before the Legislative Council, Trevelyan, J., had, on the other hand, hesitated to adopt such a course, even though there was precedent in its favour in the Full Bench decision in *Queen-Empress v. Karlik* (16). The Judicial Committee cannot be deemed to have

departed from the rule enunciated by them in *Administrator-General v. Premlal Mullick* (14), merely because they did not again express their disapproval of a similar method of interpretation adopted by a Full Bench of the Allahabad High Court in the case of *Re, Parbati Charan Chatterjee* (17). Lord Watson and Sir Richard Couch were members of the Board on each occasion, and there is no indication that the Judicial Committee had, in the course of a few months, altered their opinion on the subject.

As regards the principles, which, as indicated by Lord Watson in *Administrator-General v. Premlal Mullick* (14), exclude the consideration of proceedings of the Legislature when the clauses of an Act of the British Legislature are under construction, it may be taken as well-settled that although light may be thrown on the scope of a statute by looking at what Parliament was doing contemporaneously and at the history of the statute, *Hawkins v. Gathercole* (18), yet even when words in a statute are so ambiguous that they may be construed in more than one sense, regard may not be had to the Bill by which it was introduced, *Herron v. Rathmines Co.* (19), nor to what has been said in Parliament, *Miller v. Taylor* (20), *A. C. Railway v. Railway Commissioners* (21), *R. v. West Riding Council* (22), or elsewhere, *Martin v. Hemming* (23) and *Ewart v. Williams* (24). The view has been con-

(10) 26 C. L. J. 94 (1916).

(11) I. L. R. 47 Cal. 188 s. c. 23 C. W. N. 1021; 30 C. L. J. 41 (1919).

(12) 24 C. W. N. 55 (1919).

(13) 21 C. W. N. 880 (1917).

(14) L. R. 22 I. A. 107; s. c. I. L. R. 22 Cal. 788 (1895).

(15) I. L. R. 31 Cal. 732 (1894).

(16) I. L. R. 14 Cal. 721 (1887).

(14) L. R. 22 I. A. 107; s. c. I. L. R. 22 Cal. 788 (1895).

(17) L. R. 22 I. A. 193 s. c. I. L. R. 17 All. 498 (1895).

(18) 6 DeG. M. & J. 1 (22) (1855).

(19) [1892] App. Cas. 498 (501).

(20) [1769] 4 Burr. 2308.

(21) 50 L. J. Q. B. 281 (1881).

(22) [1906] 2 K. B. 676 (716).

(23) 10 Exch. 478; 102 E. R. 686 (1854).

(24) 3 Drew. 21; 7 DeG. M. & G. 68 (1855).

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sistently maintained that the Court cannot look at the history of a clause or of the introduction of a proviso, *Barbat v Allen* (25) and *R. v Capel* (26), nor at debates in Parliament, *R v Whittaker* (27) and *Gorham v. Bishop of Exeter* (28), nor at amendments and alterations made in Committees, *Donegall v Layard* (29) *Attorney-General v Sillem* (30) In *Donegall v. Layard* (29), Lord Campbell observed :—

“I must lament that his (Smith, M R, Ireland) zeal to do justice has led him into enquiries respecting this Act of Parliament which could not legitimately assist him in construing it, and which I think unfortunately induced him to change the sound construction which he had twice before put upon it. Surely, the fifth section ought to receive the same construction, whether it was first introduced in the House of Commons or in the House of Lords, and whether it was introduced in the Committee or on the third reading, and whether it was or was not altered after it was introduced. Nor could the rejection of the clauses moved by Lord Beaumont on behalf of the Marquis of Donegall in any way affect the construction of the clauses which were allowed to form part of the Act when it became law.”

In *Attorney-General v Sillem* (30), Pollock said: “No Court can construe any statute, and least of all, a criminal statute, by what Counsels are pleased to suggest were alterations made in Committee by a member of Parliament, who was ‘no friend to the

Bill,’ even though the Journals of the House should give some sanction to the proposition. That is not one of the modes of discovering the meaning of an Act of Parliament recommended by Plowden or sanctioned by Lord Coke or Blackstone.”

Reference may also be made to the decision of the Supreme Court of the United States in *Re, Trans-Missouri Freight Assn* (31), of the Supreme Court of Canada in *Gosselin v R.* (32) and of the High Court of Australia in *Sydney Municipal Council v. Commonwealth* (33). We may also usefully recall the observations of Lord Halsbury in *Hilder v. Baxter* (34):

“I have more than once had occasion to say that, in construing a statute, I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which, in fact, has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards, just because what was in his mind was what was intended, though, perhaps it was not done.”

We must further remember that, as pointed out by Farwell, L. J., in *R. v. West Riding Council* (22), we have only to deal with the construction of the Act as printed and published—that is the final word of the Legislature as a whole, and the antecedent debates and subsequent statements of opinion or belief are not admissible. But they would be quite un-

(25) 7 Exch. 609, 616 (1852).

(26) 12 A. & E. 382 (411); 54 R. R. 580 (1840).

(27) 2 C. & K. 686 (640) (1848).

(28) 5 Exch. 630 (667); 82 R. R. 797 (1850).

(29) 8 H. L. G. 480, 465, 472, 478; 125 R. R. 239 (1860).

(30) 2 H. & C. 431 (521, 522); 133 R. R. 731 (1868); 10 H. L. C. 704 (1864).

(22) [1906] 2 K. B. 676 716).

(31) 166 U. S. 290 (1896).

(32) [1903] 83 Canada S. C. 255 (264).

(33) [1904] 1 Com. L. E. 208 (213).

(34) [1902] App. Cas. 474 (477).

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trustworthy in any case. In the case of an Act dealing with a controversial subject, ambiguous phrases are often used designedly, each side hoping to have thereby expressed its own view, and the belief of each that it has succeeded is more often due to the wish than to any effort of reason. The generality of public understanding is quite incapable of proof and is beside the mark, unless as an appeal to timidity. The principles of construction applicable to Acts of Parliament are well-settled; they will be found stated in *Stradling v. Morgan* (35), which received the approval of Turner, J. J., in *Hawkins v. Gathercole* (18), of Lord Halsbury in *Eastman Co. v. Controller General of Patents* (36) and were quoted with approval by the Full Bench in *Nulman v. Sati Prosad* (37). They certainly do not admit of any such consideration. We hold accordingly that reference could not be made to the Report of the Select Committee, and that even if reference were permissible, the contention of the landlords would not be advanced thereby.

Our conclusion is that in sec. 50, the term "rent" cannot be restricted to "money rent" and that it bears the meaning attributed to it in sec. 3, cl. (5). The result is that these appeals are allowed and the suits decreed with costs in all the Courts. The hearing fee in this Court will be assessed at one gold mohur in each appeal.

H. C. S. Appeals allowed.

(18) 6 DeG. M. & G. 1 (21) (1855).

(35) [1858] 1 Plowden 199, 204.

(36) [1908] App. Cas. 571 (575).

(37) I. L. R. 48 Cal. 556 (565): s. c. 25 C. W. N. 230 (F. B.) (1920).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 551 TO 554 OF 1920.

ASHUTOSH CHUCKER-
BUTTI and ORS., Plain-
tiffs, Appellants,
v.

DWARIKA NATH MITRA
and ORS., Defendants,
Respondents.

RICHARDSON, J.
SUHRAWARDY, J.
1922,
4, May.

Re-assessment of revenue and rent after expiry of settlement of temporary settled estate—Island chur—Regulation VII of 1822, sec. 9, settlement under—Collector, if may enhance rent payable by tenants—Proper procedure for enhancement—Bengal Tenancy Act (VIII of 1885), Chap. X, Part II—Act IX of 1847, if applies to temporarily settled estates.

Where after the expiry of the settlement of an island chur, proceedings being taken under Reg. VII of 1822, the revenue was reassessed, and the estate was settled with the Plaintiff (the previous settlement-holder) and he brought a rent suit against the tenants at a rent settled by the revenue authorities (which was higher than the previous rent):

Held—That the Plaintiff was not entitled to recover the rent as settled by the revenue authorities.

Sec. 9 of Reg. VII of 1822 does not appear to do more than enable the Collector to ascertain and record the rents actually payable at the time when a settlement or re-settlement is made.

If it was desired to enhance the rents of the tenants, proceedings should have been taken by the revenue authorities under Part II of Chap. X of the Bengal Tenancy Act or by the Plaintiff himself under sec. 52 or some other appropriate provisions of that Act.

Semle:—In a case of a temporarily settled estate, it would be always open to the revenue authorities to re-assess the revenue and re-settle the estate with effect

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from the expiry of a previous term of settlement, Act IX of 1847 not applying to the case.

This was an appeal against a decree of the Subordinate Judge of Khulna (Babu Nitai Charan Ghosh), dated the 25th November 1919, affirming a decree of the Munsif of Bagerhat (Babu Satchidanund Mukerjee), dated the 11th January 1919.

The facts material to this report are these :—

These appeals arose out of suits for rent by the Plaintiffs against the Defendants in respect of *has mahal* lands in island *chur* Sonakur bearing Touzi No. 1020 of the Khulna Collectorate held by the Plaintiffs as *ijaradars* under the Government. As a result of the proceedings taken under Reg. VII of 1822 the revenue payable by the Plaintiffs was re-assessed, and the annual revenue was settled at Rs. 674, the previous revenue having been Rs. 178. In the said proceedings the revenue authorities also settled the rents payable by the Defendants to the Plaintiffs, and these rents were higher than the previous rents. The reason of the enhanced rates was on account of increase in area.

Plaintiffs brought the present rent suits against the Defendants at the enhanced rates settled by the revenue authorities. The defence, *inter alia*, was that the Plaintiffs could not recover rents at the rates claimed as the settlement made under Reg. VII of 1822 was illegal, and that the settlement ought to have been made under the provisions of Act IX of 1847.

The Court of first instance held that the settlement made under Reg. VII of 1822 was illegal and decreed the suits at the original rates.

The learned Munsif held as follows. —

“ . . . It is argued on behalf of the Defendants that this is island *chur*, i.e., land gained from the sea or river and the

Reg. VII of 1822 therefore has ceased to have effect in all such cases and that Act IX of 1847, i.e., the Bengal Alluvion and Diluvion Act shall be applicable in the present case. I do not see how the Plaintiff can get over this point. I think the settlement was not correctly made and that it was illegal. Under the circumstances the Defendants cannot be bound by the settlement. I therefore hold that the Plaintiffs would get rents at the original rate. Ordered that the suits are decreed in part at the admitted rate.”

On appeal by the Plaintiffs, the learned Subordinate Judge of Khulna affirmed the decision of the Munsif, and dismissed the appeals.

The following portion of his judgment will be found material to this report —

“ The learned vakil for the Appellants argues that Act IX of 1847 is confined to two questions, *viz* — (1) The liability to assessment of lands gained from the sea or from river by alluvion or dereliction, and (2) the right of Government to the ownership thereof, and he states that the question as to the settlement of rent is still within the scope of Reg. VII of 1822 of the Bengal Tenancy Act. I think his contention is not a sound one. The question as to the liability to assessment covers settlement of rent. On a perusal of the provisions of secs. 3, 4, 5 and 6 of Act IX of 1847, it is evident that the assessment of new lands formed after the last survey can be undertaken only after the lapse of 10 years from the date of the previous survey under Act IX of 1847, which is in force in Bengal, Bihar and Orissa. Alluvial increments are to be assessed under the rules in force (see sec. 6 of Act IX of 1847). The last settlement of *chur* Sonakur was made in 1907. The area of the *chur* had been nearly doubled owing to alluvial accretion (see the Report mark-

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ed Ex. 5). The re-settlement operation ought therefore to have been undertaken under Act IX of 1847 in 1917. I cannot therefore think that the settlement was legal and valid. The learned Munsif was therefore justified in deciding the claim for rent at the old rates."

Against this decision of the Subordinate Judge the Plaintiffs preferred the present second appeals to the High Court. *Babus Surendra Chandra Sen and Hemendra Chandra Sen* for the Appellants.

Rabu Mukunda Behary Mallick for the Respondents in Nos 551, 552 and 553.

THE JUDGMENT OF THE COURT was as follows :—

RICHARDSON, J.—It appears that an island formed in the Dhaleswari river in the District of Khulna to which the provisions of Bengal Act, IV of 1868, would seem to have been applicable. Possession of the island was taken by the Government, and in the year 1902 the island was settled with the Plaintiffs for a period of five years expiring on the 31st March 1907, as *chur* Sonakur bearing Touzi No 1020. This temporary settlement was continued for another period of five years ending on the 31st March 1912. The revenue authorities then decided that there should be a fresh assessment of revenue. The estate was therefore resettled for one year only with the Plaintiffs and proceedings were taken under Regulation VII of 1822 to re-assess the revenue. The result was that the estate was settled with the Plaintiffs for a term of five years commencing on the 1st April 1913 at an annual revenue of Rs. 674, the previous revenue having been Rs. 178.

In 1917 the Plaintiffs instituted four suits for rent which have given rise to the second appeals now before us. The Courts below concurred in dismissing these suits

on the ground that the revenue authorities were not at liberty to proceed under Reg. VII of 1822 but were bound to proceed under Act IX of 1847. As to that Act the lower Appellate Court was of opinion that it was not open to the revenue authorities to apply its provisions because ten years had not elapsed from the date of the last previous survey thereunder. The learned Subordinate Judge seems to have assumed, without finding, that a survey of the land had been made under the Act before the second settlement of 1907. But apart from that I should have thought, though I do not decide the point in these appeals, that in the circumstances the Act of 1847 had no application and that in the case of a temporarily settled estate such as this, it would always be open to the revenue authorities to re-assess the revenue and re-settle the estate with effect from the expiry of a previous term of settlement.

Here, however, the revenue authorities not only re-assessed the revenue and made a Revenue settlement of the estate. They also purported to settle the rents payable by the Defendants and these suits are suits for arrears of rent at the rates thus settled. The question, therefore, arises whether the Defendants are under a legal liability to pay rent at those rates.

In the final report of the new settlement, dated 15th August 1914, it is stated that on the 18th February 1914, it was ordered that the operations should be carried out in accordance with the Regulations and not under the Bengal Tenancy Act. I gather from that and from the course which these suits followed in the Courts below, that the rents of the tenants were not settled under the provisions of Chap. X of the Bengal Tenancy Act or under any other provisions of that Act.

The final report shows that the rate of rent was fixed under the Collector's orders

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at a uniform rate of Re. 1-8^{as} per standard bigha for all lands comprised in the *chur* and that the revenue assessed was calculated on the aggregate rental so arrived at. It is not disputed that the Defendants' rents, or the rents entered as payable by the Defendants in the settlement proceedings, were higher than the rents previously payable by them. The learned vakil for the Plaintiffs has been unable to tell us under what provision of Reg. VII of 1822 it was open to the revenue authorities to impose this increase or enhancement of rent on the Defendants.

No doubt sec. 9 of the Regulation lays certain duties on a Collector making or revising a settlement of the land revenue. *Inter alia* it requires that "a record shall likewise be formed of the rates per bigha of each description of land or kind of produce demandable from the resident cultivators not claiming any transferable property in the soil whether possessing the right of hereditary occupancy or not." The section also says—"The information collected on the above points shall be so arranged and recorded as to admit of an immediate reference hereafter by the Courts of Judicature, it being understood and declared that all decisions on the demands of the zamindar shall hereafter be regulated by the rates of rent and modes of payment arrived and ascertained at the settlement and recorded in the Collector's proceedings until distinctly altered by mutual agreement or after full investigation in a regular suit."

These provisions however do not appear to do more than enable the Collector to ascertain and record the rents actually payable at the time when a settlement or re-settlement is made.

If it was desired to enhance the rents of the tenants, proceedings should, as it would seem, have been taken by the reve-

nue authorities under Part II of Chap. IX of the Tenancy Act or by the Plaintiffs themselves under sec. 52 or some other appropriate provision of that Act. This view, I may add, accords with that of the Board of Revenue as expressed in r. 87 at p. 19 of the Bengal Survey and Settlement Manual, 1917. The Rule states that "an officer making a settlement under Reg. VII of 1822 has no power to settle rents or to record rents higher than those hitherto paid, except by agreement with the parties subject to sec. 29 of the Bengal Tenancy Act in the case of rayati lands, when that Act applies."

In the circumstances I am not satisfied that the rents recorded in the settlement proceedings against the names of the Defendants in those suits were validly settled rents which the Defendants are bound to pay. As I understood the trial Court gave the Plaintiffs a decree for arrears of rent at the rates admitted by the Defendants, or at the original rates as the learned Munsif calls them.

The learned vakil for the Appellants has pressed for a remand of these cases to the trial Court for the purpose of an enquiry being made whether proceedings were in fact taken under the Bengal Tenancy Act or not. To my mind it would serve no useful purpose to direct a remand in face of the plain statement contained in the settlement report. These suits are in respect of rent for a period before the 31st March 1918, when the revenue settlement in question came to an end. It may be that other steps have been taken since and that the position is now different.

In the circumstances I am of opinion that these appeals should be dismissed with costs in all the appeals except No 554.

SUBHAWARDY, J.—I agree.

H. C. S.

Appeals dismissed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

VISCOUNT CAVE.

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

1922,

Heard, 23, March.

Judgment,

10, April.

AMULYA CHANDRA

BANERJEA and ors.,

Appellants,

v.

THE CORPORATION

OF CALCUTTA,

Respondent.

Calcutta Municipal Act (III, B. C., of 1899), sec. 14 (xi), 357, 556—Acquisition of land by Municipality to provide dharmshala for pilgrims to Kalighat Temple—"Public purpose," acquisition, if for, and for carrying out a purpose of the Act—Discretion given by statute to Municipality, if may be questioned in Court.

The provision of suitable and decent accommodation for the large numbers of worshippers who at certain seasons crowd into and about the Temple of Kali in a part of the town is, in view of the general questions involved, of public convenience, proper sanitation and the prevention of danger and disease to the worshippers themselves and to the ordinary resident population, a "public purpose" and not the less so because the persons mainly interested would be the worshippers and dignitaries of the Temple.

By the construction and maintenance of a dharmshala, the corporation of Calcutta carries out a purpose of the Act within the meaning of cl. (xi) of sec. 14 of Act III, B. C., of 1899.

Sec. 556 of Act III, B. C., of 1899, plainly confers upon the Corporation of Calcutta power to acquire land and buildings which are, in the opinion of the Corporation, necessary for carrying out any of the purposes of the Act. The exercise by the Corporation of the discretion thus expressly placed with it by secs. 14 and 556 of the Act cannot be questioned in a Civil Court.

The facts in this case are fully set out in the judgment of the Board.

The Appellants were owners of the premises No. 92-92/4, Kalighat Road, which were scheduled for acquisition by the Respondent in connection with a road and general improvement scheme—which included the erection of a dharmshala provided by private endowment.

The suit was instituted by the Appellants for a declaration that the Corporation was not competent in law to acquire land for a dharmshala, and for an injunction.

The Subordinate Judge made a decree in their favour on the 13th December 1917, but that decree was reversed by the District Judge of the 24-Pargannas on the 12th March 1919 and his judgment was upheld by a decree of the High Court (N. R. Chatterjea and Panton, JJ.), on the 27th February 1920.

From this latter decree the Appellants appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellants.—The action of the Corporation is "ultra vires."

They ought not to have power to erect out of the rates a dharmshala over which they could exercise no control. If everything that tends to the public convenience is within their powers irrespective of the chapters in the Act dealing with "health, safety and convenience" the Corporation's powers would be unlimited. The words "health, safety and convenience" are intended to be in the nature of a limitation and no evidence has been produced to show that the dharmshala was intended for the purposes of health, safety and convenience.

Mr. Dunne, K. C. (with him Mr. S. Hyam) for the Respondent.—Apart from other specific sections of the Act, sec. 14 (xi) is sufficient to give me power.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from

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a decree, dated the 27th February 1920, of the High Court of Judicature at Fort William in Bengal in its Appellate Civil Jurisdiction affirming a decree of the District Judge of 24-Pargannas, dated the 12th March 1919, which reversed a decree of the Subordinate Judge of that District, dated the 13th December 1917.

The suit was brought by the present Appellants for a declaration that the Municipality of Calcutta "is not competent, according to law, to acquire" certain property, and for a permanent order of injunction against their doing so.

The duties and powers of the Corporation as far as this case is concerned are contained in the Calcutta Municipal Act (Bengal Act III of 1899). The piece of land which is the subject of this suit is said by the Corporation to lie in "the very congested and insanitary area surrounding the ancient and famous Temple of the Goddess Kali of Kalighat." The area was added to and incorporated in Calcutta by the Bengal Act II of 1888. The condition and development of this area have been under the consideration of the Corporation for several years past. From the plans produced before the Board, it is clear that a system, *inter alia*, of widening of roads, involving the acquisition, and thereafter, the demolition of various buildings is in process of being carried out there.

On the 12th August 1914, the Corporation passed the following resolution:—

"(1) That the proposed 20-foot road on the north of the passage leading to the gate of the Temple be constructed in the place of the 40-foot road originally proposed over the site of Sham Roy's Temple and that the rest of the road be made 40 feet wide as proposed

"(2) That surplus land be acquired as shown on the plan.

"(3) That the estimate amounting to Rs 77,330 be sanctioned.

"(4) That in addition to the surplus lands included in the estimate amounting to Rs 77,330, the whole of the premises Nos 92 to 92 (4) Kalighat Road be also acquired, and that the additional sum required for the purpose be reported to the Corporation at their next meeting."

On the 26th May 1915, the following further resolution was passed:—

"(1) That the scheme for the construction of a colonnaded Dharamshala at a cost of Rs 28,000 on the land to be acquired at Nos 92 to 92 (4) Kalighat Road, and a Dispensary at a cost of Rs 15,000 on the land acquired on the north of the 60-foot road near the Kalighat Police Out-post, be sanctioned."

To these resolutions this explanation may be added. In the area there stands the Temple referred to—viz, that of Kali, the Goddess of Destruction. There resort to it at certain seasons of the year large numbers of worshippers, who crowd into this part of the City. They come from various parts of India, and their presence in such large numbers involves the provision of suitable and decent accommodation, and the avoidance of inconvenience or of danger to life or health. These inconveniences and dangers, to themselves and to the ordinary resident population, have required and obtained consideration at the hands of the Municipality.

The scheme which was formulated and is disclosed in these proceedings included the construction of roads adjoining the Temple of Kali. The property of the Appellants is in the neighbourhood of that Temple and consists of a square block of land with buildings upon it. The scheme involved the construction of a 20-foot road running north and south, cutting off a large eastern slice from the Appellants' land adjoining the Temple, which lies to the east. Another 20-foot road cut off a

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considerable slice of its western side, and was added for the widening of an existing narrow road. It cannot be denied that these slices, in so far as the scheme was a road construction or widening scheme, fell within the powers of the Municipality Sec 357, after quoted, covers that case.

The remainder of the Appellants' block thus forms a central plot within the two roads referred to. It was surplus land, and the Corporation had over it such powers of acquisition as the statute conferred.

As it turned out, a philanthropist was willing, out of his own private resources, to pay the expenses of constructing upon the plot a *dharmshala*, being a hostel or rest-house with proper sanitary and other suitable accommodation, so that the needs of pilgrims and visitors, and particularly the worshippers of Kali, during the period of overcrowding and danger already mentioned should so far be met. There can be no doubt that the principal object of the acquisition by the Corporation of this land was to enable the City of Calcutta to become the possessor of this great public addition to its municipal resources and advantages.

The Appellants, however, challenge the right of the Corporation to acquire the land compulsorily. The challenge was successful before the Subordinate Judge. Before the statutes are cited it is necessary to say that their Lordships fundamentally disagree with the proposition upon which his judgment is rested, *viz.*, that the *dharmshala* is excluded from the term "public purpose" because the persons mainly interested would have been the worshippers' and dignitaries of the Temple. What the Municipality had to consider was not the religious beliefs and purposes of those assembling in such numbers, but what was the situation of

the City in respect to this assemblage and to the citizens at large in view of the general questions of public convenience, proper sanitation, and the prevention of danger and disease. Any enlightened Municipality would carefully attend to these questions and endeavour to avoid the evils referred to. This is not to be ruled out by a consideration as to the particular form of belief or practice of those who would primarily benefit by the improvements made.

But, of course, the question of powers under the statute remains.

The following sections of the Act are material.—

"Sec' 14 In addition to the other duties and powers conferred or imposed on them by or under this Act or any other Act for the time being in force, the Corporation may, in their discretion, provide from time to time, either wholly or partly, for all or any of the following matters.—

(u) The construction, alteration, maintenance and adornment of public halls, offices and other buildings under the control of the Corporation or required for municipal purposes;

(v) The construction and maintenance of hospitals and almshouses;

(x) Any other matter which is likely to promote the public health, safety, or convenience or the carrying out of this Act."

By sec. 357 it is provided :—

"(1) The Chairman, with the approval of the Corporation, may acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street, or of making any new public street, and the buildings (if any), standing upon such land.

"(2) The Chairman, with the approval of the Corporation and the sanction of the local Government, may acquire, in addition to land and buildings acquired under sub-sec. (1), any land outside the proposed street alignment, with the buildings, if any, standing thereupon, which the Corporation may, in the exercise of any of the powers conferred

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by sub-sec (1), consider it expedient to acquire;

"Provided that, in any case in which it is decided to acquire any land under this sub-section, the owner of such land may retain it by paying to the Corporation an annual sum to be fixed by the General Committee in that behalf, or a lump sum to be fixed by the General Committee, not being less than twenty-five times such annual sum."

It was stated that the Appellants, as owners of the land, were desirous of exercising any power of retention by payment as provided for in this section, although they had not yet taken any steps for that purpose.

By sec. 556 it is provided:—

"Sec. 556—In addition to the powers expressly conferred on any municipal authority by any other Chapter of this Act for acquisition and disposal of land or buildings, the Corporation may—

"(1) Acquire, or pay rent for, or take on lease under such conditions as they may think fit, any land and buildings, whether situated in Calcutta or not, which may in their opinion be needed for carrying out any of the purposes of this Act"

It is unnecessary to enter into the various points which are raised upon the statutes, and commented on in the judgments of the Court below, other than the one now to be mentioned. Their Lordships are clearly of opinion that the judgment of the High Court is right in one matter which is fundamental, and is entirely sufficient to dispose of the case.

In their Lordships' opinion, sec. 556 of the statute plainly confers upon the Corporation power to acquire land and buildings which are, in their opinion, necessary for carrying out any of the purposes of the Act. This refers back to, *inter alia*, the various cases in sec. 14. Those cited in argument are three in number, *viz.*—
(ii) the construction and maintenance of buildings under the control of the Cor-

poration or required for municipal purposes, (v) the construction and maintenance of hospitals and almshouses; but there further remains, after a large category of no fewer than ten different items with much variety, sub-sec. (xi): "any other matter which is likely to promote the public health, safety or convenience, or the carrying out of this Act."

It may be true that the acquisition of this block of land for a *dharmshala* would not fall under (ii) as being for a building under the control of the Corporation, or even under the general denomination of hospitals or almshouses in (v); but upon these nothing need be said, for their Lordships are clearly of opinion that the construction and maintenance of a *dharmshala* cannot be said to be ruled out of (xi), which covers "any other matter which is likely to promote the public health, safety or convenience, or the carrying out of this Act." This being so, their Lordships would be the last to question the opinion of, or the exercise of discretion by, the Municipality of Calcutta, even if they differed from it, which they certainly do not. The Act by sec. 14 and sec. 556 has expressly placed the discretion, not with this Board or with a Court of Law, but with the Municipality itself. The Corporation has the power of acquisition of land which may in their opinion be needed for carrying out any of the purposes of the Act. The resolutions come to clearly enough express that opinion. And the matter is thus at an end.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors: *Messrs. Watkins and Hunter* for the Appellants.

Solicitors: *Messrs. Orr, Dignam & Co.* for the Respondent.
G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER
OF OUDH.]

VISCOUNT CAVE.

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

1922,

Heard, 17, 20 and

21, March.

Judgment, 12, May.]

Oudh Estates Act (I of 1869), sec. 23—Succession to taluqdari estate in List 4—"Ordinary law," if includes sanad—Crown Grants Act (XV of 1895), sec. 3—Family custom, proof of, antecedent to sanad, if admissible—Instance of subsequent date, value of.

The "ordinary law" by which, under sec. 23 of the Oudh Estates Act, the succession on intestacy to a taluqdari estate entered in List 4 is to be regulated is the law which would govern the parties apart from the statute and includes any sanad giving title to the property in dispute.

NARENDRA BAHADUR SINGH v. ACHAL RAM (1), DEBI BAKSH SINGH v. CHANDRA-BHAN SINGH (3) and SITLA BAKSH SINGH v. SITAL SINGH (4) relied on.

BRIJ INDAR BAHADUR SINGH v. RANEE JANKI KOER (5) and PARBATI KUAR v. CHANDRAPAL KUAR (2) explained.

Instances of succession in the family which occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in a sanad of 1863 cannot be used to set up a rule of succession directly contrary to the terms of the sanad, and a single instance, unexplained, of a subsequent date which

(1) L. R. 20 I. A. 77; s. c. I. L. R. 20 Cal. 619, 654 (1893)

(2) L. R. 36 I. A. 125; s. c. I. L. R. 31 All. 457 at p. 474; 13 C. W. N. 1078 (1909).

(3) L. R. 57 I. A. 168; s. c. 14 C. W. N. 1010 (1910).

(4) L. R. 48 I. A. 228; s. c. 25 C. W. N. 721 (1921).

(5) L. R. 5 I. A. 1 at p. 13 (1877).

occurred in one branch of the family was wholly insufficient to establish a custom binding on another branch.

THAKUR SHEO SINGH v. RANI RAGHUBANS KUNWAR (6) referred to.

This was an appeal from a decree of the Court of the Judicial Commissioner, Oudh, dated the 2nd January 1907, affirming a decree of the Court of the Subordinate Judge of Partabgarh, dated the 25th February 1915.

The suit out of which this appeal arose was brought by the Appellant to recover possession of a taluqdari estate in Oudh. The estate in question was held by Lal Ram Kinkar who died without issue in 1907 and his widow the first Respondent entered into possession. The Appellant as the nearest male relative of Lal Ram Kinkar claimed to be entitled to his estate (1) under the terms of a sanad granted jointly to the representatives of four branches of the family (including Chattarpal mentioned below), (2) by an alleged family custom of lineal primogeniture, (3) and under the Will of Chattarpal who was the Appellant's paternal uncle and father of the first Respondent's late husband.

The Subordinate Judge held that the alleged custom was not proved, and that the succession as provided in the sanad was not applicable owing to the entry of Chattarpal's name in List IV under Act I of 1869 and he dismissed the suit. On appeal to the Court of the Judicial Commissioner, Kanhaiya Lal, J. C., held that the rule of succession provided by the sanad had not been superseded by Act I of 1869; Kendall, J. C., however, took the view that for the purposes of succession reference must be made to the Act and not to the sanad. Both the learned Judicial Commissioners, however, agreed that no

(6) L. R. 32 I. A. 203; s. c. 9 C. W. N. 1009 (1906).

BADRI NARAIN SINGH v. THAKURAIN HARNAM KUAR.

custom had been established which prevented the widow from succeeding and they made a decree dismissing the appeal.

From that decree the Plaintiff appealed to His Majesty in Council.

Messrs. Dunne, K. C. and Kenworthy Brown for the Appellant—The sanad was in the common form and provided for succession to the estate by male lineal primogeniture. Subsequently the Oudh Estates Act, I of 1869, was passed and the owners of the estate, were in accordance with the provisions of sec. 8 entered in List IV—sec. 23 of the Act is therefore applicable, which provides that succession is to be “regulated by the ordinary law to which members of the intestate’s tribe and religion are ‘subject’” Where a sanad has already been given the “ordinary law” must include any limitations in the sanad as to succession.

Debi Bakhsh Singh v Chandrabhan Singh (3) and *Sitla Baksh Singh v. Sital Singh* (4).

The case of *Brij Indar Bahadur Singh v. Rancee Janki Koer* (5) has been cited as an authority for the proposition that the Act overrides the sanad, but that case was distinguished in *Debi Bakhsh Singh v Chandrabhan Singh* (3).

It was a case under List 2 and was governed by the provisions of sec. 22 of the Act and not sec. 23.

The provisions of the sanad are rules of “ordinary law” which are to be taken into consideration in conformity with sec. 23.

Sheo Singh v. Raghubans Kunwar (6)

Further in *Ram Lal Kinkar’s* time the

(3) L. R. 37 I. A. 168 : s. c. 14 C. W. N. 1010 (1910).

(4) L. R. 48 I. A. 228 at pp. 234, 238, 240 : s. c. 25 C. W. N. 721 (1921).

(5) L. R. 5 I. A. 1 at p. 13 (1877).

(6) L. R. 32 I. A. 203 : s. c. 9 C. W. N. 1009 (1905).

family were joint and undivided, on his death the succession would be by survivorship and the Appellant under the Mitakshara is the heir.

• *Bajnath Prasad Singh v. Tej Bali Singh* (7).

[LORD PHILLIMORE.—There is evidence on the record that even if this is an undivided family, the widow could succeed by custom.]

Mr. Dunne, K. C.—There was a grant to each separate branch by Government and a new stock arises with Chattarpal. There is no custom of female inheritance in his line.

Messrs. DeGruyther, K. C. and Dubé for the Respondents.—After the confiscation, the titles granted by Government in 1858 were of self-acquired property. This estate was split up into four partible and not four impartible estates and succession to it could not be by survivorship.

Sec. 23 of Act I of 1869 is the controlling section and by that section the sanad is not to be considered.

List 4 is a list of persons who do not hold impartible estates and includes, e.g., Mahomedans. The effect of putting this estate in List 4 was tantamount to a declaration that the succession should be governed by ordinary law and not by the sanad.

The ordinary law must mean the custom by which the intestate is ordinarily governed without the incorporation of the sanad.

Debi Bakhsh Singh v Chandrabhan Singh (3) specifically states that you may only refer to the sanad in case of ambiguity. Here there is no ambiguity and reference to the sanad is not justified.

(3) L. R. 37 I. A. 168 : s. c. 14 C. W. N. 1010 (1910).

• (7) L. R. 48 I. A. 195 : s. c. 25 C. W. N. 564 (1921).

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They also referred to *Achal Ram v. Uday Partab Addiya Dat Singh* (8), *Dewan Ran Bijai Bahadur Singh v. Rae Jagatpal Singh* (9), *Narendra Bahadur Singh v. Achal Ram* (1), *Jagdish Bahadur v. Sheo Partab Singh* (10), *Lal Sheo Partab Bahadur Singh v. Allahabad Bank* (11), *Parbati Kuar v. Chandrapal Kuar* (2) and *Debi Bakhsh Singh v. Chandrabhan Singh* (3).

'Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVE.—This is an appeal by the Plaintiff in the suit from a decree of the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Partabgarh by which the Plaintiff's suit was dismissed. The question raised is as to the title to an estate in Oudh of considerable value known as the Mahal Tajpur.

Lal Ajodhia Bakhsh, the ancestor of the Plaintiff, belonged to a family of Bisen Thakurs long settled in the District of Partabgarh, and was the owner of an estate called Kundrajit or Shamspur. At the time of the Mutiny, this family had four branches representing the descendants of the four sons of Lal Ajodhia Bakhsh; the first branch being represented by Thakurain Baijnath (a widow), the second by Lal Chhatarpal, the third by Lal Surajpal and the fourth by Lal Chandrapal. On the annexation of Oudh in

1856, this estate, with the remainder of the soil of the province, was confiscated by the British Government, which assumed the right (as stated in Lord Canning's Proclamation of the 15th March 1858), to dispose of it in such manner as it thought fitting. Lal Chhatarpal had taken action against the British Government, but Thakurain Baijnath had been loyal; and ultimately by a sanad, which is undated but which appears from other documents to have been executed in the year 1863, the Chief Commissioner of Oudh under the authority of the Governor-General granted the estate of Kundrajit to the above-named four persons, Thakurain Baijnath, Lal Chhatarpal, Lal Surajpal and Lal Chandrapal, and their heirs, subject to the usual conditions as to the surrender of arms and loyalty to the British Government. The sanad was in the form then commonly adopted and contained the following clause:—

"It is another condition of this grant that, in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please."

Chhatarpal appears to have objected to the sanad on the ground that he was alone entitled to the whole estate, but it was ultimately accepted by him and by the other grantees.

On the passing of the Oudh Estates Act (Act I of 1869), the four grantees above-named (bracketed together), were entered as owners of Kundrajit in List 1 and List 4, as prepared under sec. 8 of the Act. There appears to have been no reason why they should not have been entered in List 3 as owners of an estate regulated by the

(1) L. R. 20 I. A. 77 s. c. I. L. R. 20 Cal. 619 at p. 654 (1893).

(2) L. R. 36 I. A. 125: s. c. I. L. R. 31 All 457 at p. 474; 18 C. W. N. 1073 (1909).

(3) L. R. 37 I. A. 168: s. c. 14 C. W. N. 1010 (1910).

(8) L. R. 11 I. A. 51 (1883).

(9) L. R. 17 I. A. 173 (1890).

(10) L. R. 28 I. A. 100: s. c. 5 C. W. N. 602 (1901).

(11) L. R. 30 I. A. 215. s. c. 7 C. W. N. 840 (1903).

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rule of primogeniture; but they may have preferred not to be subject to the special rules of succession which, under sec. 22 (cls. 1 to 10) of the Act, apply to estates entered in that List. In any case, this is now immaterial, as the estate must be dealt with according to the rules regulating estates entered in List 4.

In or about the year 1872, Kundrajit was divided into four Mahals, which were allotted to the four branches of the family, Mahal Tajpur being allotted to Chhatarpal. The effect of this partition was that this Mahal was held by Chhatarpal alone as an impartible taluq on the terms of the sanad and of the Act of 1869.

Chhatarpal died on the 19th October 1899, and was succeeded by his son Lal Ram Kinkar. On the death of the latter without issue on the 6th October 1907, his widow, the first Respondent, Thakurain Harnam Kuar, took possession of Tajpur and the lands then held with it. Thereupon, the Appellant, Babu Badri Naram Singh, who was the son of Chhatarpal's eldest brother and was the nearest male heir in line and degree, claimed to be entitled to the succession: and on his right being disputed he commenced, in 1913, the present suit against Thakurain Harnam Kuar and other members of the family for possession of Tajpur and other lands. By his plaint, he claimed possession (a) under the terms of the sanad, (b) by an alleged family custom of succession by male lineal primogeniture, and (c) under a Will executed by Chhatarpal on the 6th September 1899. This Will, having been executed less than 3 months before the death of Chhatarpal, is now admitted to have been inoperative (under sec. 13 of the Act of 1869), to pass the estate, and it need not be further referred to.

The suit was heard by the Subordinate

Judge of Partabgarh, who held that the alleged custom was not proved, and that having regard to sec. 23 of the Act of 1869, under which the succession on intestacy to a taluqdari estate entered in List 4 is to be "regulated by the ordinary law to which the members of the intestate's tribe and religion are subject," the succession in this case was to be regulated not by the sanad but by the law of the Mitakshara. He accordingly held that the widow of Lal Ram Kinkar was entitled to succeed, and dismissed the suit.

On appeal the Judicial Commissioners differed on the question whether the sanad applied; but they agreed in holding that there was an established custom in the family that the widow should succeed, and that this custom continued notwithstanding the forfeiture and re-grant of the estate, and they accordingly affirmed the decision of the Subordinate Judge. Against this decision the present appeal was brought.

It is not and cannot be disputed that, if the rule of succession laid down in the sanad of 1863 is to have effect, the Appellant as the nearest male heir is entitled to the succession; and in the argument for the Respondents, the principal stress was laid upon the contention which prevailed with the Subordinate Judge, namely, that the effect of sec. 23 of Act I of 1869 was wholly to displace the rule of succession prescribed by the sanad and to substitute for it the ordinary rules of succession prevailing among Hindus who are subject to the law of the Mitakshara. This contention was disposed of by the First Judicial Commissioner in manner appearing by the following extract from his judgment:—

"The meaning of the words 'ordinary law' has been the subject of much discussion in this case. It could not merely imply the personal law of the intestate's tribe and

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religion, because the personal law applicable to Hindus and Muhammadans has, in many instances, been modified and is controlled by the Indian Statutes. In the case of Hindus, for instance, the personal law of Hindus is controlled and governed in some respects by the Caste Disabilities Removal Act (XXI of 1850), the Hindu Widows Re-marriage Act (XV of 1856), the Hindu Wills Act (XXI of 1870) and the provisions of the Transfer of Property Act (IV of 1882) and the Crown Grants Act (XV of 1895), wherever they are applicable. In the case of Muhammadans, the provisions of the Muhammadan Law are similarly controlled and governed in some respects by the Transfer of Property Act (IV of 1882), wherever they are applicable. It cannot, therefore, be said that a reference to the 'ordinary law' in sec 23 is merely meant to imply the personal law uncontrolled by custom or Acts of the Indian Legislature. As pointed out by Lord Hobhouse in a case of List 2, the effect of the 11th sub-sec. of sec 22 is simply to refer the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted, and such ordinary law would include custom [Bhai Narendra Bahadur Singh v. Achal Ram (1)]. In *Purbati Kunwar v. Chandrapal Kunwar* (2), Lord Collins applied the same rule to a case of List 4, governed by sec. 23. In other words, when the special rules of succession laid down in sec 22 are exhausted and sec. 22, cl (11) is reached, or when sec 23 is applicable, the situation governing the succession has to be found apart from the Statute, that is, in the ordinary law applicable as if Act I of 1869 had not been passed. That ordinary law would include not only custom but also a *sanad*, where the *sanad* contains a rule of succession which is enforceable by Statute."

Their Lordships agree with the reasoning and conclusion of the First Judicial Commissioner; and indeed no other conclusion is consistent with the decisions of

(1) L. R. 20 I. A. 77; s. c. I. L. R. 20 Cal., 649, 654 (1893).

(2) L. R. 36 I. A. 125; s. c. I. L. R. 31 All.

457 at p. 474; 13 C. W. N. 1073 (1909).

this Board in *Narendra Bahadur Singh v. Achal Ram* (1), *Debi Bakhsh Singh v. Chandrabhan Singh* (3) and *Sitla Baksh Singh v. Sital Singh* (4). These decisions clearly establish that the "ordinary law" referred to in the Act is the law which would govern the parties apart from the statute and includes any *sanad* giving title to the property in dispute. It is true that these decisions were rendered with reference to cl. 11 of sec. 22, and not with reference to sec 23 of the Act; but the terms of the latter section are precisely similar to those of sec. 22 (11), and their Lordships see no sufficient reason for giving to them a different construction. It may be added that the Oudh Estates (Amendment) Act, 1910, has no application to this case, which arose before that Act was passed.

An argument was founded, as in the cases cited, upon the dictum of Sir Barnes Peacock in *Brij Indar Bahadur Singh v. Ranee Janki Koer* (5), that in that case "the limitation in the *sanad* was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of sec. 22 of that Act." But it must be remembered that in that case (which arose under List 2) the contest was between the female heir of the grantee (a widow) and the heir of her late husband, neither of whom could claim under the *sanad*; and this being so, the case is no authority for the view that the effect of sec. 22 (11) or of sec. 23 of the Act was wholly to destroy the rules of succession laid down under *sanads* which had been so recently granted. Probably the dictum means no more than this, that

(1) L. R. 20 I. A. 77; s. c. I. L. R. 20 Cal. 649, 654 (1893).

(3) L. R. 37 I. A. 168; s. c. 14 C. W. N. 1010 (1910).

(4) L. R. 43 I. A. 228; s. c. 25 C. W. N. 721 (1921).

(5) L. R. 5 I. A. 1 at p. 13 (1877).

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the Act supersedes the sanad where the two are in conflict. Reliance was also placed on the case of *Musammat Parbati Kunwar v. Rani Chandrapal Kunwar* (2), which arose under List 4; but that case was argued (doubtless for good reasons) without any reference whatever to the sanad, and cannot, therefore, be taken as an authority on the question now under discussion.

In their Lordships' opinion, this argument fails.

With regard to the question of custom, the decision of the Judicial Commissioners appears to have been founded on certain instances in which the members of the family of Lal Ajodhia Bakhsh were succeeded by their widows; but all these instances, with one exception, occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in the sanad; and they cannot be used to set up a rule of succession directly contrary to the terms of the sanad under which the estate is now held. The Crown Grants Act of 1895, sec. 3, enacts that all provisions, etc., contained in a grant "shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding," and full effect was given to this enactment in *Thakur Sheo Singh v. Rani Raghubans Kunwar* (6). The exception was in the case of the widow of Surajpal, one of the grantees under the sanad of 1863, who appears to have been allowed to take possession of his estate to the exclusion of his male heirs; but this single instance, which is unexplained, is wholly insufficient to establish a custom binding on another

branch of the family. This argument, therefore, also fails, and the Appellant's title prevails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner and the decree of the Subordinate Judge should be set aside; and that the Appellant should be held entitled to possession of Mahal Tajpur with any accretions thereto and to an account and payment of mesne profits. The Respondents will pay the costs of the Appellant in both Courts and his costs of this appeal.

Solicitor: Mr. Douglas Grant for the Appellant.

Solicitors: Messrs. T. L. Wilson & Co. for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2428 OF 1919.

SUBHAWARDY, J.

CUMING, J.

1921,

Heard, 28 and

29, November.

1922,

Judgment,

10, February.

SHIB CHANDRA SINGHA

and ors., Defendants,

Appellants,

v.

GOUR CHANDRA PAL

and ors., Plaintiffs,

Respondents.

Indian Evidence Act (I of 1872), sec. 68, imperative character of—Exceptions other than those laid down by secs. 69, 70 and 71, if admissible—Evidences admitted without objection in the trial Court, when can be challenged in appeal.

Where two mortgage bonds were, in the Court of first instance, proved in the ordinary way and admitted in evidence without any objection from the Opposite Party, although the provisions of sec. 68 of the Indian Evidence Act were not complied with and no proof was given that no attesting witness to the documents was alive or available:

(2) L. R. 36 L. A. 125; s. c. I. L. R. 31 All. 457 at p. 474; 18 C. W. N. 1073 (1909).

(6) L. R. 32 I. A. 203; s. c. 9 C. W. N. 1009 (1905).

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Held—That sec. 68 of the Indian Evidence Act is imperative and does not on the face of it admit of any relaxation except in the cases provided by secs. 69, 70 and 71 of the Act and that the mortgage bonds were improperly admitted.

Taylor on Evidence, 11th Ed., p. 1230, sec. 1843 and MANNERS v. POSTAN (2) referred to.

TOTALUDDI PEADA v. MAHAR ALI (3) distinguished.

SHAMU PATTAR v. ABDUL KADIR (4) referred to.

The contention that the strict mode of proof prescribed in sec. 68 of the Indian Evidence Act applies only to cases where the document is attempted to be enforced to prove the legal right or relation it creates and not in cases where such document is sought to be proved for a collateral purpose is not sound.

Held, further—That where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment, does not apply.

HARAK CHAND v. BISHNU CHANDRA (6) referred to.

This was an appeal preferred on the 17th November 1919 against a decree of the Additional District Judge of Noakhali (Amrita Lal Mukerjee, Esq.), dated the 13th August 1919, affirming a decree of the Munsif at Sudharam (Babu Tribhubaneshwar Roy), dated the 19th November 1917.

The facts of the case appear from the following extracts from the judgment of the lower Appellate Court.

(2) [1908] 4 Esp. 289; 8 Bos. & P. 348.

(3) I. L. R. 28 Cal. 78 (1898).

(4) I. L. R. 31 Mad. 215 (1908).

(6) 8 C. W. N. 101 (1908).

This appeal arose out of a suit for khas possession of the disputed properties after establishment of Plaintiff's title thereto.

The Plaintiff's case was that one Ram Sunder Pal had eight sons of whom Madan Chandra Mohan who died leaving a son Nagendra, Defendant No. 8. Sambhu, deceased father of Plaintiff No. 3, Kasinath, Gour Chandra (Plaintiff No. 1), Raj Chandra (Plaintiff No. 2), Joy Chandra, Kali Chandra and Haris Chandra were his other seven surviving sons at his death. Kasinath died leaving two widows, Nabatara and Janaki (Defendant No. 4). Nabatara died Defendants Nos 9 and 10 were sons of Joy Chandra deceased. Kali and Haris died unmarried and their mother Joytara inherited their shares.

Ram Sunder took howla settlement of 4 kanis 2 karas 2 kags land of Taluk Emamuddin in 1279 in the name of his able and intelligent son Kasinath. At that time Kasi and Sambhu only were majors and some of the other sons were not born and others were minors including Plaintiffs Nos. 1 and 2. Ram Sunder then acquired one-third share of the taluk, in which partitioned share the said howla lands were included, exclusively in Kasinath's name in 1285 B. S. The howla merged into the taluki right and that land was property No. 1 of the plaint. Ram Sunder was joint in mess with all his sons and grandsons till his death in 1300 B. S. Then there was dispute among his heirs and by amicable settlement Kasinath got the said taluki share exclusively but it was arranged that Kasinath would possess six annas of the taluk in khas and grant jote rights to the brothers in respect of the remaining ten annas share. In this way five jotes were created. Four jotes were at Rs. 2-8-0 per annum, each in the names of Gour Chandra, Raj Chandra, Joy Chan-

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dra and Sambhu Chandra and one in the names of their step-brothers Kali and Haris at Rs. 5.

In 1311, Kasinath in order to defray his expenses of pilgrimage to Gaya sold his six annas *khas* taluki lands to Plaintiffs Nos. 1 and 2 and Joy Chandra. Kali and Haris having died, their mother Joytara took respectively Rs. 40 and Rs. 25 from Plaintiffs Nos. 1 and 2 on occasions of their *sraddhs* and sold their *jotes* to Plaintiffs Nos. 1 and 2. Previously to their death Haris and Kali and Sambhu joined their *jotes* and were in joint possession. After purchase by Plaintiffs Nos. 1 and 2, they and Sambhu similarly possessed jointly the *jotes* of Haris and Kali.

In 1319, Sambhu died and his son Bepin, Plaintiff No. 3, remained in joint possession of the *jotes* with Plaintiffs Nos. 1 and 2.

Defendants Nos. 1 and 2 dispossessed Plaintiffs from the *jotes* of Kali, Haris and Sambhu alleging that they had purchased ten annas of the taluk from Defendant No. 4 and that they were entitled to *khas* possession. Defendant No. 3, the maternal uncle of Defendants Nos. 1 and 2, was one of the dispossessors. Defendants Nos. 5 to 7 took a *kat-kabala* of these properties from Defendants Nos. 1 and 2.

Property No. 2 was Ram Sunder Pal's *osat raiyati*. After Ram Sunder's death Plaintiffs became 16 annas owners by inheritance and by virtue of surrenders by other heirs of Ram Sunder.

Property No. 3 was Ram Sunder's *osat raiyati* at Rs. 29 and property No. 4 was his *osat raiyati* at Rs. 13. 13 gandas land of property No. 3 and 15 gandas land of property No. 4 were disputed. They fell to the 2 annas 16 gandas share of Kasinath. On his death and on the death of his widow Nabatara, Defendant No. 4

(the other widow) granted *barga* settlement of 13 gandas of property No. 3 to Plaintiffs and Kunja, and *osat raiyati* settlement of 15 gandas lands of property Nos. 3 and 4 to Plaintiffs by accepting a *kabuliyat*.

Defendants Nos. 1 and 2 having taken a *kabala* from Defendant No. 4 in respect of 10 annas *taluki* property, 8 annas of property No. 2 and 2 annas 16 gandas of properties Nos. 3 and 4 dispossessed Plaintiffs from these properties. There was a case under sec. 145, Cr P C., and it was decided against the Plaintiffs. Hence the suit.

Defendants Nos. 1 and 2 were the real contesting Defendants. Defendants Nos. 3, 4, 5 to 7 and 9 and 10 supported Plaintiffs. Defendant No. 8 did not file any defence.

The main contentions of Defendants Nos. 1 and 2 were that the *howla* and the taluk belonged to Kasinath as he acquired the same; that six sons of Ram Sunder separated from him during his life-time; that there was no amicable settlement or creation of *jotes* or division of the taluk as alleged in the plaint; that only *nal* lands were transferred to Plaintiffs by Kasinath out of his 6 annas *taluki* right excluding tanks, banks, gars and gardens, etc., that Joytara never sold Kali's and Haris's shares to Plaintiffs Nos. 1 and 2; that Ram Sunder had no *osat raiyati* right in property No. 2, but that it was the *osat raiyati* of Sambhu and Kasinath in equal shares; that 8 annas of it was possessed by Plaintiff No. 3 and 8 annas by Defendants Nos. 1 and 2 by purchase; that the story of surrender was false; that properties Nos. 3 and 4 belonged to Ram Sunder and 2 annas 16 gandas share belonged to Kasinath but there was no *barga* or *osat raiyati* settlement by Defendant No. 4 with Plaintiffs

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and the Plaintiffs' alleged *kabuliyat* was never accepted by Defendant No. 4; that Defendants Nos. 1 and 2 had purchased all the properties of Kasinath from Defendant No. 4 and then mortgaged the same to Defendants Nos. 5 to 7.

The learned Munsif decreed the Plaintiff's suit in part declaring 4 annas right to property No. 1 of Plaintiffs Nos 1 and 2 and 11 annas 4 gandas share of the Plaintiffs in property No. 2. He rejected their other prayers and granted possession of the shares declared as Plaintiffs' properties.

Upon appeal, the lower Appellate Court modified that decree, and in the course of his judgment observed:—

“As to the dispute and amicable arrangement the Plaintiff (P. W. No. 5) and P. W. No. 10, the only surviving witness, prove the fact. P. W. No. 8 was not present then. Much has been said against P. W. No. 10. He is financing the Plaintiffs for conducting this litigation. So, he is styled by the learned Pleader for the Respondents as master of Plaintiff No. 1. But this man has been styled by the lower Court as a jail bird. He was once convicted for inflicting grievous hurt to a man. That does not make him a felon. At a moment of excitement for some reason or other every man good or bad may inflict some injuries to a person which may turn out to be grievous. I cannot agree with the lower Court or with the learned Vakil for the Respondent that this man's evidence is to be discarded on the above grounds. This very man attested many of Defendants' documents, Exs. A and B. He is an important old witness and so he is expected to know all these old matters. I am not inclined to disbelieve him. Thus I find that Ram Sunder Pal acquired this taluk in his son Kasinath's name. Kasinath was the ablest

man then. His other sons were either not born or minors. Gour, Plaintiff No. 1, was a minor then. P. W. No. 8 says that Gour became competent afterwards and then looked after the affairs of the family. But he being a minor at the time of the creation of the *howla* and the taluk the same were acquired in Kasinath's name. There was nothing unusual in it. In these circumstances the story of the Baithak and the amicable settlement as alleged by Plaintiffs and proved by P. W. Nos. 5 and 10 is in my opinion true. If it had not been so, then there would not have been the division of the taluk in 6 annas and 10 annas as alleged by the Plaintiffs.

Then it is attempted by Defendants to prove that Kasinath made these fictitious *jotes* only to reduce the cesses in the cess return in consultation with Bhuia Gazi, father of D. W. No. 4, who had similarly submitted his return making a *jote* in the name of his brother-in-law Laku Miya. This story of Defendant No. 1 and D. W. No. 4 cannot at all be believed. I cannot place any reliance on their evidence to the effect that Kasi took Defendant No. 1 in his confidence although he was 18 years old then and that Bhuia Gazi took his son in confidence on such a fraudulent transaction. I asked the learned Vakil for the Respondents whether by that means Kasinath succeeded in reducing the cesses.* He answered in the affirmative. But subsequently he said that he was not aware of it. However that may be, it can be said that Kasinath or his widow or her vendees cannot take advantage of a completed fraud practised upon the Government, by such a nefarious and fraudulent act. I have already observed that this story is quite false. Ex. 5 does not at all rebut the presumption raised by the Ex. 4 cess return as I have already shown.

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It dealt with one the 6 annas *khas taluki* lands and not with the *jotes* and the recitals that no *jote* existed therein did not qualify the 10 annas *jote* share of the taluk in any way. In my opinion Exs. A and B though unopposed in the lower Court were not proved by any attesting witness and were inadmissible in evidence. Ex. B shows that all the brothers of Kasinath were made liable for the debts incurred thereby. The entire taluk was mortgaged and thus Kasinath made his brothers liable for the debt incurred on the occasion of their father's *sradh*. His statement would not have bound his brothers, if they were not interested in the property as alleged by Plaintiffs."

In the result the lower Appellate Court ordered the judgment and decree of the Court of first instance to be modified and decreed the suit in part with proportionate costs and interest at 6 per cent. per annum; the Plaintiffs' title to 10 annas share of the taluk standing in Kasinath Pal's name was declared in their *jote* right under Defendants Nos. 1 and 2 and 4 and it was ordered that Plaintiffs do get *khas* possession of the lands of property No. 1 of the plaint in that 10 annas *jote* share; in other respects the lower Court's judgment and decree were confirmed.

Hence this second appeal.

* *Babu Jitendra Kumar Sen Gupta* for the Appellants.

Babu Aswiranjan Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for the recovery of possession of certain properties described in the plaint and establishment of the Plaintiffs' title thereto. The facts of the case which are rather complicated

are fully set out in the judgment of the lower Appellate Court. The Court of first instance gave the Plaintiffs a partial decree by declaring the taluki right of Plaintiffs Nos. 1 and 2 in four annas share of the lands described as property No. 1 in the plaint and the *osat raiyat* title of the Plaintiffs to eleven annas four gondas share of property No. 2 and dismissed the Plaintiffs' claim with regard to the rest of the properties in suit. On appeal the lower Appellate Court modified the decree of the first Court by declaring Plaintiffs' *jote* right under Defendants Nos. 1, 2 and 4 in property No. 1 and granting them a decree for *khas* possession of that property and in other respects upheld the decree of the first Court. Several objections have been taken to the findings of the lower Appellate Court, some of which in our opinion do not stand scrutiny. The points that require serious consideration are, (1) That the Court of appeal below has erred in holding that the family being joint and Ram Sunder with his seven surviving sons including Kasinath living in joint mess, the property must be said to be the joint properties of all, that the Defendants must show that Kasinath had a separate fund of his own from which he acquired this property and that hence the presumption is that it was joint property of the joint Hindu family of Ram Sunder and his sons. It is argued that as the family was one governed by the Dayabhaga School of the Hindu law, such presumption ought not to have been raised and the burden cast upon the Defendants to prove that the property was purchased with the funds of Kasinath in whose name it stood. It is clear from the perusal of the judgment that the learned District Judge on an examination of the oral evidence has found that the property was purchased in the name of

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Kasinath as he was the ablest and most intelligent of Ram Sunder's sons, and in consideration of the fact and circumstances of the case he has demanded proof from the Defendants that the property was purchased by Kasinath out of his personal fund. The question of onus loses its importance when both parties have adduced evidence in support of their respective cases, and the Court on an examination of such evidence shifts the burden of proof from one party to the other. This must be more so at the Appellate stage. *Krishna Kisore De v. Nagendra Bala* (1). The finding of the learned Judge is based on a consideration of the evidence in the case and is unassailable in second appeal.

The second point is of some importance. The Court of first instance admitted in evidence two mortgage bonds Exs. A and B without objection by the Plaintiffs. These documents were executed by Kasinath and his widow, Defendant No. 4, in which it is stated that the mortgagors had not created any subordinate interest or encumbered the property in suit which they mortgaged by those deeds. The documents were proved not by any attesting witness to them, but by evidence of persons who identified the signature of the executants. The Plaintiffs claim in this suit *jotes* created by Kasinath under his taluki right in property No. 1. It was attempted to show by these documents that some time ago, i.e., in 1900 and 1912 Kasinath and his widow made statements to the effect that they had not created any such subordinate interest in the property. Considering the circumstances under which these statements were made, it is doubtful if these admissions are admissible in evidence under sec. 13 of the Evidence Act in favour of the persons who made them

or those claiming under such persons. But in view of our decision as to the documents having been legally proved, it is not necessary to discuss the matter further.

Sec. 59 of the Transfer of Property Act requires a mortgage deed to be attested by two witnesses and sec. 68 of the Indian Evidence Act enacts as follows :—

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence." The only exception to this imperative rule is laid down in sec. 70 of the Evidence Act to the effect that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him. In the present case there is no proof that there is no attesting witness to these documents alive or available. In the circumstances it is evident that the provisions of sec. 68 of the Evidence Act has not been complied with and the documents not legally proved. It is contended for the Appellant that the strict mode of proof prescribed in sec. 68 of the Evidence Act applies only to cases where the document is attempted to be enforced to prove the legal right or relation it creates. But in cases where such document is sought to be proved for a collateral purpose, it may be proved by the ordinary law laid down for proof of a document as a piece of evidence. We do not think we should give effect to this contention. The law as laid down in sec. 68 is imperative and does not on the face of it admit of any relaxation except in the cases provided in secs. 69, 70 and 71 of the Evidence Act. Sec. 68 of the Evidence Act is based on the English Law on the point which is thus stated in Taylor on

(1) 25 C. W. N. 942; s. c. 34 C. L. J. 333 (1931).

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Evidence, 11th Ed., p 1230, sec. 1843. "The general rule which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable that it applies even to a cancelled or a burnt deed, as also to one, the execution of which is admitted by the party to it and that too, though such admission be deliberately made, either in open Court or in a subsequent agreement or even in a sworn answer to interrogatories delivered to the party in the cause. A party in a cause, who is called as a witness by his opponent cannot be required to prove the execution by himself of any instrument, to the validity of which attestation is requisite, so long as the attesting witness is capable of being called. So also the attesting witness must be called, though subsequently to the execution of the deed, he has become blind, and the Court will not dispense with his presence on account of illness, however severe. If the indisposition of the witness be of long-standing, the party, requiring his evidence, should have applied for power to examine him before a Commissioner or Examiner, and if he be taken suddenly ill, a motion must be made to postpone the trial."

Sec. 1844, p. 1231. "The rule is equally applicable, whatever be the purpose for which the instrument is produced"

This statement of the law found judicial recognition in the case of *Manners v Postan* (2) in which Lord Alvanley clearly laid down that the rule of law (as codified in sec. 68 of the Indian Evidence Act) is not confined to cases where the attested instrument was the ground of action but that it applied also to cases where it was used in evidence for collateral purposes. This view is also supported by the imperative and stringent wording of sec. 68

(2) [1808] 4 Esp., 339; 3 Bos. & P. 343.

which does not permit the use of the instrument as evidence for any purpose whatsoever unless and until it is proved in strict accordance with the provisions of the section. The rigour of the English Law on which the present section is founded has been to a certain extent lessened by the proviso as contained in sec 70 of the Evidence Act. The enactment of this proviso, to our mind, clearly, indicates that the Indian Legislature intended to provide only one exception to this inflexible rule and no other.

It has been argued on the authority of *Tofaluddi Peada v Mahar Ali* (3) and other cases of this and other High Courts that a mortgage deed though not enforceable as such has been used as evidence and proved in the ordinary way to enforce a personal covenant to pay. In all these cases the bond was not attested in accordance with sec 59 of the Transfer of Property Act and hence it was not treated as a mortgage bond, but given effect to as a simple money bond. These cases therefore do not support the position taken by the Appellants. We have not been referred to any case where a mortgage bond properly attested, though not proved in conformity with sec. 68 of the Evidence Act, was received in evidence to prove the personal obligation created thereby. For the contrary view we have the authority of the case of *Shamu Patter v. Abdul Kadir* (4). The case was taken to the Privy Council which affirmed the decision of the Madras High Court in *Shamu Patter v. Abdul Kadir* (5). The point whether such a document could be used as a bond was negatived by the Madras High Court; it was urged by Counsel for the Appellant at

(3) I. L. R. 26 Cal. 78 (1898).

(4) I. L. R. 31 Mad. 215 (1903).

(5) L. R. 39 I. A. 218, s.c. I. L. R. 35 Mad. 607; 16 C. W. N. 1009 (1912).

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the bar of the Privy Council but was presumably not pressed and there is no direct finding of the Judicial Committee on this question, though the dismissal of the suit indicates that in their Lordship's opinion there was no ground on which the Plaintiff in that case was entitled to any relief. It is further noticeable that in that case the deed in suit was admitted by the executants and the contesting Defendants in the pleadings, which fact assumes importance with reference to the next question raised before us by the Appellants.

It is further argued in this connection that the Plaintiffs were not competent to object to the admissibility of the mortgage bonds in the Court of appeal below as they were admitted without objection in the first Court. It is not clear from the judgment of the lower Appellate Court whether the documents were rejected by it *suo motu* or on the objection of the Respondents. We are not unmindful of the cases in which it has been laid down that where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment, does not apply. See *Harak Chand v. Bishun Chandra* (6). In the present case, the law has laid down an inflexible rule of proof which cannot be deviated from except as provided in the Act. If the Legislature had intended to modify the stringency of the English Law so far as to make an instrument not proved in accordance with the provisions

of sec. 68 of the Evidence Act admissible when not objected to by the other party, one would have expected a proviso to that effect similar to sec. 70 of the Evidence Act. In our opinion, the enactment of sec. 70 lends considerable colour to the supposition that the legislature desired to add no further exception to the law laying down the special method of proof of instruments required by law to be attested. We accordingly hold that the mortgage bonds were rightly rejected by the learned Judge.

We may observe that the bond, even if admitted, would have apparently afforded evidence of the weakest character, and the Munsif who decided the case in favour of the Defendants did not even refer to them in his elaborate judgment.

The decree of the lower Appellate Court requires slight modification in that it has decreed to the Plaintiffs "*khas* possession of the lands of property No. 1 in their 10 annas *jote* share." The Plaintiffs claimed their *jote* right in Plots Nos. 1, 2 and 3 of property No. 1 and not in the whole of that property. The Plaintiffs' *jote* right will therefore be declared in, and *khas* possession granted to them of, Plots Nos. 1, 2 and 3 only of property No. 1. With this variation, the decree of the Court of appeal below is affirmed and this appeal dismissed with costs.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1473 of 1919.

CHATTERJEA, J.	GANGADHAR KALWAR.
PEARSON, J.	Defendant, Appellant,
1921,	v.
19, July.	MUSST. SEKALI TELINI
	and ors., Plaintiffs,
	Respondents.

Res judicata—Suit for damages for malicious cuti on and counter suit for damages for using

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abusive language, tried together upon same evidence and disposed of by separate judgments—Appeal in one only—Decision in the other suit, if operates as res judicata in the appeal.

P. instituted a suit for damages for malicious prosecution against G., and the latter brought a counter suit for damages against P. for using abusive language to him. The question at issue common to both the suits was whether P. did use abusive language towards G. The suits were tried together upon the same evidence and were disposed of by separate judgments. G.'s suit was first dismissed and subsequently P.'s suit was decreed. G. appealed against the decree in P.'s suit but did not appeal against the decree in the suit instituted by him:

Held—That the earlier decision in the suit brought by G. not having been appealed against operated as res judicata in the other suit as regards the issue which was common to both the suits, and that issue was not further open for decision in the other suit.

ABDUL MAJID v. JOY NARAIN MAHATO (1), MARIAMNISSA BIBI v. JOYNAB BIBI (2), PANCHANANDA VELAN v. VAITHINATHA SASTRIAL (3) distinguished.

CHHAJJU v. SHEO SAHAI (4), ZAHARIA v. DEBI (5), DAKHNI DIN v. ALI ASGAR (6), LAL MUHAMMAD v. SHAKURAN (7) and MIDNAPORE ZAMINDARY CO., LTD. v. NITYAKALI DAS (8) referred to.

This was an appeal against the decree of G. C. Sankey, Esq., Additional District Judge of Zillah Assam Valley at District

Sibsagar, dated the 24th of March 1919, affirming the decree of Moulvi Mahamed Chowdhury, Munsif of Jorhat, dated the 18th of August 1917.

The facts will fully appear from the judgment.

Babu Dwijendra Nath Mukherjee for the Appellant.

M. A. S. M. Akram for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for damages for malicious prosecution.

It appears that the Defendant (Gangadhar) brought a criminal case under sec. 504, I. P. C., against the Plaintiffs who are the mother, wife and brother's wife respectively of one Janaki Teli against whom he had obtained a decree and taken out attachment of his homestead. The criminal case was dismissed and thereupon this suit for damages for malicious prosecution was instituted by the Plaintiffs. The Defendant (Gangadhar) also brought a suit for damages against the Plaintiffs for having used abusive language to him (the Defendant).

The suits were tried together upon the same evidence but two separate judgments were pronounced. The suit instituted by the present Defendant for damages against the Plaintiffs for having used abusive language was dismissed and then the Plaintiffs' suit for damages for malicious prosecution was decreed. The Defendant appealed to the lower Appellate Court in the suit for damages for malicious prosecution and did not appeal against the decree in the suit instituted by him. The learned District Judge held that the decision in the latter case operated as res judicata. He was also of opinion that if there was no abuse there could have been no reason-

(1) I. L. R. 16 Cal. 238 (1888).

(2) I. L. R. 33 Cal. 1101: s. c. 10 C. W. N. 984 (1906).

(3) I. L. R. 29 Mad. 333 (1905).

(4) I. L. R. 10 All. 123 (1887).

(5) 7 All. L. J. 861 (F. B.); 7 I. C. 156 (1910).

(6) 7 All. L. J. 995; 7 I. C. 909 (1910).

(7) 18 Ind. Cas. 867 (1913).

(8) 24 Ind. Cas. 343 (1914).

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able cause and upon that finding dismissed the appeal without coming to any finding upon the question of malice.

The Defendant has appealed to this Court.

Two contentions have been raised before us. The first is that the decision in the first suit does not operate as *res judicata*.

There is some divergence of judicial opinion upon the question whether the decree in one of two suits tried together and governed by the same judgment, in which the same question is in controversy, operates as *res judicata* in the other suit if no appeal is preferred in the one suit, although an appeal is preferred in the other. [See the cases of *Abdul Mand v. Joy Narain Mahato* (1), *Mariamnissa Bibi v. Joyrab Bibi* (2) and *Panchananda Velan v. Vaithinatha Sastrial* (3)]. In all these cases it was held that the decision in one of the suits does not operate as *res judicata* in the other.

A contrary view was taken in certain decisions of the Allahabad High Court. See the cases of *Chhajju v. Sheo Sahai* (4) and *Zaharia v. Debi* (5) (where the cases on the point are collected), *Dakhu Din v. Ali Aagar* (6) and *Lal Muhammad v. Shakuran* (7).

In the case of *Midnapore Zamindari Co., Ltd. v. Nityakali Das* (8) (a decision of this Court), the two suits were tried separately and the evidence also appears to have been different.

It is unnecessary to discuss the other

cases on the point because in the present case there were two separate judgments though the evidence was the same, and the decision in the suit brought by the Defendant Gangadhar was the earlier one. We think that in these circumstances the earlier decision in Gangadhar's suit not having been appealed against operates as *res judicata* in the other suit.

The question at issue which was common to both the suits was whether the Plaintiffs did use abusive language towards Gangadhar. The onus of proving the affirmative of that issue was upon Gangadhar who was the Plaintiff in the suit for damages, and the onus of proving that there was no abusive language used was upon the ladies who were the Plaintiffs in the suit for malicious prosecution. But the finding is that the Plaintiffs (the ladies) did not use any abusive language at all to the Defendant (Gangadhar) and that the case that the Plaintiffs used abusive language was false. That being so, we do not see how upon the face of that finding in the suit brought by Gangadhar the question is still open for decision in the other suit. So far as that issue is concerned, we must hold that the decision in the suit instituted by Gangadhar not having been appealed against, operated as *res judicata*.

The second contention is that the learned Judge was wrong in dismissing the appeal without deciding the question whether the Defendant in bringing the criminal case was actuated by malice. The Court of first instance considered that question also, but the learned Judge merely held that if there was no abuse, there could have been no reasonable cause.

The decree of the lower Appellate Court must accordingly be set aside and the case sent back to that Court in order that the question of malice may be considered and the case disposed of according to law.

(1) I. L. R. 16 Cal. 233 (1888).

(2) I. L. R. 33 Cal. 1101; s. c. 10 C. W. N. 984 (1906).

(3) I. L. R. 29 Mad. 833 (1905).

(4) I. L. R. 10 All. 123 (1887).

(5) 7 All. L. J. 861 (F. B.); 7 I. C. 156 (1910).

(6) 7 All. L. J. 935; 7 I. C. 909 (1910).

(7) 18 Ind. Cas. 897 (1913).

(8) 24 Ind. Cas. 243 (1914).

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Costs to abide the result.

J. N. R. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 237 of 1920.

SHIB CHARAN CHAKRA-

BURTTY and ors.,

Plaintiffs, Appellants,

v.

WOODROFFE, J.

B. B. GHOSE, J.

1922, .

27 & 29, March.

|BEPIN BEHARY CHAKRA-

BURTTY and ors., De-

fendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 155—Suit for ejectment and compensation—Misuse of tenancy—Notice, validity of—Where misuse capable of remedy, notice without requiring the tenant to remedy the same, effect of—Suit, if maintainable.

Where a notice under sec. 155 of the Bengal Tenancy Act did not require the tenant to remedy the misuse, though upon evidence it was found that it was capable of remedy, but only asked for compensation to remedy the misuse:

Held—That the notice was not valid according to the requirements of sec. 155 of the Bengal Tenancy Act, and the suit was not maintainable, and a claim for compensation was not sustainable.

This was an appeal preferred on the 30th of January 1920, against the decree of Babu Rajendra Lal Sadhu, Subordinate Judge of Zillah Jessore, dated the 4th of November 1919, reversing the decree of Babu Basanta Behari Mukherjee, Additional Munsif of Narail, dated the 20th of August 1918.

The facts material to this report are as follows:—

This appeal arose out of a suit brought in 1912 by the Plaintiff against the Defendants for recovery of *khas* possession of a certain plot of land by ejecting the Defendants therefrom and for recovery of Rs. 300 as compensation for misuse of

the lands. Plaintiff's case was that the Defendants held the lands as occupancy rayats under him, that the Defendants were using Plot No. 1 of the holding for preparing bricks by making an excavation therein and also for burning bricks by making a kiln there, and thus rendered the lands unfit for the purpose of the tenancy, that the Defendants had been served with a notice under sec. 155 of the Bengal Tenancy Act, but in spite of that they had been using the land as aforesaid. Plaintiff further prayed for a perpetual injunction restraining the Defendants from making excavations on the land and preparing bricks thereon. Defendant No. 1 contested the suit. The defence, *inter alia*, was that no notice was served, that the notice was bad in law, that the Plaintiff was neither entitled to get *khas* possession nor compensation.

The notice under sec. 155, Bengal Tenancy Act was in these terms:—

“ . . . Recently you prepared a brick field by digging pits on the land of *dag* No. 1 comprised therein and have thus rendered the land unfit for the purpose for which it is used, and the *jamai* right which you had, has accordingly been extinguished by your aforesaid act; you are, therefore, hereby informed that within 15 days from the date of receipt of this notice, you shall pay as damages Rs. 300 for filling up the pits on the said land and for causing depreciation of the value thereof and shall give up possession of the lands, otherwise on the expiry of the term a suit will be brought against you for getting *khas* possession of the said land and for damages.”

The Court of first instance dismissed the suit, on the 19th September 1918, on a preliminary ground, and held as follows:—“ . . . From the notice Ex. 2, it appears that the Plaintiff in this case

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simply asked for the compensation for the misuse and for filling up the excavation without requiring the tenant to remedy the misuse of the land. It is admitted in the notice that the misuse is capable of remedy. It was, therefore, the duty of the Plaintiff to require the Defendants to fill up the excavation within a certain time. Plaintiff's cause of action would have arisen if the Defendants failed to comply within that time with that request. I must therefore hold that the notice is defective under sec. 155 of the Bengal Tenancy Act in not asking the Defendants to fill up the excavation. As such a suit is not to be entertained unless the notice is found to have been served in strict compliance with sec. 155 of the Bengal Tenancy Act and as the notice has been found to be defective, Plaintiff is entitled to no relief. The suit, therefore, must fail. The other issues do not require decision as the suit fails on the important law point."

On appeal by the Plaintiff, the Court of Appeal below, on the 11th January 1915, reversed the decision of the Munsif and sent back the case for trial on the merits. The following portion of the judgment of the Subordinate Judge will be found material to this report:—

" . . . The lower Court found fault with the notice as the Plaintiff did not ask the Defendant to remedy the misuse or breach holding that the Plaintiff admitted in the notice that the misuse is capable of remedy. But the notice does not shew any such admission of the Plaintiff and the admission that it would cost Rs. 300 to fill up the excavation would not be construed that the misuse is capable of remedy. It is optional with a Plaintiff to admit a misuse being capable of remedy or not and that point requires adjudication by a Court, so the mere fact that the

Plaintiff did not call upon the Defendants to fill up the excavation by that notice should not stand in his way and so I find that this suit shall go back to the lower Court for a decision on the merits."

Against this order of remand, the Defendants preferred an appeal (M. A. No. 52 of 1915) to the High Court. Teunon and Newbould, JJ., dismissed the appeal on the 30th November 1917 and passed the following judgment:—

" This is an appeal against an order of remand by the Subordinate Judge of Jessore. The suit, it appears, was one brought under the provisions of sec. 155 of the Bengal Tenancy Act. It was dismissed by the trial Court on the ground that the notice served under that section was defective. The defect alleged was that the notice did not require the tenant to remedy the misuse complained of. The decision of the Munsif proceeded on the ground that in the notice itself there was an admission that the misuse was in fact capable of remedy. On appeal the learned Subordinate Judge took the view that in fact in the notice there was no such admission and that the Plaintiff in giving his notice proceeded on the view that the misuse was in fact incapable of remedy. We agree with the learned Subordinate Judge in the view he has taken of the notice, and that being so, it is clear that the notice was sufficient and that the Subordinate Judge's order in remanding the case for trial on the merits was a proper one. This appeal is accordingly dismissed."

After the case went back on remand from the lower Appellate Court, the Munsif tried it on the merits and found that the notice was served, and that the misuse was capable of remedy, but without deciding as to the legality of the notice, held that the question was concluded by

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the earlier decision of the lower Appellate Court which was affirmed by the High Court on appeal. The Munsif decreed the suit, on the 20th August 1918, allowing *khas* possession, and Rs. 10 as compensation. On appeal by the Defendants, the lower Appellate Court reversed the decision of the Munsif, and dismissed the suit on the 4th November 1919. The learned Subordinate Judge held that the former decision did not stand in the way of the Defendants raising the objection as to the legality of the notice as that question had not been decided previously by the lower Appellate Court or the High Court. As to the legality of the notice he held as follows :—

“Upon the evidence, I find that the misuse is capable of remedy and that when the notice was issued the Plaintiff knew it well that the misuse complained of was capable of remedy. The notice shews that the Plaintiff did not ask the Defendants to remedy the misuse though it was capable of remedy. That being the case I must hold that the notice is bad in law. The principle laid down in *Kali Chandra v. Kali Kumar* (1) supports the view taken by me. Accordingly I find that the notice is bad in law and the suit is not maintainable.”

Against this decision of the Subordinate Judge, the Plaintiff preferred the present second appeal to the High Court.

Dr. Judunath Kanjilal for the Appellant.—My submissions are two-fold. *Firstly*, I submit that the notice was previously found by the lower Appellate Court and the High Court as legal and sufficient. The judgment of the High Court is conclusive on the point. It was not competent for the lower Appellate Court after remand to re-open the said question and come to a contrary decision. It is not

open to the Defendants to raise the same question again. Reads the previous judgments. Their Lordships say in that judgment that the notice was sufficient. *Secondly*, my submission is that the notice that was served upon the Defendants is legal and complies with the requirements of sec. 155 of the Bengal Tenancy Act. In the notice a demand has been made for compensation for filling up the pits. I submit that this implies a demand for remedying the misuse.

Babu Surendra Chandra Sen (with him *Babu Hemendra Chandra Sen*) for the Respondents.—I submit that the contentions of the Appellant are not well-founded. The Munsif dismissed the suit in the first instance on a preliminary ground that in the notice itself there was an admission that the misuse was in fact capable of remedy, and as the notice did not require the Defendant to remedy the misuse complained of, it was defective. The Munsif did not enter into the evidence but based his decision on the ground that there was an admission in the notice. On appeal the Subordinate Judge took the view that in fact there was no such admission in the notice and hence remanded the case for trial on the merits. On appeal against this order of remand the High Court agreed with the Subordinate Judge in the view he had taken of the notice and held that the Subordinate Judge's order in remanding the case for trial on the merits was a proper one, and dismissed the appeal. The observation by their Lordships in that judgment that the notice was sufficient must be read in reference to the context. Upon the view that there was no admission in the notice, their Lordships said that the notice was sufficient, so that the suit could not be dismissed on the preliminary ground that there was an admission without deciding the question

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on the merits as to whether upon the evidence the misuse complained of was in fact capable of remedy. On the merits it has been found now after remand that the misuse is in fact capable of remedy. That being so, the question arises whether upon that state of things the notice served upon the Defendants is valid according to the requirements of sec. 155 of the Bengal Tenancy Act. This is a new question which was not decided in the previous appeal. The lower Appellate Court after remand was competent to decide this question and has held in favour of the Defendants.

I submit that the notice served is bad in law as it does not fulfil the requirements of sec. 155 of the Bengal Tenancy Act. Under that section a suit is not maintainable unless the landlord, in the case where the misuse is capable of remedy, serves a notice requiring the tenant to remedy the same. In the notice served upon the Defendants there is no demand requiring them to remedy the misuse complained of. Hence the notice is not legal and as such the suit is not maintainable.

As to the claim for compensation my submission is that it is not sustainable inasmuch as that claim can only arise when the suit under sec. 155 is held to be maintainable. Here the notice being invalid the suit is not maintainable. Further, I may point out that no ground of appeal has been taken on the question of compensation. I submit that the decision of the lower Appellate Court is correct.

Dr. Jadunath Kanjilal in reply.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—This appeal has taken some time but the point is very simple. It arises out of a suit brought by the Plaintiff against the Defendants for re-

covery of *khas* possession of certain plot of land by ejecting the Defendants therefrom and for recovery of a certain sum of money claimed by way of compensation for misuse of the land. The defence is that no notice was served and that if it was served it was invalid. The point which comes before us for decision is this: whether the decision of the High Court when it made a remand in this matter is conclusive. I am of opinion that it is not conclusive in the sense in which it has been urged before us by the Appellant to-day. The question then is, that being so and there being no bar to the decision by the Subordinate Judge, whether his decision on that particular point with regard to the notice is correct. He finds on the evidence as a question of fact that "the misuse is capable of remedy and that when the notice was issued the Plaintiff knew it well that the misuse complained of was capable of remedy." Then, after referring to the notice, he says that "the notice shows that the Plaintiff did not ask the Defendants to remedy the misuse though it was capable of remedy." Accordingly he holds that the notice was not good in law. As regards the claim for compensation there is no ground of appeal nor is it sustainable, the notice having been held to be bad.

In my opinion, the appeal fails and must be dismissed with costs and in addition one gold mohur for further hearing on the 29th March 1922.*

GHOSH, J.—I agree.

H. C. S. *Appeal dismissed with costs.*

* On the case being mentioned by the learned Valid for the Appellant, the Appeal was again heard on 29-3-22. Their Lordships allowed additional costs to the Respondents for this hearing.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 27 OF 1921.

TEUNON, J.	}	CHANDRA MOHAN DAS
GHOSE, J.		MANDAL and anr.,
1921,		Accused, Petitioners,
4, April.		v.
		KING-EMPEROR,
		Opposite Party.

Summary trial—Complaint disclosing facts constituting offences not triable summarily—Process, issue of, and trial for minor offence, if legal—Procedure—Jurisdiction of Magistrate.

Where the petition of complaint disclosed the commission of an offence under sec. 144, I. P. C., not triable summarily, and there was nothing in the examination of the complainant to reduce the offence to one less serious, and the accused was tried by the summary procedure and convicted under sec. 447, I. P. C.:

Held—That the case was not triable summarily, and the conviction and sentence were set aside, and a retrial under the regular procedure was directed.

This was a Reference under sec. 438, Cr. P. C., made on the 21st February 1921, by H. C. Maitland, Esq., Sessions Judge of Rangpur, recommending that the order of Babu Mohit Chandra Ghosh, Deputy Magistrate of Rangpur, Sadar, dated the 3rd November 1921, convicting the accused under sec. 447, I. P. C., and sentencing them to pay fine of Rs. 40 each, in default, three weeks' rigorous imprisonment, and directing each of them to execute a bond of Rs. 200 to keep the peace for a year, in default, to simple imprisonment for a year under sec. 106, Cr. P. C., be revised.

The facts material to this report appear from the order of the learned Sessions Judge, dated the 18th February 1921, and the letter of Reference, which are given below:—

"The Appellants have been summarily tried under sec. 147, I. P. C., convicted

under that section, fined and bound down to keep the peace under sec. 106, Cr. P. C.

Two points are pressed before me. The fact is that the petition of complaint clearly discloses an offence under sec. 144, I. P. C., and that there is nothing in the complainant's examination on S. A. to reduce the offence to one less serious and that therefore the trial by the summary procedure under sec. 447 was illegal. The petition of complaint in fact asserts that seven persons entered the complainant's bari and behaved in such a manner as to shew clearly that they formed an unlawful assembly, one of them being armed with a gun. There is, further, nothing in the examination on S. A. to shew any of the allegations to be untrue. *Kailash Ch. Pal v Joynuddin* (1) is referred to. For the present purpose that case would appear to be essentially the same as the present case. It is true 17 or 18 persons were there referred to in the complaint, whereas here only seven are referred to, and it might be said that making allowance for such exaggeration as complainants frequently indulge in there might be a doubt whether so many as five persons took part in the occurrence. There is, however, nothing to indicate exaggeration in this case. The complainant has throughout said there were seven persons and most of his witnesses supported him at this trial on this point.

It appears to me therefore that I am bound by the authority to which I have referred to make a reference in the case.

The next point is that the order under sec. 106, Cr. P. C., is improper, there being no express finding of facts justifying such an order, and this conviction being only under sec. 447, I. P. C., which does not of itself import a breach of the peace. Here *Baidya, Nath Majumdar v. Nibaran*

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Ch. Gope (2) is relied on, and here again the Magistrate's order appears to be in conflict with the law as laid down in that authority.

For these reasons I submit this case to the High Court with the suggestion that the conviction on summary trial and the order under sec. 106, Cr. P. C. be set aside.

I should like to add a reference to the case of *Abdul Ali v. King-Emperor* (3) according to which such a finding as is required by the authority last cited might be dispensed with where the evidence is so clear that without such a finding a superior Court such as a Court of revision should be satisfied that the offence committed does involve a breach of the peace. In the present case, it would appear that in so far as it is found that there is such evidence it must also the more clearly be found that the summary trial was inappropriate."

Holding as above, the learned Sessions Judge made the Reference to the High Court as follows:—

"Under sec 438, Cr. P. C. I herewith transmit the record of the case noted in the margin, to be laid before the High Court, with the following report."

1. A brief analysis of the case.

The two accused, one of them armed with a gun, and five other persons are alleged to have entered the complainant's house and behaved in a highly menacing manner. He went inside a hut and shouted. Then neighbours came and the assailants went away. Summonses were issued under sec 417, I. P. C. only and the accused were tried summarily under that section, convicted and bound down under sec. 106, Cr. P. C.

2. The order complained for revision.

(2) I. L. R. 30 Cal. 93 (1903).

(3) 20 C. W. N. 197 (1915).

The summons under sec. 447 rather than under sec. 144, I. P. C., and the summary trial and conviction under the former section, and also the order under sec. 106, Cr. P. C.

3. In what particular portion of that order the Court making the Reference considers an error on a point of law to exist.

The summonses under sec 417 and summary trial under that section when the complaint clearly discloses an offence not summarily triable appear illegal and also probably the order under sec. 106, Cr. P. C.

4. The grounds upon which in the opinion of the Court the order should be revised

The grounds are set forth in full in the order-sheet *Kailash Ch. Pal v Jagnuddin* (1) is relied on.

The explanation of the lower Court is submitted herewith "

Babu Hemendra Chandra Sen for the accused.

No one opposed the Reference.

The JUDGMENT OF THE COURT was as follows:—

This is a Reference made by the learned Sessions Judge of Rangpur under the provisions of sec. 438, Cr. P. C. As is pointed out by the learned Judge, the complaint discloses or alleges the commission of an offence, in the case of at least one of the accused, punishable under sec 144, I. P. C. There is nothing, it is further pointed out by the learned Sessions Judge, to indicate that in so far as the number of persons was concerned the case was in any way exaggerated. It follows that the case now before us was not triable summarily.

We must therefore set aside the conviction and sentence against which this Reference has been made and direct that

(1) 5 C. W. N. 252 (1900).

CHANDRA MOHAN DAS MANDAL v. KING-EMPEROR.

the two accused before us be now retried under the regular procedure. The retrial will take place in the Court of a Magistrate other than the Magistrate in whose Court the conviction now set aside was had, such Magistrate to be nominated by the District Magistrate.

The fine, if paid, will now be refunded.

H. C. S. Conviction set aside:
Retrial ordered

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI. CHET RAM and ors.,
1922, Appellants,

Heard, 27, February | v.
and 10 and 13, RAM SINGH and ors.,
March. Respondents.

Judgment,
10, April.

Hindu law—Mitakshara—Mortgage of ancestral property, when binds descendants in absence of necessity and consent—"Antecedent debt," what is—Mortgage "illegally" effected, if may support subsequent sale, as for "antecedent debt,"—"Pious obligation" to pay, if arises in father's life-time.

The antecedent debt for which in the absence of justifying necessity a Mitakshara Hindu can mortgage ancestral property without the consent, express or implied, of his descendants who are his co-parceners in the property must be quite distinct from the debt incurred in the mortgage in fact as well as in time. It must, as laid down in SAHU RAM CHANDRA v. BHUP SINGH (1), be incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate.

JOGI DAS v. GANGA RAM (4) referred to

(1) L. R. 44 I. A. 126. s. c. 21 O. W. N. 698 (1917).

(4) 21 O. W. N. 957 (P. C.) (1917).

A mortgage of ancestral property effected by the ancestor without necessity and without such consent and not for an antecedent debt in the above sense cannot, on the principle of "antecedent debt," form the consideration for a sale of such property subsequent to the mortgage.

The doctrine of "pious obligation" cannot be invoked in the life-time of the father of the person sought to be charged.

This was an appeal from a judgment and decree of the High Court, Allahabad, dated the 11th March 1919, which varied a judgment and decree of the Subordinate Judge of Meerut, dated the 31st March 1916

The suit out of which this appeal has arisen was instituted by three grandsons of Amar Singh to recover possession of property transferred by him in 1907. In 1904 Amar Singh who was the karta of the joint family executed a usufructuary mortgage of the property in suit for Rs. 8,000 in favour of Chet Ram and Himmat, and in 1907 he sold his equity of redemption to the mortgagees for Rs. 13,500. Rs. 8,000, part of the sale proceeds, was retained by the mortgagees in satisfaction of their mortgage and the balance Rs. 5,500 was paid over to Amar Singh.

Amar Singh died in 1909, and in 1915 the Plaintiffs instituted this suit and urged that the said mortgage and sale were not binding on the family.

They impleaded their fathers as *pro forma* Defendants.

The suit came before the Subordinate Judge of Meerut who found that the sum of Rs. 8,000 was an antecedent debt for which Amar Singh could make a binding alienation of the joint family property. In regard to the Rs. 5,500 he decided that

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there was no proof that it had been borrowed for immoral purposes, nor to meet any valid legal necessity, and he held that the "sons cannot, unless the money was obtained for illegal or immoral purposes, set it aside without refunding the amount of the purchase money as the purchase money would be a debt which on account of their pious duty as Hindu sons they would be liable to pay." In the event he decreed the claim in respect of a 11/27th share of the property sold, the Plaintiffs to recover possession of such share on payment within three months of the sum of Rs. 5,500 to the Defendant vendees.

From this decree the Plaintiffs appealed to the High Court of Allahabad

The learned Judges of the High Court (Rafique and Lindsay, JJ.) were of opinion that :—

(1) The mortgage of 1904 could not be considered to be an antecedent debt, and they say :—

"In appeal to this Court it is contended on behalf of the Plaintiffs that in view of the pronouncement of their Lordships of the Privy Council in the case of *Sahu Ram Chandra v. Bhup Singh* (1) the mortgage of 1904 does not fall within the definition of an antecedent debt.

* * * * *

It is apparent that the obligation incurred by a father which would be binding upon his sons must have two attributes, namely, first that it must have been incurred antecedently to the transaction in suit, and secondly it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. In the present case the sum of Rs. 8,000 was borrowed by

Amar Singh on the security of the joint estate. There is nothing to show that the money was advanced to him on his personal credit. In fact on the contrary it appears that the mortgage was a usufructuary mortgage under which Amar Singh the mortgagor incurred no personal liability. Applying, therefore, the test laid down in the case of *Sahu Ram Chandra v. Bhup Singh* (1), we find that the mortgage of 1904 cannot be considered to be an antecedent debt as defined in the said case. The point was again considered by their Lordships of the Privy Council in the case of *Jogi Das v. Ganga Ram* (4), where Lord Haldane interpreted the judgment in the case of *Sahu Ram Chandra v. Bhup Singh* (1) as follows :— 'In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage.' A similar point arose in the case of *Brij Narain Rai v. Mangla Prasad* (6) decided by a Bench of this Court to which one of us was a party. It was held in that case 'that the mortgage in suit having been ostensibly created in order to pay off two prior mortgages, that is, debts which had been incurred *prima facie* on the security of the joint family property, would not in view of the decision in *Sahu Ram Chandra v. Bhup Singh* (1) be one created to pay off antecedent debts ' "

(1) L. R. 44 I. A. 126; s. c. 21 C. W. N. 698 (1917).

(4) 21 C. W. N. 957 (P. C.) (1917).

(6) 17 All. L. J. 249 (1916).

(1) L. R. 44 I. A. 126; s. c. 21 C. W. N. 698 (1917).

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(2) That the doctrine of pious obligation did not operate as against the grandsons in the life-time of their father.

"The pious obligation to pay the debts of Amar Singh lies upon his sons and not upon his grandsons. . . . We therefore find that there is no pious obligation on the Plaintiffs to pay the sum of Rs. 5,500 before recovering the property "

Messrs DeGruyther, K C and S Hyam for the Appellants—I accept the principle laid down in *Sahu Ram Chandra v Bhup Singh* (1) and the sale as such cannot stand but the sons are not entitled to recover the property without paying the father's debt. It has been decided that a creditor can bring to sale the whole ancestral property it is immaterial who are the actual owners or whether sons or grandsons are interested in it.

Girdharce Lall v Kantoo Lall (7), *Bhagat Persad v Guja Koer* (8), *Badri Prasad v Madan o Lal* (9), *Nanomi Babuasin v Modun Mohun* (10) and *Ramasami Nadam v. Ulaganatha Goundan* (11). Mayne's Hindu Law, paras 301, 306, 312, 321 and 366.

On the texts the grandsons are just as much bound as the sons even if the sons are alive.

Vyavastha (Chandrika (S. C. Sirkar) (1878), Vol I, pp 238-240

Suraj Bansi Koer v. Sheo Proshad Singh (12).

There is no evidence that the debt was contracted for immoral purposes; and where a debt is contracted by a father for satisfying his own antecedent debt he binds the shares of sons and grandsons even though the transaction is not for the benefit of the family.

Sahu Ram Chandra v. Bhup Singh (1) was only intended to exclude cases in which the alienation unpeached was made as security for the debt alleged as antecedent, and merely decided that a debt practically contemporaneous with an alienation was not antecedent. The Courts in India have so interpreted this decision.—

Peda Venkanna v Sreenivasa Deckshatulu (13), *Armugham Chetty v. Muthu Koundan* (14) and *Kandasami Gounden v Kuppu Mooppan* (15) and the point is untouched by the later decisions of the Board in —

Narain Prasad v Sarnam Singh (5) and *Jogi Das v Ganga Ram* (4).

Further, in equity the grandsons who must be presumed to have got the benefit of the transaction cannot set it aside without refunding the money obtained.

Muddun Gopal Thakoor v. Ram Buksh Pandey (16)

A member of the joint family who gets a sale set aside acts on behalf of the joint family and is bound to refund the purchase money so far as he has got part of the joint family estate.

(1) I. R. 44 I. A 126 at p. 134; s. c. 21 C. W. N. 698 (1917).

(7) L. R. 1 I. A. 321 at p. 331; 22 W. R. (P. C.) 56, 14 B. L. R. 187 (1874).

(8) L. R. 15 I. A. 99; s. c. I. L. R. 15 Cal 717 (1888)

(9) I. L. R. 15 All. 75 (1893).

(10) I. R. 13 I. A. 1; s. c. I. L. R. 13 Cal. 21 (1885).

(11) I. L. R. 22 Mad. 49 (F. B.) (1898).

(12) L. R. 6 I. A. 88 at p. 104; s. c. I. L. R. 5 Cal. 149 (1880).

(1) L. R. 44 I. A 126 s. c. 21 C. W. N. 698 (1917).

(4) 21 C. W. N 957 (P. O.) (1917).

(5) L. R. 44 I. A 168; s. c. I. L. R. 39 All. 500; 21 C. W. N 990 (1917).

(13) I. L. R. 41 Mad. 136 (1918).

(14) I. L. R. 42 Mad. 711 (F. B.) (1919).

(15) I. L. R. 43 Mad. 421 (1919).

(16) 6 W. R. 71 (1863).

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Suraj Bansi Koer v. Sheo Proshad Singh (12).

The High Court have said there was no debt because the mortgage was usufructuary.

This view is erroneous because although there is no personal debt for interest yet there is an obligation to repay in order to recover the property and in this respect the Rs. 8,000 and the Rs. 5,500 stand on the same footing.

Messrs. Dunne, K. C. and Dubé for the Respondents.—This case is concluded by *Sahu Ram Chandra v. Bhup Singh* (1).

It must be shown that the transaction put forward as antecedent is really and entirely dissociated with the mortgage or sale. There could be no pious obligation on the grandsons to meet the debt when their father is still alive.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree, dated the 11th March 1919, of the High Court of Judicature at Allahabad, which varied a decree, dated the 31st March 1916.

The suit was brought on the 24th July 1915, in the Court of the Subordinate Judge of Meerut. The Plaintiffs were minors and sued through their guardian, Ram Singh.

No pedigree need be given. It is sufficient to bear in mind that Amar Singh succeeded on the death of his father, Nawal Singh, to a half of Nawal's property. This half, thus ancestral family property, was, at the date of the mortgage and sale after mentioned, the joint family property of Amar, of his two sons,

Bharat and Kehar, and of Ram, son of Bharat, and Mahabir and Gajraj, the two sons of Kehar. This ancestral joint undivided estate was thus owned by two sons and three grandsons. The two sons as well as the three grandsons, the Plaintiffs, were all alive at the date of the mortgage and sale after mentioned, and they are still alive. Amar, the grandfather, died in 1909.

On 23rd March 1901, Amar executed a mortgage over this family property for Rs. 8,000. It is a fact beyond dispute that Amar, whom the Subordinate Judge finds to have been a man of extravagant habits, not leading a moral life and addicted to drink, incurred this debt for his own personal purposes. It was, with the doubtful exception of Rs. 1,000 to be presently referred to, neither incurred nor used for family purposes or necessity, nor was it an antecedent debt. It was scheduled upon the mortgage as "Received in cash at the village before registration, Rs. 1,000. Cash at the time of registration, Rs. 7,000." (As to the Rs. 1,000, the High Court has allowed it with certain interest as a good charge, and the Respondents do not present any cross-appeal. The item may accordingly be dismissed from further consideration).

In short, Amar treated the property as his own and violated the well-known rule of the Mitakshara, under which, as clearly laid down in *Sahu Ram Chandra v. Bhup Singh* (1), joint family property "cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid, the estate is wholly

(1) L. R. 44 L. A. 126; s. c. 21 C. W. N. 698 (1917).

(12) L. R. 6 I. A. 88 at p. 104; s. c. I. L. R. 5 Cal. 148 (1880).

(1) L. R. 44 I. A. 126; s. c. 21 C. W. N. 698 (1917).

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unaffected by it, and it stands entirely free of it." This law has been, in substance, repeated again and again. It is in entire accord with the ancient texts. It was accepted law long prior to *Sahu Ram Chandra's* case (1)—a convenient instance being Lord Watson's judgment in *Madhoo Parshad v. Mehrban Singh* (2), and it has been followed by the cases after referred to.

The exception to this rule is where the consideration for the transaction is an antecedent debt of the vendor or mortgagor. And the judgment of Sir John Stanley on this part of the law in *Chandra-deo Singh v. Mala Prasad* (3) and expressly affirmed by this Board in *Sahu Ram Chandra v. Bhup Singh* (1), appears to this Board exactly to cover the present case.

Before passing from the mortgage, however, their Lordships desire to note that it was, by its terms, a usufructuary mortgage, and was for the period of ten years running from its date—that is, from 1907-1917. It is stipulated that, possession and occupation being given to the mortgagee—

"The profits of the mortgaged land will be equal to the interest of the amount of mortgage until redemption of the mortgage.

Whenever, after the expiry of ten years, I, the executant shall have paid the entire amount of mortgage in a lump sum to the mortgagee, I shall get the property mortgaged by me redeemed. I shall not have power to the redemption of the mortgage before the expiry of ten years."

Apparently, however, the profuse scale of the father's personal expenditure continued, and he was again willing to put, or attempt to put, in jeopardy the joint

family property. Notwithstanding the ten years' provision of the usufructuary mortgage, he (Amar Singh) within three years from its date—namely, on the 16th July 1907—sold his equity of redemption in the property to the mortgagees for Rs. 13,500. In the specification of the consideration he "allowed credit" to the vendees for the Rs. 8,000 obtained from the mortgage, and the balance was put down "Received in cash at the time of the registration."

Beyond all question with regard to this latter sum, here was a sale in flat defiance of the law. For what is not pretended to be any family purpose or necessity, he had improperly and illegally sold the family property, and such a sale cannot stand.

This case is singularly clear because it is not affected by other considerations such as the property having been publicly sold: there are no rights of execution-creditors or auction-purchasers to be considered.

But an argument was submitted, supported by the judgment of the Subordinate Judge, to the effect that although by the rules of the Mitakshara law a mortgage is at its date an invalid deed in so far as purporting to encumber the joint family property, yet when it purports to become the consideration for a sale it then becomes a just and a legal consideration on the principle of "antecedent debt." The family property could not be affected by such an invalid mortgage, but it could be sold next year or next day to the mortgagee for an "antecedent" debt—namely, the mortgage debt itself! Thus by turning the "antecedent debt" simply into a debt "antecedent" to the sale, the whole doctrine of antecedent debt is reduced *ad absurdum*, the principle of the Mitakshara law is circumvented, and the rights of the

(1) L. R. 44 I. A. 126 at p. 133: s. c. 21 O. W. N. 698 (1917).

(2) L. R. 17 I. A. 194: s. c. I. L. R. 18 Cal. 157 (1890).

(3) I. L. R. 31 A. L. 176, 193 (F. B.) (1909).

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junior members of a Hindu family are no longer protected but can be easily destroyed. Their Lordships cannot hold that this is in accordance with law. The views of the Board have been expressed quite recently in *Sahu Ram Chandra's* case (1) and in *Jogi Das* (4) about to be referred to.

As to the matter of the antecedency of debts, it is clear beyond question that the antecedency is antecedency to the mortgage itself. And it is more than that—it is disconnection with the mortgage in fact as well as in time. In no other way can the law of Indian joint family property protect itself against being undermined.

These sentences from *Sahu Ram Chandra's* case (1) may be quoted as particularly applicable to the circumstances of this appeal.

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, namely, that no manager, guardian or trustee can be entitled

for his own purposes to dispose of the estate which is under his charge."

The law thus laid down was followed in *Narain Prasad v. Sarnam Singh* (5). Further, to employ the résumé made by the learned Judges of the High Court—

"The point was again considered by their Lordships of the Privy Council in the case of *Jogi Das v. Ganqa Ram* (4) where Lord Haldane interpreted the judgment in the case of *Sahu Ram Chandra v. Bhun Singh* (1) as follows—"In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage."

This body of law is rightly followed and applied by the High Court, and their Lordships fully approve of the judgment delivered.

A separate and protracted argument was laid before the Board to the effect that the Respondents, the grandsons of Amar Singh, are not entitled to have their property without payment against his invalid proceedings by reason of "pious obligation." It is sufficient to say that no such doctrine can be invoked in the circumstances of the present case. In *Sahu Ram Chandra's* case (1) a similar appeal to the "pious obligation" doctrine was made during the father's life-time, and the point was thus dealt with:—

While, the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of

(1) L. R. 44 I. A. 126. s. c. 21 C. W. N. 698 (1917).

(4) 21 C. W. N. 957 (P. C.) (1917).

(5) L. R. 44 I. A. 163; s. c. I. L. R. 39 All. 500; 21 C. W. N. 990 (1917).

(1) L. E. 44 I. A. 126. s. c. 21 C. W. N. 698 (1917).

(4) 21 C. W. N. 957 (P. C.) (1917).

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the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail, and the simplest of all reasons may be assigned for this—namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing."

In the present case the doctrine is invoked against grandsons and in the lifetime of sons.

Nothing more need be said. The invocation of the doctrine entirely fails.

Their Lordships will humbly advise His Majesty that the appeal should be refused with costs.

Solicitors: Messrs Barrow, Rogers & Nevill for the Appellants.

Solicitor: Mr. H. S. L. Polak for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.)

LORD ATKINSON.

LORD SUMNER.

LORD PARMOOR.

1922,

Heard, 12, May.

Judgment, 12, May.

PRAMATHA NATH
ROY, Appellant,

v.

THE HON. WILLIAM
ARTHUR LEE,
Respondent.

Limitation Act (IX of 1908), sec. 12—Judgment of Judge on Original Side, appeal from—Delay on the part of Appellant in having the order drawn up—Whether entire time taken in obtaining the order to be deducted—Practice, not amounting to a Rule of Court.

In determining what is the requisite time referred to in sec 12 of the Limitation Act, the conduct of the Appellant must be considered. No period can be regarded as requisite under the Act which need not have elapsed if the Appellant had

taken reasonable and proper steps to obtain the order appealed against.

The decision in *BANI MADHUB MITTER v MATUNGINI DASSI* (1) does not support the proposition that in determining what period is to be deducted in any case, the time actually consumed in obtaining the decree is to be regarded.

On the question whether this was the practice, the Judicial Committee on being referred to a well-known book on practice observed that it did not appear to be laid down in terms so plain and unhesitating that their Lordships could rely upon it for the purpose of saying that it had become established as the equivalent of a Rule of Court.

This was an appeal from a decree of the High Court at Calcutta in its Appellate Jurisdiction, dated the 29th January 1919, dismissing an appeal from the same Court in its Ordinary Original Civil Jurisdiction, dated the 26th July 1918.

The suit out of which this appeal arose was instituted by the Respondent as Plaintiff for the recovery of rather more than Rs. 27,000.

Owing to the Defendant's failure to give inspection of documents his defence was struck out, and on the 14th February 1918, the suit was decided *ex parte* (Greaves, J), in favour of the Plaintiff for the amount claimed.

On the 23rd March 1918 upon the application of the Defendant an order was made that the *ex parte* decree be set aside and the suit restored for hearing provided the Defendant gave security to the satisfaction of the Registrar for Rs. 27,000 and paid the Plaintiffs costs on or before the 10th April 1918.

The period within which such security should be furnished was extended from time to time until the 10th May 1918.

(1) I. L. R. 13 Cal. 104 (F. B.) (1886).

PRAMATHA NATH ROY v. THE HON. WILLIAM ARTHUR LEE.

On the 1st July 1918 an application was made by the Defendant for an order directing the Registrar to accept the security offered, and directing the *ex parte* decree to be set aside.

On the 26th July 1918 the application was heard by Greaves, J., and refused as time barred.

Against this order of the 26th July 1918 the Appellant filed a memorandum of appeal on the 30th August 1918, and the appeal was heard by Sanderson, C. J. and Chitty, J. and dismissed on the 29th January 1919 on the ground that it was barred by limitation under Art. 151 of the 1st Schedule to the Limitation Act (IX of 1908).

In their judgments the learned Judges stated that the Appellant claimed the benefit of sec. 12 (2) of the Limitation Act which provides that in computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the order appealed from should be excluded. They held, however, that he was not entitled to claim any time under that provision inasmuch as he had not presented a copy of the order with his memorandum of appeal but had obtained leave to file it without a copy of the order, and also because he did not apply for a copy of the order until the 9th of September 1918. They disallowed a contention of the Appellant that, as the Respondent had applied on the 5th or 6th of August 1918 to have the order drawn up, and as the draft of the order had been served on the Appellant on the 7th August and approved by him on the 16th August, and signed by the master on the 28th August, and filed on September 3rd by the Respondent, he was entitled to deduct that time. They saw no cause for granting an extension of time for the appeal for which the Appellant had also asked.

From this decision* the Appellant appealed to His Majesty in Council.

Messrs. A. M. Dunne, K. C. and Macaskie for the Appellant contended that the appeal was within time. Sec. 12 (2) of the Limitation Act provides for the exclusion of time occupied in obtaining a copy of the decree.

The Appellant was not competent to apply to have the order drawn up for four days. (Chap. XVI, r. 27, Rules and Orders of the Supreme Court).

He was actually unable for one reason or another to obtain a copy of the order until the 3rd September. The period between 7th August and 3rd September must therefore be excluded.

This is an invariable Rule of practice in Calcutta and is supported by judicial authority.

Bani Madhub Mitter v. Matungini Dass (1).

Hochle's Rules and Orders, 2nd Ed., p. 389.

Mr. E. B. Rankes for the Respondent was not called upon.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER—The Appellant in this case is the Defendant in a suit which the Respondent instituted by a plaint filed on the 24th June 1916. The various stages in the litigation are set out in detail in the judgment of the Chief Justice in the Appeal Court at Calcutta*, and it is unnecessary that they should be repeated. Among these there was a decree made on the 14th February 1918, decreeing in favour of the Respondent and against the Appellant the sum of Rs. 27,443. Application made by the Appellant to Mr. Justice Greaves to set

* (1) 1, L. R. 13 Cal. 104 (F. B.) (1886).

Reported 23 C. W. N. 552 (1919).

PRAMATHA NATH ROY v. THE HON. WILLIAM ARTHUR LEE.

that decree aside was refused on the 26th July 1918. The Appellant desired to appeal from that refusal, and he produced his memorandum of appeal before the Court on the 30th August of that year, on the eve of the Court rising for the vacation.

By r. 3 of Chap XXXII of the Rules of the High Court of 1914, it is provided that every memorandum of appeal shall be accompanied by a copy of the decree or order appealed from, and with this rule the Appellant did not comply. The memorandum of appeal was, however, admitted without the order, subject to all objections that might be raised on the hearing which took place on the 29th of January 1919. It was then decided by the High Court that the appeal was out of time, and it is from that judgment that the present appeal has been brought. That the notice of appeal was out of time, in fact, is beyond dispute, for the period of appeal is twenty days from the date of the decree or order which it is sought to impeach and that period expired on the 15th August 1918. But there is a provision contained in sec. 12, sub-sec 2, of the Limitation Act of 1908, which provides that in computing the time for appeal there shall be excluded the time requisite for obtaining a copy of the decree. The Appellant's contention is that the time "requisite" within the meaning of that sub-section is the time which, in the circumstances of the case, is actually occupied in obtaining the decree, and that, so regarded, the time that ought to be deducted here is more than sufficient to rectify the delay.

The facts with regard to that matter are these—After the order had been made on the 26th July no steps were immediately taken by the Plaintiff to have the order drawn up, but after the lapse

of four days it was competent to the Defendant to apply for that purpose. Th four days elapsed and nothing was done. On the 6th August application was made by the Plaintiff to have the order drawn up, and on the 7th August the draft of the order was sent to the Appellant. The order was simplicity itself, but the Appellant only returned the draft on the 16th August. On the 28th August it was signed, and on the 3rd September it was filed by the Plaintiff.

Now the learned Judges in the Appeal Court have held that in determining what is the requisite time referred to in sec 1 of the Limitation Act the conduct of the Appellant must be considered, and their Lordships think that in so determining they have rightly regarded the statutory provision. In their Lordships' opinion no period can be regarded as requisite under the Act which need not have elapsed if the Appellant had taken reasonable and proper steps to obtain the order. In the present case he took none, and the periods between the 30th July and the 6th August, and again between the 7th August and the 16th August, which were within the Appellant's control, are sufficiently great to prevent the Appellant saying that the time that did elapse must have elapsed even if he had acted with reasonable promptitude.

It is then urged that there is an authority, decided in 1886, which has been the origin of a practice undeviatingly followed by the Courts in Calcutta in the interpretation of the statute, and that practice said to be that in determining what is the time requisite which may be deducted you are, in all cases, to look at the time that has actually elapsed in obtaining the order. Their Lordships are unable to see how this decision, *Bani Madhub Mitter v*

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Matungini Dassi (1), can have been so misunderstood. In that case judgment was pronounced on the 17th July 1883, and the decree was signed on the 23rd July, so that only six days elapsed between the pronouncing of the judgment and the signing of the decree. It would be impossible for anybody to suggest that that was an unreasonable time. Again, the application for the copy was made on the 3rd August, and it was obtained on the 11th August; another eight days elapsed there for which the Appellant need not be held responsible. All that that case decided was that those two periods of time, one of which was prompt and effective and the other of which the Appellant might not have been able to control, ought to be deducted from the length of time between the decree and the lodging of the memorandum. It certainly does not support the proposition that in determining what period is to be deducted in any case the time actually consumed in obtaining the decree is to be regarded. Their Lordships have been referred to a well-known book on practice which, it is said, shows that that is the practice, notwithstanding the limited character of the judgment, but even there it is impossible to find this practice laid down in terms so plain and so unhesitating that their Lordships could rely upon that authority for the purpose of saying that it has become established as the equivalent of a Rule of Court.

Their Lordships think that the Appellant here is wrong, for the reason stated, which they regard as forming the foundation of the judgment appealed from.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors : Messrs. J. J. Edwards & Co. for the Appellant.

(1) I. L. R. 13 Cal. 104 (F. B.) (1886).

Solicitors : Messrs Watkins and Hunter for the Respondent.

G. D. M.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 86 OF 1920.

MOOKERJEE, J.

CUMING, J.

1922,

Heard, 17, Febru-

ary & 8, March:

Judgment,

6, June.

GAJENDRA NATH DEY,
Appellant,

v.

MOULVI ASHRAF

HOSSAIN, Respondent

Lease of wakf property for ten years by mutwalli, with a covenant for perpetual renewal for similar periods, validity of—Lessee holding over after expiry of such lease, status of—Acquisition of the status of perpetual tenant at a fixed rent to the detriment of wakf estate—Adverse possession against a religious endowment—Tenant holding over under a covenant for renewal but without actual renewal of lease, when in the same position as if the lease had been renewed.

A mutwalli granted a lease of some wakf property for ten years with a covenant for perpetual renewal, after the expiry of the term, for additional terms of ten years at a time. After the expiry of the term the tenant held over but no fresh lease was executed, and when the land came to be acquired by Government, the lessee claimed that, by virtue of the covenant for perpetual renewal, he must be deemed to hold under a permanent lease at a fixed rent, so that the landlord was not entitled to anything beyond the capitalised value of the rent:

Held—That under the Mahomedan law the lease for a term of ten years was *prima facie* in excess of the authority of the mutwalli and was liable to be annulled as unlawful, unless established to be for the benefit of the wakf which had not been done in this case.

GAJENDRA NATH DEY *v.* MOULVI ASHRAF HOSSAIN.

SUJAT ALI *v.* ZUMBEEROODDEEN (1) and DALRYMPLE *v.* KHOONDEKAR (2) referred to.

That when in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents had not been executed, the position is the same as if the documents had been executed, subject to the all important proviso that specific performance can be obtained between the parties to the agreement, in the same Court and at the same time as the subsequent legal question falls to be determined.

But no Court of equity will grant specific performance where a trustee has entered into a contract for a lease which is in excess of his power, or has entered into a covenant for renewal which is ultra vires. In the present case, as the covenant for renewal could not be specifically enforced, the lessee on the expiry of the lease, held over, under sec 116 of the Transfer of Property Act read with sec. 106, as a tenant from month to month.

WALSH *v.* LONSDALE (3), FOSTER *v.* REEVES (4), SHYAM *v.* DINESH (6), HARIPADA *v.* NIROD (8), HARNETT *v.* YEILDING (18), KHULNA LOAN CO. *v.* JAHIR (28) and several other cases referred to.

Held, further—That where the Manager of a religious endowment had granted a permanent lease in excess of his authority, the possession of the lessee was not adverse to the endowment during the life of the head who granted the lease, and so the lessee did not acquire the

status of a permanent lessee by adverse possession for twelve years from the date of the lease.

VIDYA VARUTHI *v.* VALUSAMI (32) followed.

MAGDALEN COLLEGE *v.* ATTORNEY-GENERAL (33) and other cases referred to.

This was an appeal preferred on the 1st of May 1920, against the decree of S. C. Banerjee, Esq., President in the Court of Calcutta Improvement Tribunal, Calcutta, dated the 24th of January 1920.

The facts of the case out of which the present appeal arose are as follows:—One Rakhal Chandra in 1880 took a lease of some *wakf* land for ten years from the *mutwalli* and executed a *kabulyat*, in which was embodied a covenant for the renewal of the lease for a period of ten years after the expiration of the term granted by the lease, and which also contained a stipulation that if the land should be acquired by the Government the lessor alone would get the compensation for the land and the lessee would take the compensation for the brick-built structure. The lease was renewed in 1891 by the same *mutwalli*, and in 1901 by his successor-in-office, on substantially the same terms. The term of the last lease expired in 1911, and though the tenant continued in occupation, no fresh lease was granted up to the time when the land was notified for acquisition by Government. When the land was acquired the lessor claimed the entire compensation for the land under the terms of the lease and the lessee contended that, by virtue of the covenant for perpetual renewal, he must be deemed to hold under a permanent lease at a fixed rent, so that the landlord was not entitled to anything be-

(1) 5 W. R. 158 (1865).
 (2) [1858] Beng. S. D. A. 586.
 (3) L. R. 21 Ch. Div. 9 (1882).
 (4) [1892] 2 Q. B. 255.
 (6) 31 C. L. J. 75 (1919).
 (8) 33 C. L. J. 437 (1920).
 (18) [1805] 2 Sch. & Lef. 548, 559; 9 E. R. 98,
 (28) 24 Ind. Cas. 209 (1914).

(32) L. R. 45 I. A. 302; s. c. I. L. R. 44 Mad. 331; 26 O. W. N. 537 (1921).
 (33) 6 H. L. C. 62; 108 E. R. 62 (1857).

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yond the capitalised value of the rent. The President of the Improvement Tribunal held that the lease was not operative as a permanent lease of the *wakf* land and that, at the date of the acquisition, the lessee had no higher status than that of a tenant from month to month and that he did not by lapse of time acquire the status of a permanent tenant at a fixed rent to the detriment of the *wakf* estate. The lessee thereupon preferred the present appeal to the High Court.

Babu Nagendra Nath Ghose for the Appellant.

Mr. Sinha and Mr A. K Fazlul Huq and Babu Sachindra Prosad Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J —This appeal is directed against the decision of the President of the Calcutta Improvement Tribunal in a case for apportionment of compensation in respect of the land acquired for the Calcutta Improvement Trust under a declaration published on the 27th March 1918. The rival claimants are the lessor and the lessee of the disputed property. The President has decided that the lessor is entitled to the entire compensation money awarded for the land. The lessee has consequently appealed to this Court.

The President has found that the land in question was valid *wakf* and that the lessor was the *mutwalli*. No serious attempt has been made in this Court to controvert this conclusion. The evidence shows that the rents and profits have been for many years appropriated to defray the expense of a mosque, and the property is described throughout as *wakf* in all the relevant documents. The case must consequently be decided on the

footing that the land acquired was a valid *wakf*.

On the 14th April 1880, Rakhal Chandra De, the father of the present lessee, who had already been a tenant in occupation on a rent of Rs. 22 monthly, took a lease of the land from Abdul Ali *mutwalli* and executed a *kabuliyat* in his favour. A premium of Rs. 50 was paid, the rent was fixed at Rs. 23 monthly, and the tenancy, it was provided, would last for a term of ten years from the 12th April 1880 to the 12th April 1890. The *kabuliyat* embodied a covenant for the renewal of the lease for a period of ten years after the expiration of the term granted by the lease, and stated expressly that if the land should be acquired by the Government the lessor alone would get the compensation for the land and the lessee would take the compensation for the brick-built structure. The term of the lease expired and the lessee held over. On the 27th January 1891, Abdul Ali *mutwalli*, the landlord, again granted a lease to Rakhal Chandra De, on a rental of Rs. 23 a month and for a term of ten years from the 13th January 1891 to the 13th January 1901. The *patta* reproduced the provision of the earlier lease for distribution of compensation money in the event of acquisition, and further contained a covenant that on the expiry of the term a fresh settlement would be made at a proportionate rent. The term expired and the tenant again held over. On the 9th March 1901, a fresh *patta* was granted by *mutwalli* Ashraf Hossain (who had meanwhile succeeded to the office) to Rakhal Chandra De on a monthly rent of Rs. 23 and for a term of ten years from the 14th March 1901 to the 14th March 1911. The *patta* stated that if it should be necessary for the Government to acquire the land, the lessor would

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take the compensation for the land in accordance with the rules, while the lessee alone would get the compensation paid for the building. There was further a covenant that the lessee would be entitled, on the expiry of the term, to get fresh *pattas* for ten years at a time on a rent of Rs. 23 monthly and thus remain in possession with heirs in succession. The term of this lease expired on the 14th March 1911 and though the tenant continued in occupation, no fresh lease had been granted up to the time of the acquisition. The lessor now claims the entire compensation under the terms of the lease; the lessee, on the other hand, contends that by virtue of the covenant for perpetual renewal, he must be deemed to hold under a permanent lease at a fixed rent, so that the landlord is not entitled to anything beyond the capitalised value of the rent. In reply, the lessor urges that if the legal effect of the covenant for renewal be to transform the lease into a perpetual grant at a fixed rent, the lease does not bind the *wakf* estate because created by the *mutwalli* in excess of his authority. The President has held that the lease is not operative as a permanent lease of the *wakf* estate and that, at the date of the acquisition, the lessee had no higher status than that of a tenant from month to month. He has further held that the lessee did not by lapse of time acquire the status of a perpetual tenant at a fixed rent to the detriment of the *wakf* estate.

It is well settled that a *mutwalli* should not lease *wakf* property, if it be agricultural, for a term exceeding three years, and, if non-agricultural for a term exceeding one year, unless he is expressly authorised by the deed of *wakf* to do so, or, where he has no such authority, unless he has obtained the leave of the Court

to do so Tyabji (Mahomedan Law, sec. 502) states that where the *wakf* property consists of a house dedicated to the poor or other charitable object the *mutwalli* may validly grant a lease of it for a year, and where it consists of lands, he may validly grant a lease for three years, provided that where the *mutwalli* purports to grant a lease for a longer term than a year or three years respectively, it is not void but voidable. This is in accord with the statement in Baillie (Mahomedan Law, Vol. I, p. 606): "When the Superintendent of a *wakf* has let a mansion appropriated for the poor for more than a year, the lease is unlawful. In the absence of any condition, the approved doctrine is that the lease of estate in land may be decreed to be lawful for three years, unless it be for the benefit of the *wakf* to annul them, and that with regard to leases of other property, they should be decreed to be unlawful when they exceed one year, unless it be for the benefit of the *wakf* to sustain them. But this varies with the change of places and times. This is approved for the *fatwa*." Substantially to the same effect is the statement by Sir Ronald Wilson (Anglo-Mahomedan Law, sec. 337). The original authorities collected by Ameer Ali (Mahomedan Law, Vol I) show that the limitation with regard to the duration of a lease, imposed by the earlier jurists in respect of *wakf* property, has been gradually modified, and the rule now stands in a much more elastic form than when it was first enunciated.

In the Fatawai Kazikha which is one of the earlier authorities, it is stated in substance that "where the *wakf* has made no provision in the document of *wakf* (about the grant of leases in respect of the *wakf* property) the *mutwalli* has a discretion to do what is proper and to the

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advantage of the poor (in other words, the beneficiaries), subject to the condition that he should not lease a house for a longer term than one year, for a long lease is apt to give rise to the idea that the lessee is the owner. And he may not give a longer lease of land than is necessary for purpose of cultivation. Should the *wakf* have imposed a condition that the land shall not be leased for more than one year, and people are not willing to take such a short lease, and it is to the advantage of the beneficiaries to lease the property for a longer period, the Kyyum (the *mutwalli*) cannot act contrary to the condition in the *wakf* and give a longer lease, unless he submits the matter before the *kazi* who can sanction a longer lease on the ground that it is to the advantage of the *wakf*, for the *kazi* is the supervisor over (the interests of) the poor, the absent and deceased persons."

"And should the *wakf* have provided in the document of *wakf* that the *mutwalli* shall not grant a lease for more than a year unless it is for the advantage of the poor (the beneficiaries), in which case he (the *mutwalli*) may do so himself (i.e., of his own authority) if he considers it expedient, and it does not require being taken to the Court of the *kazi*, for the *wakf* has (already) given him the power."

"In case the *mutwalli* has created a lease for five years, Sheikh Abdul Kassim of Balkh has declared that it would not be valid over a year, unless some need has arisen for expediting the rent; but says the jurist Abu Baker Mahommed-bil-al-Fazl that he does not consider such a lease should be held to be void, but the Hakim (Judge) should take note of it, and if it is to the injury of the *wakf* he should cancel it."

"Abu'l Hassan *alias* Sugdi has expressed the same view. And it is stated

from the jurist Abu Lais that where the *wakif* had imposed no condition against a lease being granted for more than a year he permitted it to be given for three years, irrespective of the question whether the property was house or land. It is reported from Imam Abu Hais Bokhari that he permitted the lease of land for three years. But there is a difference of opinion regarding (the effect of) a lease for more than three years; the majority of the jurists of Balkh have held that such a lease is not valid, whilst others have declared that it is to be submitted to the *kazi*, so that he may cancel it, this doctrine the jurist Abu Lais has adopted."

In the Durr-ul-Mukhtar, the rule is given in a more compendious form. "Any condition imposed by the *wakf* regarding the leasing of *wakf* property must be followed, and the Kyyum (*mutwalli*) cannot act contrary to it, but the *kazi* may, for to him appertains the supervision over the interests of the poor, the absent and deceased people. So, where the *wakf* has left indeterminate the period for which a *wakf* property may be leased, some (jurists) have said, the Kyyum has a general discretion as to the length of the term, whilst others have said, the limit should be one year in all cases. And the *fatwa* is with regard to a year for (the lease of) houses and three years in respect of land, unless expediency is opposed to this, and expediency varies according to time and locality."

The author of the Radd-ul-Mukhtar in commenting on the above passage makes an important statement on the authority of the Fatawal Kari-ul-Hedaya: "When the repairs of the *wakf* premises cannot be effected without letting (some portion of) it, the matter must be placed before the Judge who can direct the grant of a lease long enough for that purpose."

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The view thus indicated was adopted by this Court in *Sujat Ali v. Zumeerooddeen* (1), where a lease in perpetuity at a fixed rent, granted by a *mutwalli* in respect of *wakf* property, was declared void, even on the supposition that the office of the *mutwalli* was hereditary, and the contrary view adopted in *Dalrymple v. Khoondekar* (2) was pronounced to be unsupported by any authority and unsound in principle.

In the case before us, each of the three successive leases for a term of ten years was *prima facie* in excess of the authority of the *mutwalli* and was liable to be annulled as unlawful, unless established to be for the benefit of the *wakf* which has not been done in this case. The contention that the lease granted on the 9th March 1901 for a term of ten years with a perpetual covenant for renewal should be interpreted as a permanent lease at a fixed rent and should be deemed operative against the *wakf* is manifestly untenable. The lease has not in fact been renewed; but the lessee invokes the aid of *Walsh v. Lonsdale* (3) and urges that this is immaterial for, in equity, he is precisely in the same position as if the lease had been renewed. This argument is fallacious. No doubt, it is well-settled, as the result of a long series of decisions in this Court, that when in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed, subject to the all important proviso that specific performance can be obtained between the parties to the agreement, in the same Court and at the same time as

the subsequent legal question falls to be determined. We need not here emphasise the circumstance that specific performance could not be obtained before the Calcutta Improvement Tribunal; cf. *Foster v. Reeves* (4) and *Angel v. Jay* (5). Apart from this, reference may be made to the decision in *Shyam Kishore v. Dinesh Chandra* (6), which reviews the earlier decisions from *Bibi Jawahir Kumari v. Chhaterput Singh* (7). As was pointed out in *Haripada v. Nirod Krishna* (8), the result of these cases may be reached either by the application of the doctrine of part performance enunciated in *Maddison v. Alderson* (9), which was followed by the Judicial Committee in *Mahommed Musa v. Aghore Kumar* (10), or by the application of the rule in *Walsh v. Lonsdale* (3). The doctrine of part performance is clearly of no avail to the Appellant. For, assuming with Baggallay, L. J., *Alderson v. Maddison* (11), that mere retention of possession is not in itself sufficient to constitute part performance, though the contrary view has been sometimes favoured, *Lanyon v. Martin* (12), and assuming further that special circumstances must be established to show that it is necessarily referable to an agreement for a lease or contract for renewal, *Dowell v. Dew* (13), such contract for renewal must be enforceable in a Court of equity. Nor is the rule in *Walsh v. Lonsdale* (3) of greater efficacy to the Ap-

(3) L. R. 21 Ch. Div. 9 (1882).

(4) [1892] 2 Q. R. 255.

(5) [1911] 1 K. B. 667.

(6) 31 C. L. J. 75 (1919).

(7) 2 C. L. J. 343 (1905).

(8) 33 C. L. J. 437 (1920).

(9) 8 A. C. 467 (1883).

(10) L. R. 42 I. A. 1: s. c. I. L. R. 42 Cal. 801; 19 C. W. N. 250 (1914).

(11) 7 Q. B. D. 174 (178) (1881).

(12) 13 L. B. Ir. 297 (1884).

(13) 1 Y. & C. C. C. 845; 57 R. N. 268 (1884).

(1) 5 W. R. 158 (1865).

(2) [1858] Beng. S. D. A. 586.

(3) L. R. 21 Ch. Div. 9 (1882).

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pellant, unless the contract for renewal is valid and operative. For, though on the assumption made in *Secretary of State v. Forbes* (14), *Lani Mia v. Mahomed Yaseen* (15), *Secretary of State v. Digamber* (16) and *Secretary of State v. Siba Prosad* (17), the position of a lessee, who has always been ready and willing to accept a renewal on proper terms, is the same in equity, as if a proper lease has been granted, it is essential that the covenant for renewal should be such as may be specifically enforced. In the case before us, the lessor was not competent to grant a lease of this description. It cannot be disputed that no Court of equity will grant specific performance where a trustee has entered into a contract for a lease which is in excess of his power or has entered into a covenant for renewal which is *ultra vires*. In *Harnett v. Yeilding* (18), Lord Redesdale, L. C., said that the party who comes into equity for a specific performance, must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do, for if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice, if a party is compelled to do an act which he is not lawfully authorised to do, he is exposed to a new action for damages at the suit of the person injured by such act. To the same effect is the decision of the House of Lords in *Byrne v. Acton* (19), where it was held that a tenant for life, who had agreed to grant a lease for thirty-one years, in excess of his power which was

limited to the grant of leases for twenty years or three lives, was bound to grant such a lease as was warranted by the power. Again, in *Bellringer v. Belgrave* (20), Knight Bruce, V. C., referred to *Mortlock v. Buller* (21) and *Ord v. Noel* (22) and ruled that the Court would not interfere for the purpose of performance of a covenant for renewal such as would enable or assist parties to commit a breach of trust. This view has been repeatedly followed in this Court, see, for instance, *Baikuntha v. Sibdas* (23), *Sarbesh Chandra v. Kshetrapal* (24), *Moti Das v. Madhusudhan* (25), *Narayan v. Akshoy* (26), *Mahommed Esmat v. Nanda Dulal* (27) and *Khulna Loan Company v. Jahir Goldar* (28). The conclusion follows that in this case the covenant for renewal could not be specifically enforced. Consequently, when upon the expiry of the lease, granted on the 9th March 1901, the lessee held over, the lease was, under sec. 116 of the Transfer of Property Act, read with sec. 106, renewed from month to month. *Trailakhya v. Sarat* (29), *Manilal v. Nandlal* (30), see also *Clayton v. Blakey* (31).

As a last resort, the Appellant has contended that as he always professed to hold as a permanent lessee, he acquired such status by adverse possession for twelve years from the date of the last lease. This contention is clearly opposed to the decision of the Judicial Committee in *Vidya*

(14) 16 O. L. J. 217 (1912).

(15) 20 O. W. N. 948 (1915).

(16) 27 O. L. J. 448 (1917).

(17) 27 O. L. J. 447 (1917).

(18) [1805] 2 Sch. & Lef. 548, 553; 9 R. R. 98.

(19) [1781] 1 Brown P. C. 186,

(20) 1 DeG. & Sm. 63; 75 R. R. 38 (1847).

(21) [1804] 10 Ves. 292; 7 R. R. 417.

(22) [1820] 5 Madd. 438, 21 R. R. 328.

(23) 2 O. L. J. 321 (1904).

(24) 11 O. L. J. 346 (1910).

(25) 1 W. R. 4 (1864).

(26) 1 L. R. 12 Cal. 158 (1885).

(27) 16 Ind. Cas. 390 (1902).

(28) 24 Ind. Cas. 209 (1914).

(29) 1 L. R. 32 Cal. 123 (1904).

(30) 22 Bom. L. R. 133 (1919).

(31) 8 T. R. 8; 4 R. R. 575 (1798).

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Varuthi v. Valusami (32), which shows that where the manager of a religious endowment had granted a permanent lease in excess of his authority, the possession of the lessee was not adverse to the endowment during the life of the head who granted the lease. The case before us has no analogy to the decision of the House of Lords in *Magdalen College v. Attorney-General* (33), which was applied in *Attorney-General v. Davey* (34), it rather falls within the rule recognised by the House of Lords in *Magdalen Hospital v. Knotts* (35), namely, that if any rent has been reserved and received, however small, the legal relation of a tenancy from year to year has been created, and the statute of limitations cannot have run. We hold accordingly that the President has correctly concluded that at the time of the acquisition, the lessee was a tenant from month to month and that his claim to appropriate what is in substance the corpus of the *wakf* estate has no legal foundation.

The result is that the decree of the lower Court is affirmed and this appeal dismissed with costs. We assess the hearing fee at one hundred rupees. The costs will be paid by the Receiver out of the estate in his hands.

J. N. R.

Appeal dismissed

(32) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad 831; 26 C. W. N. 537 (1921)

(33) 6 H. L. C. 62; 108 R. R. 62 (1857)

(34) 4 DeG. & J. 136; 124 R. R. 194 (1859)

(35) L. R. 4 A. C. 824 (1876).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2449 of 1919.

RAJ KUMARI BOSE
CHOUDHURANI, Defendant,
Appellant,
v.

CHATTERJEA, J.
PANTON, J.
1921,
6, May.

SURENDRA NATH GUHA
CHOUDHURI, Plaintiff,
Respondent.

Abatement of rent, in respect of leased out land of which tenant got no possession—Limitation—Acquiescence—Presumption

A tenant is entitled to abatement of rent in respect of leased out land of which he did not obtain possession.

Although the question of limitation does not arise in connection with the plea of abatement, the question of acquiescence and the presumption arising from such acquiescence may arise.

RAM NARAIN CHAKRABARTY v. POOLIN BEHARI LALL SINGH (1) referred to.

This was an appeal against the decree of Babu Narendra Nath Lahiri, Subordinate Judge, 1st Court of Zillah Bakergunj, dated the 20th of August 1919, affirming the decree of Babu Upendra Lal Das Gupta, Munsif, 3rd Court at Perojpur, dated the 24th of June 1918.

The facts of the case will appear from the judgment.

Babus Surendra Ch. Sen and Hemen-dra Ch. Sen for the Appellant.

Babu Abinash Ch. Guha for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for rent. The defence was that the Defendant was dispossessed of three out of seven villages which form the subject-matter of the ten-

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ancy and that therefore there should be suspension of rent.

The Courts below have found that the Defendants failed to prove any dispossession and have disallowed the plea of suspension of rent.

The Defendant has appealed to this Court.

The learned Subordinate Judge observes as follows :—"The two *pottas* by which the two tenancies were created no doubt show that lands of seven mauzas were let out. Defendant also files some *dakhilas* to show that they were granted by the landlord for seven mauzas. But in the settlement *khewats* one under-tenancy in Baishari, and one under-tenancy in Uttarkul and two under-tenancies in Iluhar had not been recorded under the tenancies in arrears. The settlement authorities refused to record these under-tenancies under the Defendant's tenancies notwithstanding the prayer on Defendant's behalf."

The mere fact that the settlement authorities did not record the under-tenancies as being included in the Defendant's tenancies cannot affect the right of the latter if as a matter of fact they formed the subject-matter of the lease.

Then again, the learned Subordinate Judge says : "In order to entitle the Defendant to suspension of rent, she must first prove that she was in possession and secondly that the Plaintiff had dispossessed her."

So far as the question of possession and dispossession is concerned, it must be taken now after the findings of the Courts below that the Defendant had never been in possession nor had been dispossessed. If, however, all the seven mauzas were included in the lease as the *pottas* and *dakhilas* go to show, there does not appear to be any sufficient reason why the

Defendant should not be entitled to claim abatement of rent in respect of the mauzas of which she did not obtain possession.

It is contended by the learned Pleader for the Respondent that it is not a fact that the seven mauzas in their entirety were let out to the Defendant, though portions thereof might have been let out, that only three mauzas out of the seven claimed by the Defendant were let out in their entirety, that in any case the Plaintiff was not in possession of any land covered by the lease to the Defendant and that the Plaintiff himself (or through his tenants) was in possession of other lands in his own right, which were not covered by the lease.

The questions, therefore, for determination are whether the three mauzas in question in their entirety were let out to the Defendant. If not, whether any lands of the said mauzas were so let out; and if so, whether the Plaintiff himself, or through his tenants, was in possession of such lands; in other words, whether the Plaintiff was in possession of any land let out to the Defendant. These questions do not appear to have been gone into by either of the Courts below.

It appears from the record that the leases were granted so far back as 1260, i.e., more than 60 years before the suit; and although the question of limitation does not arise in connection with the plea of abatement, the question of acquiescence and the presumption arising from such acquiescence may arise [see the case of *Ram Nardin Chakrabarty v. Poolin Behari Lall Singh* (1)].

It is contended, however, by the learned Pleader for the Appellant that even if such a presumption could be drawn from the fact of acquiescence for a long period, no such presumption can arise in the pre-

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sent case because the landlord has been all along granting *dakhilas* for rent, in which all the seven mauzas are expressly mentioned and this has continued up to the year 1311 which was within 12 years of the suit, and that in these circumstances, it was open to the Defendant to maintain a suit for recovery of possession of those mauzas on the strength of the acknowledgment in the *dakhilas*, even assuming that the Defendant had never been in possession before. These matters have not been considered by the Court below and in fact, neither of the Courts below has even referred to the fact that the leases were granted so far back as 1260.

We think, in these circumstances, that the case should go back to the lower Appellate Court in order that the Court may consider all the questions mentioned above and dispose of the case according to law.

Costs will abide the result

H. C. S

Case remanded

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 731 OF 1922.

SHIB CHANDRA

CHAKRAVARTY,

Petitioner,

v.

RABBANI MONDAL

and ors., Accused,

Opposite Party

NEWBOULD, J.

SUHWARWADY, J.

1922,

23, November

Compounding of offences—Hurt caused to one person, and wrongful confinement of the same and another—Complaint by one of them—Charges framed under sec. 323, I. P. C., in respect of hurt to the complainant, and under sec. 342, for wrongful confinement of both—Compromise by complainant only on appeal—Legality of acquittal of offence committed against the other—Criminal Procedure Code (Act V of 1898), sec. 345.

When several persons are hurt or wrongfully confined, each of them can

compound only the offences committed against himself, and not those committed against the others.

Where a complaint was lodged by one of the persons confined, and charges were framed, under sec. 323, I. P. C., of hurt caused to him, and also under sec. 342, of wrongful confinement of himself and the Petitioner, a witness in the case, and the accused were convicted and appealed, and on the appeal, the complainant alone compounded the offences charged.

Held—That the Petitioner, not having been a party to the compromise, the acquittal, so far as it related to an offence committed against him, was illegal, and that the appeal must be re-heard on the merits in respect of such offence only.

This was a Rule against an order of the District Magistrate of Jessore (Mr C. Sell), dated the 26th day of June 1922, acquitting, on appeal, under sec. 345, Cr P C, the Opposite Party who were convicted under secs. 323 and 342, I. P. C. and sentenced to suffer two months' rigorous imprisonment under the former section, and four months' rigorous imprisonment under the latter section (sentences to run concurrently) by the Sub-Deputy Magistrate of Bongaon (Babu Surendra Nath Banerjee), on the 25th May 1922.

The Opposite Party, Rabbani Mondal, was the *tehsildar* of the Alampore Zemindari Syndicate Company at their Nahatta *cutchery* in Bongaon, in the District of Jessore. Rabbani was dismissed in January 1922, and directed to make over charge to the naib, Harinath Bose. On the 20th instant, Harinath, accompanied by the Petitioner, Shib Chandra Chakravarty, went to the *cutchery* and took possession: and the next day he sent for

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Rabbani to hand over charge. *Rabbani*, it was alleged, went to the *cutchery* with a body of men, assaulted *Harinath* and turned him out, and thereafter kept him and the Petitioner confined in the house of a neighbour till they were released by the police. *Harinath* filed a complaint on the 27th instant, and *Rabbani* and two others were summoned. The case was then transferred to *Babu Surendra Nath Banerjee* for trial. The Petitioner was examined as a witness in the case. Two charges were framed against the accused: (i) under sec. 323, I P C., for hurt caused to *Harinath*; and (ii) under sec. 342 for wrongful confinement of *Harinath* and the Petitioner. The Magistrate convicted the accused, on the 25th May, of both the charges, and sentenced them under each section. They appealed to the District Magistrate, and on the appeal, a joint petition, signed by *Harinath* and the accused, was filed, whereupon the Court, after considering the application on the merits, accepted it and acquitted them. The Petitioner then obtained the present Rule to set aside the order of acquittal, so far as his interest was concerned. The Rule was first heard by *Walmsley* and *Pearson*, JJ and judgment reserved, but their Lordships directed the case to be placed before *Newbould* and *Suhrawardy*, JJ. for a re-hearing.

Babu Dasarathi Sanyal (with *Babus Manmatha Nath Mukerjee*, *Upendra Kumar Roy* and *Lalit Mohan Sanyal*) for the Petitioner.—The offence under sec. 342, I. P. C., committed against the Petitioner could be compounded only by him under sec. 345, Criminal Procedure Code. The complaint filed by *Harinath* was on behalf of both, and could be compounded by both, but not by *Harinath* alone. The complainant is not a party under sec. 423 of the Code.

Mr. Monnier (with *Babu Sarat Chandra Mukerjee*) for the Opposite Party — The wrongful confinement of two persons amounts to two offences, see I P C., sec. 71, *Illust. (b)*; and each can file a separate complaint. The present complaint was, on the face of it, made by *Harinath* on his own behalf. The Petitioner was a witness at the trial. The position of the complainant and a witness is different under the Code. The prosecutor in a criminal case is, in theory, the Crown, and a private prosecutor, though he represents the Crown, *pro tanto*, has, as a general rule, no control over the prosecution. *Queen v. Madhub Chunder Giri* (1), *Stephen Hist. Crim. Law*, Ed. 1883, Vol. I, p. 496.

But sec. 495 allows him to conduct the prosecution, and a distinct status is given him by secs. 252, 259 and 250 (3). He is a party to the trial, see sec. 526 (3) (8). The power of withdrawing prosecutions is conferred on a prosecutor under sec. 240, the Advocate-General under sec. 333, and certain public prosecutors under sec. 494. A similar power is given to the complainant in cases falling under secs. 240 and 248. The Petitioner, on the other hand, was a witness, and not a party. If a complainant has no no general control over the prosecution, neither has one who is not a party. No section of the Code confers power on an outsider to withdraw a case. In fact the Code does not allow any outsider to intervene in any proceeding thereunder, except in one case, *viz.*, under sec. 145 (5). The Petitioner, could not, therefore, compound the offence against himself at the trial. As to the position on appeal, sec. 423 relates only to the hearing of an appeal on the merits. The complainant is not a party for such purpose, but the

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section does not affect his power to compound which he derives from his status as a party at the trial. A person not a party to the prosecution, who had no *locus standi* at the trial, has none on the appeal. He could not compound an offence committed against himself on the trial, on a complaint instituted by another person, and cannot do so on the appeal. Sec. 345 gives the right to compound to all persons injured, but does not prescribe the mode of its exercise. It does not give the Petitioner power to compound any offence against himself on the complaint of another person injured. The right must be exercised according to the general scheme of the Code, that is, by filing a complaint of his own, when he acquires the powers of a complainant. Harinath compounded only the offences committed against himself: his petition of compromise relates only to such offences, and not to the wrongful confinement of the Petitioner. The District Magistrate in this case acquitted the accused only with respect to the offences against the complainant, and his order is legal. His order does not bar a fresh complaint by the Petitioner.

The charge, no doubt, mentions wrongful confinement of both persons, but the Magistrate had to frame it with respect to the whole occurrence, and to include all offences committed on the occasion. The fact of the charge being so framed does not give the Petitioner a *locus standi* which he has not otherwise under the Code. It would make no difference if the offence against the Petitioner was put in a separate head of charge in obedience to sec. 233.

THE JUDGMENT OF THE COURT was as follows:—

Three persons who are the Opposite Parties before us were tried by Babu

Surendra Nath Banerjee, Magistrate, 2nd Class, at Bongaon, who framed charges against them for having committed offences punishable under secs. 323 and 342, I. P. C. In the first charge they were alleged to have caused hurt to one Harinath Bose, and in the second charge they were alleged to have wrongfully confined Harinath Bose and Shib Chandra Chakravarty. They were convicted on both these charges, and they appealed to the District Magistrate. At the hearing of the appeal an application was made by Harinath Bose to compound the case under sec. 345, Cr. P. C. The District Magistrate allowed the compromise, and acquitted all the Appellants under that section.

This Rule has been obtained by Shib Chandra Chakravarty on the ground that he was no party to the compromise, and that, therefore, the acquittal, so far as the offence committed against him was concerned, was illegal. We hold that this Rule must be made absolute on this ground. Though Harinath Bose was the complainant in the case, that gave him no power to compound the offences under sec. 345, Cr. P. C. Under that section the persons by whom an offence may be compounded are set out in the third column of the statement which forms part of that section. Harinath Bose could compound the offences of hurt and wrongful confinement committed against him. But the only person, who could compound the offence of wrongfully confining Shib Chandra Chakravarty, was Shib Chandra Chakravarty himself. As he was no party to the compromise, the acquittal of the accused, on this part of the charge, was illegal.

We accordingly make this Rule absolute. We set aside the order of acquittal so far as it relates to the convic-

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tion for the offence of wrongfully confining Shib Chandra Chakravarty. The appeal, so far as it relates to this offence, must be heard on the merits.

The three accused will appear before the Magistrate, and execute fresh bail bonds for their appearance when called on.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 463 OF 1922.

ARAN SARDAR and ors.,
B. B. GHOSE, J. 1st party, Petitioners,
CHOIZNER, J. v.

1922,

HARA SUNDAR MAJUM-

3, August.

[DAR and ors., 2nd party,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145, order in favour of one party in proceedings under, if can be interfered with by subsequent proceedings, before the order is set aside by a Civil Court—Magistrate's jurisdiction to attach the subject-matter of the previous order on the ground of a bonâ fide dispute as to its possession—Government of India Act, sec. 107—High Court's jurisdiction to revise the attachment order in the second proceeding—Temporary change of character of the subject-matter of the previous order, if can nullify the effect of the said order.

In a certain proceeding under sec. 145, Cr. P. C., the Magistrate passed an order in favour of the first party. A subsequent assignee of the interest of the second party, however, began to disturb the possession of the first party with respect to a portion of the lands and in a subsequent proceeding instituted at his instance, the Magistrate held that there was evidence of a bonâ fide dispute as to actual possession at that time. He therefore attached the lands under sec. 145 (4) and drew up proceedings under sec. 145 to maintain peace:

Held—That it was clearly the duty of the Magistrate to see that the possession of the first party adjudged under the previous order, was not disturbed. That

order was binding on the parties and the unsuccessful party could not be allowed to disregard it. It was not proper for the Magistrate to initiate fresh proceedings under sec. 145 for maintaining the peace. Another effect of the fresh proceedings would be to give the unsuccessful party a fresh start of limitation in order to bring a suit for recovery of possession. The result of allowing such fresh proceedings would be that the binding effect of an order under sec. 145 would be disregarded and any number of proceedings may be initiated by any disappointed party.

A temporary change in the character of the land cannot nullify the effect of the previous order passed with regard to it.

When legal proceedings are taken under the Criminal Procedure Code which amounts to an abuse of process of the Court, the High Court has ample jurisdiction to interfere and ought to interfere under sec. 107 of the Government of India Act.

This was a Rule granted on the 12th June 1922 against an order of the Sub-Divisional Magistrate of Manikgunge (Mr. R. H. Hutchings), dated the 18th May 1922, instituting fresh proceedings under sec. 145, Cr. P. C., with regard to the lands in dispute.

The facts of the case are briefly as follows.—There was a proceeding under sec. 145, Cr. P. C., between the first party and the predecessor-in-interest of the principal person of the second party, which resulted in an order in favour of the first party in August 1919. The said person of the second party, after acquiring interest in a portion of the lands, began to disturb the possession of the first party which was maintained by the order of August 1919. On the application of the said second party, the Magistrate held

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that the eastern boundary of the lands at present in dispute was not identical with that of the lands in dispute in the former sec. 145 proceedings, that the lands at present in dispute form part of the lands adjudged under the previous sec. 145 proceedings, but that there was evidence of a *bonâ fide* dispute as to actual possession at the present time. He therefore ordered that, a breach of the peace being imminent, the lands should be attached under sec. 145 (4), and proceedings drawn up under sec. 145, Cr. P. C.

Against the said order the first party obtained the present Rule under sec. 107 of the Government of India Act.

Babus Manmatha Nath Mukherjee and *Hira Lal Sanyal* for the Petitioners.

Babus Dasarathi Sanyal and *Debendra Narain Bhattacharji* for the Opposite Parties Nos. 1, 3, 6 to 9.

The JUDGMENT OF THE COURT was as follows .—

We are invited in this Rule which was obtained under sec. 107 of the Government of India Act to quash certain proceedings initiated by the Sub-Divisional Magistrate of Manikgunge under sec. 145, Cr. P. C.

The question in controversy lies within a very narrow compass. There was a proceeding, under sec. 145, Cr. P. C., between the first party and persons now represented by the second party which resulted in an order being made in favour of the first party on the 29th of August 1919, declaring such party to be entitled to retain possession until evicted in due course of law and forbidding all disturbance of such possession until such eviction. The principal person of the second party then was one U. N. Roy. The interest of U. N. Roy has now passed to one Hara Sundar Mazumdar and he is now

the principal person among the second party. It appears that after Hara Sundar acquired his interest, he began to disturb the possession of the first party which was maintained by the order of the 29th of August 1919. There is no dispute as to the identity of the parties. There was a question whether the present dispute related to the same land which was the subject-matter of dispute in the proceedings mentioned before and the Magistrate deputed a Kanungoe to make a local enquiry. The result of the enquiry, shortly stated, was that the lands in the present dispute were included within the lands which formed the subject-matter of the previous dispute. The learned Magistrate thereupon made an order on the 18th May 1922 which runs as follows.—“I am satisfied from the Kanungoe’s report that the eastern boundary of the lands at present in dispute is not identical with that which was the boundary of the lands in the former sec. 145, Cr. P. C. Nevertheless the lands at present in dispute form part of the lands adjudged under the sec. 145 proceeding, but there is evidence of a *bonâ fide* dispute as to actual possession now. Therefore, as I consider a breach of the peace to be imminent, I hereby attach the whole of the lands included in Sheet No. 1, Purulia, under sec. 145, Cr. P. C. (4). Draw up new proceedings under sec. 145, parties to produce evidence as to possession on 6th June 1922.”

The identity of the parties and the lands being established it was clearly the duty of the Magistrate to see that the possession of the first party adjudged under the previous order was not disturbed. That order is binding on the parties and the unsuccessful party cannot be allowed to disregard it and disturb the possession of the other party without having recourse

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to law. It is not the proper course for the Magistrate to initiate fresh proceedings under sec. 145 of the Criminal Procedure Code for maintaining the peace.

It has been contended on behalf of the Opposite Party that this Court has no jurisdiction to quash the proceedings at this stage. We are of opinion, however, that when legal proceedings are taken under the Code of Criminal Procedure which amounts to an abuse of process of the Court and the object of which is only to harass the party who has got a previous order of the Magistrate in his favour, this Court has ample jurisdiction to interfere and ought to interfere under sec. 107 of the Government of India Act. The object of the second party is quite apparent in instituting these proceedings. It is to get an order in his favour, if possible, contrary to the order which was passed in August 1919 and if not, even an adverse order, which may also be of advantage to him. If the proceedings are allowed to continue and terminate in a fresh order under sec. 145, Cr. P. C., it would affect the first party in another way. As is well-known the previous order of the 29th of August 1919 is binding upon the parties to the proceedings and a suit for recovery of possession by a person against whom that order was made can only be brought within three years of the order under Art. 47 of the Limitation Act. If the proceedings terminate in a fresh order it would be really giving the second party, assuming that the new order is made against him, a fresh start of limitation in order to bring a suit for recovery of possession. That is a proceeding which, appears to us, can hardly be justified.

It has further been argued on behalf of the Opposite Party that we should not interfere with the discretion of the Magistrate to proceed either under sec. 107, Cr.

P. C., or under sec. 145 of that Code as he thought fit, and the learned Vakil has cited a number of cases in support of his contention. It is no doubt true, if things stood alone, it was perfectly competent to the Magistrate to initiate such proceedings as he thought proper and the High Court would not interfere with his discretion in starting proceedings according to his judgment. In this case, however, it was duty of the Magistrate, as already pointed out, to maintain the first party in possession under the order passed previously under sec. 145, Cr. P. C., and not to start fresh proceedings under that section. The Magistrate has ample powers under the law to maintain peace and to see that the order made in August 1919 is obeyed. In this case, therefore, in our opinion, the Magistrate did not exercise proper judicial discretion in starting proceedings under sec. 145 afresh. The result of such a course would be that the binding effect of an order under sec. 145, Cr. P. Code, would be disregarded and any number of proceedings may be initiated by any disappointed party leading to no result whatsoever, a position which would surely be intolerable.

One other argument which was addressed on behalf of the Opposite Party is that the character of the property has been changed. This we consider does not require any serious consideration; because even assuming that part of the land was submerged and has re-appeared, there was no difficulty with regard to the identification of the lands; and the mere fact that there was temporary submergence would not nullify the effect of the previous order passed with regard to them on the 29th of August 1919.

We therefore set aside the order of the Magistrate, dated the 18th May 1922, instituting fresh proceedings under sec. 145,

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Cr. P. C., with regard to the lands in dispute. This order will not preclude the Magistrate from taking such other proceedings as he may consider necessary for the purpose of maintaining the first party in possession of the property and for the preservation of the peace.

J. N. R. Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.	{	GOPAL LAL SETT,
SIR JOHN EDGE.		since deceased,
MR. AMEER ALI.		(now represented
SIR LAWRENCE JENKINS		by Sasendra
1921,	{	Chandra Sett, and
Heard, 11, 14 and		ors), Appellants,
15, November.		v.
Judgment,		PURNA CHANDRA
20, December.		BASAK, since de-
		ceased, and ors ,
		Respondents.

Hindu law—Trust—Debutter—Property whether given absolutely to idols or to individuals charged with their maintenance—Trust, private—Civil Procedure Code (Act V of 1908), sec. 92, scheme of management, if may be framed under—Administration suit, order in, based on particular construction of Will—Construction, if res judicata.

The question was whether the testatrix by her Will intended to make a gift of certain properties to idols or to any person or persons charged with the maintenance of the idols.

Held—That according to the true construction of the Will the properties were given absolutely to her grandson, U charged with the performance of the worship of the deities.

That no heritable shebaitship was established by the Will, U having been appointed shebait during his life-time; and that after his death, there being no express provision made for the worship, the necessary duties would have to be performed by

persons properly appointed for that purpose.

That the gift in question was in effect a private trust to which the provisions of sec. 92 of the Code of Civil Procedure did not apply, and consequently a scheme for its administration was inappropriate.

A direction given in an administration suit has the effect of an order binding all parties and determines the construction of the Will to which it gives effect, so that after the lapse of time necessary for appeal it becomes final and conclusive.

PEARRETH v. MARRIOTT (1) referred to.

These were consolidated first appeals from a decree, dated the 10th January 1908, passed by a Special Divisional Bench of the High Court of Calcutta, consisting of Brett and Mookerjee, JJ.

The suit out of which these appeals arose was instituted by Purna Chandra Basak for the construction of the Will, dated 29th May 1841, of Bhaggobati Dasi, deceased and for a declaration that he was entitled to the shebaitship of certain Thakurs and also to the enjoyment of the surplus income of certain property comprised in the said Will.

The testatrix Bhaggobati Dasi who died in 1841 was the widow of Gobinda Chand Basak, a Hindu governed by the Bengal School of Hindu law.

His other wife who predeceased him was Kanakmoni Dasi and her descendants, of whom the Plaintiff was one, were referred to during the hearing as the Basak branch of the family.

The Special Division Bench (Brett and Mookerjee, JJ.), which tried the case held that the Basak branch were not heirs of Bhaggobati Dasi, that Uday Chand Basak the grandson of the testatrix was the sole shebait appointed under her Will, and

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that his right was personal and not heritable, that the succession of the *shebaitship* opened on the death of Uday Chand, and that under the Bengal School of Hindu law Radha Kanta Sett was then heir to Bhaggobati and his descendants were entitled to the *shebaitship* and to her property.

They further held that the testatrix disposed of all her *stridhan* properties by her Will and that they were in their entirety dedicated to the idols named therein.

In their opinion Joy Krishna Basak was at the date of Bhaggobati's death a lunatic and as such permanently excluded from the succession, and they made a decree accordingly and directed certain accounts to be taken, and a scheme to be framed for carrying out the trusts of the Will.

Messrs. DeGruyther, K. C., Dunne, K. C., Ramsay and S. C. Chaudhuri for the Appellant Gopal Lal Sett and other descendants of Uday Chand.

The real question is the construction of Bhaggobati's Will. The estate passed under it either to Uday Chand, or to the idols of which Uday Chand was *shebait*.

In either case Uday Chand's descendants are entitled to any surplus profits.

Mayne's Hindu law, paras 437-439.

The estate cannot be in abeyance and on the death of Bhaggobati it must have vested in Uday Chand who was her next heir.

Sir George Lowndes, K. C. and Messrs. E. B. Raikes and B. Dubé for the Basak branch of the family.

This is a Basak endowment, of Basak idols, in a Basak house, and the proper persons to attend to that endowment are the Basak branch of the family. Bhaggobati was not the founder of the endowment and the Courts have decided frequently in applications during the past 50

years that a Basak should be *shebait*. It has never before been suggested that Uday Chand's title was heritable.

• The whole of the property belongs to the idols and a scheme should be framed for carrying out the endowment of which the Basaks are the only fit and proper persons to be trustees.

Messrs. Upjohn, K. C. and Kenworthy Brown for named beneficiaries under the Will of Bhaggobati.—On the true construction of the Will there was no gift of property to the idols and no dedication of the corpus but the income was to be used for the upkeep of the idols, although that need not exhaust the income.

The personal rights of the parties have been decided by the Court in 1857 and have been covered by directions and orders of the Court ever since that date. No appeal has been lodged against that decision and the parties are now bound by it.

Mr J. M. Parikh, on behalf of Khoka, a minor and one of the Respondents, adopted the argument of Sir George Lowndes and urged that all Basaks should be represented in the framing of a scheme for the carrying out of the trusts.

Sir George Lowndes, K. C. and Mr. A. M. Dunne, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—The history of the litigation of which these appeals form part, extending over a period of sixty-five years, has been carefully and minutely examined in the judgment of the learned Judges of the High Court of Judicature at Fort William in Bengal, from which these appeals have been brought. Their Lordships therefore do not propose to attempt a repetition of the facts, except so far only as may be necessary to explain the reasons for the opinion they have formed.

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Several questions of interest and of importance have indeed been raised and argued upon these appeals, but the true construction of the Will of the testatrix, Bhaggobati Dasi, lies at the threshold of the dispute, and on the view taken by their Lordships of the true meaning of this document these larger questions do not arise.

The testatrix, who died on the 29th May 1841, was the second wife, and at her death had been for thirty years the widow, of one Gobind Chand Basak, a Hindu governed by the Bengal School of Hindu law. By him she had had three sons and two daughters. The eldest of these sons was Purn Krishna Basak, who predeceased his mother and left two children, Monmohini Dasi and Udoy Chand Basak. The second son, Joy Krishna, was found to be a person of unsound mind in 1838, but he was not a congenital lunatic. The third son, Raj Krishna, died in 1821, leaving no children. The eldest daughter, Tripura Sundari Dasi, died before her mother, leaving a son, Radha Kanta, and the second, Golap Dasi, or, as she is sometimes called, Golapmoni, survived. By the first marriage of Gobind Chand Basak there had been two sons, Radha Krishna Basak and Sri Krishna Basak, both of whom survived the widow, from them there have been numerous descendants, who will be referred to merely by way of description as the Basak Branch of the family. In truth the real quarrel in the present case lies between the two branches of the same family descending from the two wives. Bhaggobati's Will was executed on the day of her death. Some question has arisen as to the true translation of the Will. The differences do not seem vital, but in any case their Lordships accept the official translation Ex. A in the suit

No 711 of 1907. It is addressed to Udoy Chand Basak, her grandson, and contains on the face of it the following statement:—

“Reliance on the feet of Sri Sri Hariji.
Joy Gopal. Shiba Thakur's
Anandamoyi Thakuran's Gopal Lal Ji's”

This fact that it is addressed to Udoy Chand is important to bear in mind in construing the provisions of the Will, for the duties that it imposes are clearly placed on him. It relates first to certain property which is referred to as the Company's Paper standing in the name of the testatrix, and directs that out of the income “‘you’” (that is Udoy Chand) “shall perform the *sheba* (worship, &c.) of Sri Sri Iswar and the *sheba* of the ancestral Sri Sri Iswar, ‘you’ shall perform the *sheba* of the said Iswarjew out of the income of the ancestral garden called Iswar Gopal Lal Ji's garden, purchased in his name ‘You’ shall be the person in charge of the *sheba* of all the deities.” There is then introduced a separate and definite gift with regard to two houses, namely, a house at Chowringhee and a house at Pathumaghata, out of which was directed there should be performed the *sheba* of Sri Sri Iswarjew “as it is at present,” and that the remainder of the income should be divided between three people, namely, Monmohini, Radha Kanta, the son of Tripura, and Golapmoni, thus making provision for each one of the surviving branches of her own family except Joy Krishna, who was insane. The testatrix then refers again to the balance of the interest accruing from the Company's Paper, and directs how that is to be dealt with in connection with religious services. There is no definite gift of the residue.

The first question that arises is whether the gift is a gift to the Idols, or whe-

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ther there was a gift to any other person or persons charged with the maintenance of the Idols. The Will is most obscure, but their Lordships think that there is certainly no direct gift of the whole property to the Idols, nor in the circumstances ought one to be implied. It is consequently necessary to see in what capacity and by virtue of what right the worship of the Idols is to be carried out. The person on whom the duty was cast was undoubtedly Uday Chand, and the conclusion which their Lordships have reached is, that if, as they think, there is no gift to the Idols, it is only possible to give effect to the provisions of the Will by treating it as conferring the property upon Uday Chand. The Will is addressed to him, upon him throughout all the burdens of performing different duties are cast, and this necessarily involves the ownership of the property.

Their Lordships agree with the High Court in thinking that no heritable *shebaitship* was established by the Will. Uday Chand was to be *shebait* during his life-time, and so far as the *sheba* of Iswar Thakurani was concerned, he was directed to perform the ceremonies "according to the existing arrangements of the *sheba*" in concert with his step-mother Shiba Sundari, but after his death no express provision was made for the worship, and the necessary duties will have to be performed by persons properly appointed for that purpose.

Although this has never been declared the true interpretation of the Will, it is the construction that has in effect been acted upon for a considerable period of time, for Uday Chand died on the 8th July 1842, and upon his death administration proceedings were instituted by Golap Dasi asking for the usual administration relief. It is unnecessary to pur-

sue the whole course of this suit. Shiba Sundari was, on the 14th December 1857, appointed, jointly with the executors of Uday Chand, to take charge of the Idols, and on her death on the 14th August 1858, members of the branch of the family known as the Basak Branch were introduced into the suit, and from that time down to now, some of them have been associated with the performance of the duties.

The result of litigation and other expenses, however, has, as the Board is informed, completely exhausted the greater part of the moneys derived from the Company's Paper set apart for the worship of the Idols, and the claim has consequently been put forward for the balance of the rents from the two houses, on the ground that the whole of the property was dedicated for the worship of the gods. It is unnecessary for their Lordships to determine whether the effect of the gift in the Will which gave the income of this specially appropriated property to the three named beneficiaries without any limitation of time would be sufficient to create an absolute gift, for on the 14th December 1857, by an order made in the administration proceedings, the Court declared that out of the produce of the houses belonging to the estate of the testatrix, situate at Chowringhee and Pathuriaghata, the worship of Sri Joy Gopal should be performed, and that the surplus of the said produce should be paid as follows, namely, to the representatives of Radha Kanta Sett, deceased, one equal third part; to the representatives of Srimati Gopal Dasi, deceased, one equal third part, and to Srimati Monmohini during her life-time and to her representatives after her death the remaining one equal third part or share. This order, although it contains no express words to that

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effect, amounts to a clear and effective declaration by the Court as to the absolute interests taken by each of the three named beneficiaries in the Will, for the payment to the representatives of the named beneficiaries admits of no other explanation, but to this order the Basak Branch of the family were not parties. They were, however, parties to a suit instituted in 1881, upon which an order was made on the 15th March 1888, when it was directed that the sum of Rs 6,849 should be regarded as the surplus income derived from the property set apart for Sri Joy Gopal, and it was ordered that the trustees should divide and pay the same between the parties entitled in the proportions mentioned in the decree of the 14th December 1857, that is, to the representatives of the three named beneficiaries in equal shares. There has consequently been an order binding all parties, based upon the view that the property in which the three beneficiaries mentioned were interested was segregated from the rest of the estate and set apart for the upkeep of the named Idol (Sri Joy Gopal Jee), the surplus belonging to them absolutely in equal shares. This disposes of the whole matter in dispute upon appeal. The learned Judges of the High Court who carefully examined all these proceedings, thought that the question as to the absolute interests of the three named beneficiaries had never been definitely raised and decided, and that the directions already mentioned were only made pending the administration suit. But there is no such limitation in the terms of the order, and such a direction given in an administration suit has the effect of an order binding all parties and determines the construction to which it gives effect, so that after the lapse of time necessary for appeal it becomes final

and conclusive [See *Peareth v. Marriott* (1)].

The questions raised as to whether Joy Krishna was prevented from inheriting by virtue of his lunacy, and the point decided by the High Court as to the true reading of the Dayabhaga do not arise, and their Lordships make no pronouncement upon these points. It is only necessary to add that both from the terms of the Will of Bhaggobati herself and from the information afforded by the documents, it would appear that one at least of the Idols mentioned in the Will was ancestral, but even if that were the case their Lordships agree with the High Court in thinking that there is not sufficient evidence to prove any endowment prior to her death. Their Lordships see no reason to doubt that the Court executing the duty of appointing trustees would pay due regard to the claims of that branch of the family with whom the worship was established and by whom the services performed, but they regard the gift as in effect a private trust to which the provisions of sec 92 of the Code of Civil Procedure would not apply, and consequently the establishment of a scheme for its administration, as provided by the decree of the High Court, is inappropriate.

There remains nothing but the question of costs. The Appellants have to a certain extent succeeded, but they have gained a barren victory; they have moreover taken 14 years to bring this matter before the Board since the judgment of the High Court. Their Lordships will therefore make no order as to their costs. The cross-Appellants, represented by Sir George Lowndes, have failed. Mr Parikh's client appears in the same interest. The only persons who have succeeded at all are the repre-

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representatives of the three original beneficiaries; but although the point on which they succeed was undoubtedly raised and argued in the High Court, for reasons that it is not easy to understand, the point was never clearly and definitely raised before this Board, and no complaint was made by them against the judgment of the High Court, although it was adverse upon the point. There was, however, sufficient mention of the matter in the Respondents' case to permit of its argument, and when argued no answer to it could be found. Their Lordships are not prepared in the circumstances to allow them any costs.

Their Lordships will therefore humbly advise His Majesty (1) that the appeal No. 169 of 1919 should be allowed in part and the cross-appeal No. 170 of 1919 dismissed; (2) that the decree of the High Court of Judicature at Fort William in Bengal, dated the 10th day of January 1908, should be varied by (a) discharging so much thereof as directs a scheme to be submitted for carrying out the trusts created by the Will of Srimati Bhaggo-bati Dasī, deceased, (b) by declaring that according to the true construction of the said Will the whole of the property of the testatrix, with the exception of the houses at Chowringhee and Pathuriaghata, was given absolutely to her grandson Uday Chand Basak, charged with the performance of the worship of the deities mentioned in the said Will except the deity Sri Sri Iswarjew, and (c) by further declaring that it appearing that by virtue of two decrees, dated the 14th day of December 1857, and the 15th day of March 1888, the residue of the income arising from the said houses has been directed to be paid in proportions to the three named beneficiaries, Monmohini, Radha Kanta, and Golapmoni and their respective re-

presentatives, the question as to the absolute interests taken by the said beneficiaries under the said Will is *res judicata* between the parties to these appeals; and (3) that there should be no order as to the costs of these appeals.

Solicitors. Messrs T. L. Wilson & Co. for the Appellants.

Solicitors. Messrs W. W. Box & Co., Watkins & Hunter and J. Pugh Thomas for the Respondents.

On cross-appeal

Solicitors. Messrs. W. W. Box & Co. for the Appellants.

Solicitors Messrs. T. L. Wilson & Co., Watkins & Hunter and J. Pugh Thomas for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER
CENTRAL PROVINCES.]

VISCOUNT CAVE.

LORD SHAW.

SIR JOHN EDGE.

1922,

Heard, 9, March.

Judgment, 6, April.

SYED KASAM, since
deceased (now repre-
sented by Syed Khane
Jama and ors),
Appellant,

v.

JORAWAR SINGH and
ors. Respondents.

Hindu law—Mitakshara—Joint family property
—Claim by a member of a share and reference by
all to arbitrator for partition, if effects severance in
interest—Sale by co-sharer, if may be attacked by
other co-sharers on the ground of want of consi-
deration.

*It is settled law that in the case of a
joint Hindu family subject to the law of
the Mitakshara, a severance of estate is
effected by an unequivocal declaration on
the part of one of the joint holders of his
intention to hold his share separately,
even though no actual division takes place.*

*Where N, a member of such a family,
claimed his half-share of the ancestral*

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property, and after discussion all the joint holders signed an agreement appointing one G to partition the property agreeing to accept whatever partition he might make:

Held—That this claim and agreement were sufficient to effect a severance in interest and to prevent the share of N from passing by survivorship

That the subsequent division of the property between the co-owners which was accepted by all parties and was not alleged to be unfair could not be disturbed, and a sale by N of his share to the Plaintiff could not be set aside on the alleged ground of want of consideration at the instance of joint owners, but only (if at all) at that of the vendor's representatives, but that any proceeding for that purpose was statute barred at the date of the suit.

This was an appeal against a judgment and decree of the Court of the Judicial Commissioner, Central Provinces, dated the 6th September 1917, reversing a judgment and decree of the Court of the Additional District Judge of East Berar, dated the 18th July 1916.

The suit out of which this appeal arose was instituted by the Plaintiffs as members of the family of Nain Singh for possession of the suit properties alleged by them to be their ancestral family property.

The Defendants claim title under a sale deed executed in 1902 by Nain Singh in favour of Syed Kasam. The validity of this sale was impeached by the Plaintiffs.

The District Judge held that the sale was not fictitious, that Nain Singh had not separated at the date of the sale, that the vendee had been in possession, and had enjoyed separately the profits of his vendor's share since the date of the sale and he passed a decree accordingly.

The Plaintiffs appealed to the Court of

the Judicial Commissioner (J. Mittra, A. J. C.) which set aside the decree of the lower Court and directed the Defendants to put the Plaintiffs in possession of the property in suit on payment by the Plaintiffs of the sum of Rs 5,000.

From the decree of the Court of the Judicial Commissioner the Defendants (the representatives of Syed Kasam) appealed to His Majesty in Council.

Mr DeGruyther, K. C. and Mr. Parikh for the Appellants.—Nain Singh was governed by the Mitakshara which in Berar is interpreted according to the Bombay School. According to the Bombay School an undivided co-parcener can sell his undivided share for value.

Ram Prosad v Mt Subu Bai (5), Bhadia v Mt Bhagi (6) and Balwant Rao v Bai Rao (7).

Mayne's Hindu Law, para. 356.

The sale by Nain Singh in 1902 was an unequivocal intimation of his intention to separate which would operate as a separation.

Girja Bai v Sadashiv Dhundiraj (3) and Kawal Nain v Prabhu Lal (4).

In any event the agreement of December 1905 would in itself operate as a severance.

Musammat Parbati Debi v Chaudhuri Nanuhilal Singh (8).

Mr Kenworthy Brown for the Respondents.—Berar adopts the Bombay law as to succession but not as to sale. More-

(3) L. R. 43 I. A. 151 at p. 158; s. c. I. L. R. 43 Cal. 1031; 20 C. W. N. 1085 (1916).

(4) L. R. 44 I. A. 159; s. c. I. L. R. 89 All. 496; 21 C. W. N. 988 (1917).

(5) 4 Nag. L. R. 31 (1908).

(6) 10 Nag. L. R. 24 (1913).

(7) L. R. 47 I. A. 213; s. c. I. L. R. 48 Cal. 30; 25 C. W. N. 248 (1920).

(8) L. R. 36 I. A. 71; s. c. I. L. R. 31 All. 112; 13 C. W. N. 988 (1909).

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over the Berar Courts lean towards the decisions of the Allahabad High Court.

Ramkishore Kedar Nath v. Jainarayan Ramrachhpal (9).

The pure Mitakshara is applicable and the deed of sale was a nullity.

If there is a fixed declaration of separation by a co-parcener, it effects a separation, but it must be certain, unequivocal and intended to be operative

The evidence does not support any such intention. Moreover the argument that the agreement in 1905 effected a severance was a new case in the Judicial Commissioner's Court and the Court rightly used its discretion in refusing to admit it

There was no clear intention in the present case that separation should take place at once and this is laid down as essential in *Appovier v. Rama Subba Ayyan* (1) and *Suraj Narain v. Ikbal Narain* (10).

Mr. DeGruyther, K. C. replied.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVE.—This is an appeal by the Defendant in the suit against the decree of the Court of the Judicial Commissioner of the Central Provinces, reversing a decree of the Additional District Judge, East Berar, Amraoti, and giving judgment for the Plaintiffs

Nain Singh and the Plaintiffs, who were the issue of his brother Khannu Singh, formed at one time a joint Hindu family, resident in Berar and subject to the law of the Mitakshara as there interpreted. Before the date of the deed next

mentioned, Nain Singh and the Plaintiffs had become separate in mess and residence, but not in estate

By registered sale-deed, dated the 29th September 1902, Nain Singh sold his half share of the ancestral property of the family (with some moveable property) to Syed Kasam for 20,000 rupees, of which 15,000 rupees were admitted by the vendor to have been received in advance, and the remaining 5,000 rupees were paid to him in the presence of the registering officer. No partition was then effected, but the purchaser was allowed to hold and cultivate certain parts of the property corresponding in value to a half share. On the 4th December 1905, all the members of the family signed a *kararnama* appointing one Ghasi Ram as arbitrator to partition the property and agreeing to accept whatever partition he might make. The arbitrator divided the property into two lists, one (representing a moiety in value) containing the property to be allotted to Nain Singh, and the other (representing the remaining moiety in value) containing the property to be allotted to the Plaintiffs. The latter list was apparently divided into three sub-lists, one for each of the Plaintiffs. These lists were handed to Nain Singh. The formal division was not at once carried out, as Nain Singh died on the 26th March 1906; but after his death the lists appear to have been acted upon by all the persons interested, as the purchaser was put into possession of the property allotted by the arbitrator to Nain Singh, and the Plaintiffs from time to time dealt with various parts of the lands contained in their lists.

On the 23rd July 1914, the Plaintiffs brought the present suit against Syed Kasam, claiming possession of the lands

(1) 11 M. I. A. 57 at p. 89 (1886).

(9) L. R. 40 I. A. 218 at p. 219: s. c. I. L. R. 40 Cal. 666, 17 C. W. N. 1189 (1913).

(10) L. R. 40 I. A. 40 at p. 45: s. c. 17 C. W. N. 338 (1913).

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of which he had been so put into possession on the ground that the family had continued joint in estate down to the death of Nain Singh, and that on the death of Nain Singh's widow (which occurred on the 10th July 1910) the property had passed to them. They also alleged that the half share had been sold by Nain Singh to the Defendant "for a bogus consideration of 20,000 rupees"—an expression which has no legal signification, but which apparently meant that the consideration of 20,000 rupees had not in fact been paid.

The suit was heard by the Additional District Judge, East Berar, who dismissed it, holding that there had been an effective agreement for partition, and that the 20,000 rupees had been paid. On appeal, the Additional Judicial Commissioner held that there had been no partition, and that although 5,000 rupees, part of the purchase money, had been paid before the registering officer, the balance of 15,000 rupees had not been paid, or if paid, had been at once returned. He declined to admit the plea that the *karar-nama* effected a severance of the joint-tenancy on the ground that this had not been specifically pleaded. He therefore set aside the decree of the lower Court, and directed the Defendant to put the Plaintiffs in possession of the property in suit on payment by the Plaintiffs of 5,000 rupees. Against this decree the present appeal was brought. The original Appellant, Syed Kasam, has died pending the appeal, and is represented by the present Appellants.

Two points are taken on behalf of the Appellants. First, it is said that the law of the Mitakshara is to be interpreted in Berar in the same manner as in Bombay, and that according to that law as so in-

terpreted, Nain Singh had power to sell his undivided share in the joint family property without the consent of his co-owners, and their Lordships do not doubt that this statement is correct. But to this point it was answered by the Judicial Commissioner that the sale by Nain Singh in 1902 only gave to the purchaser an equity to enforce a partition, and that such equity was displaced by the fact that the purchase money was not fully paid. In view of their Lordships' opinion on the second question, to be hereafter stated, and of the fact that the evidence on the question of the payment of 15,000 rupees was not fully brought to their notice, they do not think it necessary to deal with this point, nor do they express any opinion on the question whether, even if it was proved that part only of the purchase money was paid, the form of decree adopted by the Judicial Commissioner was appropriate to the case.

But, secondly, it is argued on behalf of the Appellants that the transactions which took place in the year 1905 effected a severance of the joint estate, and accordingly the Plaintiffs have no right to sue; and in their Lordships' opinion this argument should prevail.

It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree [see *Appovier v. Rama Subba Aiyar* (1), *Joy Narian Gira v. Grish Chunder Mytee* (2), *Girja Bai v. Sadashiv*

(1) 11 M. T. A. 75 (1896).

(2) L. R. 5 I. A. 228 (1878).

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Dhundiraj (3) and *Kawal Nain v. Prabhu Lal* (4)].

In the present case, it was proved by the evidence of one of the Plaintiffs (Jorawar Singh) and of Ghasi Ram that Nain Singh claimed his half share of the ancestral property, and that after discussion all the joint holders signed the agreement of the 4th December 1905, appointing Ghasi Ram to partition the property and agreeing to accept whatever partition he might make; and this claim and agreement were quite sufficient to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship. It is true that the agreement was not specifically pleaded by the Defendant Syed Kasam; but he pleaded that Nain Singh was separate in estate, and relied in his written statement on the division of the property which resulted from the agreement, and then Lordships do not think that the agreement leading up to that division can be put out of account. The subsequent division of the property between the co-owners was accepted by all parties and is not said to have been unfair; and there appears to be no reason why it should be disturbed. In these circumstances the sale to Syed Kasam could not be set aside at the instance of the joint owners, but only (if at all) at that of the vendor or his representatives; and any proceedings for that purpose were statute barred before the commencement of the suit. This is sufficient to dispose of the Plaintiffs' claim.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree

of the Judicial Commissioner should be set aside and the decree of the District Judge restored, and that the Respondents should pay the costs in both the Courts below and the costs of the present appeal.

Solicitor: *Mr Edward Dalgado* for the Appellants

Solicitors *Messrs Downer and Johnson* for the Respondents

G. D. M

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

Nq. 1630 of 1920.

MOOKERJEE, J. MAKARATI, Plaintiff,
CHOTZNER, J. Appellant,
1922, v.

Heard, 19, May. SARFADDIN and ors.,
Judgment, Defendants,
13, June. Respondents

Civil Procedure Code (Act XIV of 1882), s. s. 312, 313, 314 and 315—Civil Procedure Code (Act V of 1908), Or. 21, rr. 91 and 93—Auction-purchaser's right to refund of purchase-money if the sale is set aside on the ground that judgment-debtor had no saleable interest, to be enforced, if by suit or application under the Code—Right to bring a suit for refund, accrued under the Code of 1882, if extinguished by the promulgation of the Code of 1908.

The Plaintiff purchased certain immoveable property at a sale held in execution of a mortgage decree. The sale was confirmed and the sale-certificate granted on the 11th of December 1908. Being unable to obtain possession, the Plaintiff instituted the present suit, on the 16th April 1917, against several persons, among others, the mortgagees who had received the purchase-money, for recovery of possession and in the alternative, for recovery of the purchase-money. The claim for possession being negatived, the question arose whether the Plaintiff was competent

(3) L. R. 43 I. A. 151. s. c. I. L. R. 43 Cal. 1031; 20 C. W. N. 1086 (1916).

(4) L. R. 44 I. A. 159; s. c. I. L. R. 89 All. 496; 21 C. W. N. 996 (1917).

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to maintain the suit for the recovery of the purchase-money or whether the only remedy left to him was an application under Or 21, r. 93 read with r. 91 of the Civil Procedure Code of 1908:

Held—That under the provisions of the Civil Procedure Code of 1882, the Plaintiff, on the 11th of December 1908, acquired a right to obtain a refund of the purchase-money either by application or by suit within the period prescribed by law in one contingency, namely, if it should be discovered that the judgment-debtor had no saleable interest at all in the property sold, and that this right could not be deemed to have been extinguished by the promulgation of the Code of 1908 which came into operation on the first day of January 1909; and that accordingly the Plaintiff was competent to maintain the present suit for the recovery of his purchase-money

MUNNA SINGH v. GAJADHAR SINGH (1) followed

COLONIAL SUGAR REFINING Co. v. IRVING (28) referred to.

This was an appeal from a decision of O. M. Martin, Esq., Additional District Judge, Chittagong, dated the 10th March 1920, affirming that of Babu Sachindra Kumar Sen, Munsif, Raozan, dated the 31st August 1918.

The facts of the case will appear from the judgment.

Babu Narendra Kumar Das for the Appellant.

Babus Birajmohan Mojumdar and Chandra Sekhar Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an appeal by the Plaintiff in a suit for recovery of pos-

session of immoveable property purchased by him at an execution sale, or, in the alternative, for recovery of the money paid by him as purchaser at such sale. The trial Court dismissed the suit, and that decree has been affirmed by the District Judge on appeal. The facts material for the determination of the questions of law raised before us are no longer in controversy and may be briefly recited.

On the 18th September 1904, the fifth Defendant mortgaged the disputed property to the sixth and seventh Defendants to secure a loan of Rs. 100 which was made repayable on the 12th February 1905. On the 14th June 1907, the mortgagees sued the mortgagor to enforce the security. The claim was contested by the mortgagor in his written statement, but, ultimately, a decree was made by consent on the 13th November 1907. The decree was executed in due course, and at the sale which followed, the Plaintiff, a stranger to the suit, became the purchaser for a sum of Rs. 190. The sale was confirmed and the sale-certificate was granted on the 11th December 1908. Symbolical possession was thereafter delivered to the purchaser on the 28th March 1909. She was unable, however, to obtain actual possession and was thus constrained to commence the present litigation on the 16th April 1917. The claim for possession was controverted by the first Defendant, who urged that neither the fifth Defendant nor his mortgagees nor the Plaintiff ever had any title to the disputed land, and in this defence he was supported by some of the other Defendants. The Courts below have concurrently found that the fifth Defendant had no title to the land at any time, and that, consequently, the mortgage as also the execution sale based thereon had passed no title to the Plaintiff. In this view,

(1) I. L. R. 5 All. 577 (F. B.) (1883).

(28) [1905] App. Cas. 389.

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the claim for possession put forward by the Plaintiff has been negatived. The alternative claim for recovery of the purchase-money from the sixth and seventh Defendants has been dismissed on the ground that the only remedy of the Plaintiff is by an application under Or. 21, r. 93 read with r. 91 of the Civil Procedure Code, 1908, and that a regular suit is not maintainable for the purpose. The Plaintiff has now appealed to this Court and has argued that the decision of the District Judge is erroneous on two grounds, namely, first, that under the Code of 1908, as under the Code of 1882, a regular suit may be maintained by an execution-purchaser to recover the purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold, and secondly, that, if under the Code of 1908 the law be deemed to be different from what it was under the Code of 1882, the provisions of the latter Code should be applied to the present case, as they were in force on the date when his purchase became absolute under sec. 312 and sec. 314 of that Code.

For the determination of the first question, a comparison between the relevant provisions of the Codes of 1882 and 1908 is essential. Secs. 313 and 315 of the Code of 1882 were as follows:—

“313. The purchaser at any such sale may apply to the Court to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest therein, and the Court may make such order as it thinks fit:

Provided that no order to set aside a sale shall be made unless the judgment-debtor and the decree-holder have had opportunity of being heard against such order.”

“315. When a sale of immoveable pro-

perty is set aside under secs. 310A, 312 or 313,

Or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it,—The purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the Court, may be enforced against such person under the rules provided by this Code for the execution of a decree for money.”

Rr. 91 and 93 of Or. 21 of the Code of 1908 are as follows:—

“91 The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.”

“93 Where a sale of immoveable property is set aside under r. 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.”

It will be observed that the second and fourth paragraphs of sec. 315 are not reproduced in r. 93, while the words “shall be entitled to receive back” which occurred in the third paragraph of sec. 315 are replaced by the words “shall be entitled to an order for repayment” in r. 93. The Defendants-Respondents have contended that these changes indicate a substantial alteration in the pre-existing law.

Under the Code of 1882, it had been held that a purchaser could not only obtain repayment of his purchase-money when the sale was set aside upon his ap-

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plication under sec. 313, but that he might also maintain a suit against the decree-holder for recovery of his purchase-money, if it should so happen that the judgment-debtor had no saleable interest whatever in the property sold. The existence of the alternative remedy by suit was inferred from the provision in the second paragraph of sec. 315 and from the use of the words "may be enforced" in the fourth paragraph of that section. The matter was elaborately examined by a Full Bench of the Allahabad High Court in *Munna Singh v. Gajadhar Singh* (1) where it was ruled that a purchaser at a sale in execution of a decree was competent to maintain a suit against the decree-holder for recovery of his purchase-money when the judgment-debtor was found to have had no saleable interest in the property sold; the purchaser was not restricted to the special procedure in the execution department, mentioned in sec. 315. This view was followed in *Kishunlal v. Muhammad Safdar Ali* (2), *Sidheswari v. Gossain Mayanand* (3), *Muhammad Najibulla v. Jaynarain* (4) and *Girdhar Das v. Siddheswari Prasad* (5). A similar view was adopted by the Bombay High Court in *Gurshidawa v. Gangaya* (6). The identical principle was approved in this Court in *Haridayal v. Sheikh Samsuddin* (7), *Nityananda v. Jagat Chandra* (8) and *Ram Kumar v. Ram Gour* (9). The same construction was placed upon the Code by the Madras High

Court in *Pachayappan v. Narayana* (10), *Nula Kanta v. Imam Saheb* (11), *Mohideen v. Mahomed Mura* (12) and *Tirumalai Swami v. Subramanian* (13). This then was the accepted interpretation of the provisions of the Code of 1882, though there might have been now and then a note of hesitation and even of dissent; *Kishunlal v. Muhammad* (2), *Sidheswari v. Gossain* (3), *Muhammad v. Jaynarain* (4) and *Sundara Gopalan v. Venkata Varada* (14). It was further held that an application under sec. 313 to set aside the sale was required to be made within sixty days from the date of the sale under Art. 172 of the second Schedule to the Indian Limitation Act, 1877, *Haji v. Atharaman* (15). That Article, however, as pointed out in *Sivarama v. Rama* (16), would not apply to an application under sec. 315 for refund of the purchase-money, such an application was governed by Art. 178, which enacted that an application, for which no period of limitation was provided elsewhere in the Schedule, could be made within three years from the date when the right to apply accrued; *Gurdhari v. Sital Prasad* (17). On the other hand, a regular suit, instituted by the auction-purchaser under sec. 315, would be governed by Art. 120, which provided that a suit for which no period of limitation was provided elsewhere in the Schedule could be instituted within six years from the date when the right to sue accrued;

(1) I. L. R. 5 All. 577 (F. B.) (1883)

(2) I. L. R. 13 All. 383 (1891).

(3) I. L. R. 35 All. 419 (1913).

(4) I. L. R. 36 All. 529 (1914).

(5) I. L. R. 40 All. 411 (1918).

(6) I. L. R. 22 Bom 784 (1897)

(7) 5 C. W. N. 240 (1900)

(8) 7 C. W. N. 105 (1902).

(9) I. L. R. 37 Cal. 67 (1903).

(2) I. L. R. 13 All. 383 (1891).

(3) I. L. R. 35 All. 419 (1913).

(4) I. L. R. 36 All. 529 (1914).

(10) I. L. R. 11 Mad. 269 (1887).

(11) I. L. R. 16 Mad. 361 (1892).

(12) 23 Mad. L. J. 487 (1912).

(13) I. L. R. 40 Mad. 1009 (1916).

(14) I. L. R. 17 Mad. 228 (1893).

(15) I. L. R. 7 Mad. 512 (1884).

(16) I. L. R. 8 Mad. 99 (1884).

(17) I. L. R. 11 All. 373 (1889).

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Nilā Kanta v. Imam Saheb (11) and *Sidheswari v. Gossain* (3).

Under the Code of 1908, it has been urged before us, a substantial alteration has been effected in the law. The purchase-money cannot now be got back unless the sale is set aside; further, a suit does not lie for recovery of the purchase-money, as it did under the Code of 1882. This view has been adopted in *Nannulal v. Bhagwandas* (18), *Parvathi v. Gobinda Swami* (19), *Mohideen v. Mahomed* (12), *Tirumalai Swami v. Subramanian* (13), *Subbu Ammal v. Ponnambala Reddi* (20), *Bhagabandas v. Allabaksh* (21), *Ram Sarup v. Dalpat Rai* (22), *Juraun Mahomed v. Mahomed Jathi* (23), *Manmohan v. Gopinath* (24) and *Prasanna Kumar v. Ibrahim Mirza* (25). But it must be noted that the contrary view found favour with the Bombay High Court in *Rustomji v. Vinayak* (26), where without an examination of the changes introduced by the Code of 1908, it was ruled that the purchaser might now, as before, proceed by suit. It is not necessary, for our present purpose, to pronounce a final judgment upon the question of the exact extent of the alteration made in the pre-existing law by the Code of 1908. But this much is indisputable that if the law has been changed, the alteration has been of a substantial character, namely, first, the right to re-

cover the purchase-money by a suit instituted within six years after the accrual of the right to sue has been taken away; and secondly, the purchaser is restricted to his remedy by an application under r. 91, which must be made within thirty days from the date of the sale under Art. 166 of the Schedule to the Indian Limitation Act, 1908, followed by an application under r. 93, which may be made within three years from the accrual of the right under Art. 181. This leads us on to a consideration of the second point.

For the determination of the second question, we must recall that when the execution sale took place in this case and was confirmed, the Code of 1882 was in force. The auction-purchaser, whose title accrued on the 11th December 1908, acquired on that date the right to obtain a refund of the purchase-money either by application or by suit, within the prescribed period, in one contingency, namely, if it should be discovered that the judgment-debtor had no saleable interest at all in the property sold. This right cannot be deemed to have been extinguished by the promulgation of the Code of 1908, which came into operation on the first day of January 1909. This view is supported by the decision in *Sidheswari v. Gossain* (3), *Mohideen v. Mahomed Mura* (12), *Parvathi Ammal v. Gobinda Swami Pillai* (19), *Tirumalai Swami v. Subramanian* (13) and *Alaji v. Vengu* (27), where the provisions of the Code of 1882 were applied, though the suit had been instituted after the commencement of the Code of 1908; it may be observed parenthetically that, apparently through

(3) I. L. R. 35 All. 419 (1913).

(11) I. L. R. 16 Mad. 361 (1892).

(12) 23 Mad. L. J. 487 (1912).

(13) I. L. R. 40 Mad. 1009 (1916).

(18) I. L. R. 39 All. 114 (1916).

(19) I. L. R. 39 Mad. 803 (1915).

(20) [1918] Mad. W. N. 656.

(21) [1919] P. R. 52.

(22) I. L. R. 43 All. 60 (1920).

(23) 22 O. W. N. 760 (1917).

(24) 16 All. L. J. 511 (1918).

(25) 41 Ind. Cas. 924 (1917).

(26) I. L. R. 35 Bom. 29 (1910).

(3) I. L. R. 35 All. 419 (1913).

(12) 23 Mad. L. J. 487 (1912).

(13) I. L. R. 40 Mad. 1009 (1916).

(19) I. L. R. 39 Mad. 803 (1915).

(27) [1920] Mad. W. N. 736; 12 Mad. L. W.

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an oversight, in *Muhammad v. Jaynarain* (4), the provisions of the Code of 1882 were assumed to be applicable, though the sale had been held on the 26th November 1910 in execution of a mortgage decree made in 1892. Our conclusion is clearly supported by sec. 6, cls (c) and (e) of the General Clauses Act, 1897, which provide that a repeal shall not affect any right or privilege acquired or accrued under the enactment repealed. The right of the purchaser dates from the confirmation of his purchase, and is primarily to the property, and secondarily, in the alternative and contingently, to repayment; the latter branch becomes enforceable only in consequence of the discovery that the debtor had no saleable interest and that the title which the purchaser had imagined that he had acquired had no real existence. Such an alternative and contingent right is preserved by sec. 6, cl. (c) of the General Clauses Act, 1897. Reference may in this connection be made to the lucid exposition contained in the judgment of the Judicial Committee in *Colonial Sugar Refining Co. v. Irving* (28). In that case, the creation of the High Court of Australia took away the right of appeal from the supreme Court of Queensland direct to His Majesty in Council. It was ruled that the Australian Commonwealth Judiciary Act, 1903, whereby the High Court was established, could not be interpreted as retrospective in operation, and that a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards, was not taken away. Lord Macnaghten observed as follows:—

“As regards the general principles applicable to the case, there was no contro-

versy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the Appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the Appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights, contrary to the well-known general principle that statutes are not to be held to act retrospectively, unless a clear intention to that effect is manifested.”

This opinion is not opposed to the decision of the Judicial Committee in *Abbott v. Minister of Lands* (29), where the right in controversy was neither definite nor enforceable from its origin. The principle of the decision in *Colonial Sugar Refining Co. v. Irving* (28) has been repeatedly followed; *Kalinga v. Narasingha* (30), *Salimamma v. Valli* (31), *Madurai Pillai v.*

(28) [1905] App. Cas. 369.

(29) [1896] App. Cas. 476.

(30) 21 Mad. L. J. 681 (1911).

(31) 21 Mad. L. J. 704 (1911).

(4) I. L. R. 36 Cal. 529 (1914).

(28) [1905] App. Cas. 369.

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Muthu Chetty (32), *Raja of Pittapur v. Venkata* (33) and *Alaji v. Vengu* (27). We must further bear in mind the important circumstance that if, in the class of cases now before us, the new Code were held applicable, the remedy of the purchaser, even by way of application, might be found barred by limitation at the date of the commencement of the new Code, as actually happened in *Tirumalai Swami v. Subramanian* (13). In such an event, the repealing enactment cannot be given retrospective operation, so as to impose an impossible condition on pain of forfeiture of a vested right; see *Munghoori v. Akel Mahammad* (34), *Budhu Koer v. Hafiz* (35), *Gopeswar v. Jiban Chandra* (36) and *Raja of Pittapur v. Venkata Subba Row* (33). We hold accordingly that the right of the Plaintiff to maintain the present suit must be determined with reference to the provisions of the Civil Procedure Code of 1882, when the sale took place, and his title as execution-purchaser accrued on confirmation.

The result is that this appeal is allowed and the decree of dismissal made by the District Judge set aside. A decree will be made in favour of the Plaintiff against the sixth and seventh Defendants for a sum of rupees one hundred and ninety with interest at six per cent. per annum from the 11th December 1908 to the date of realisation. The Plaintiff will have his costs in all the Courts from the sixth and seventh Defendants. The other Defend-

ants will pay their own costs in all the Courts.

P. K. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1533 OF 1920.

WALMSLEY, J.

B. B. GHOSE, J.

1922,

Heard, 17 and

18, July.

Judgment,

18, July.

RAJENDRA NARAIN
CHOODHURI, Defend-
ant No. 3, Appellant.

KHAN BAHADUR
MOULVI ABU NASOR
ABHIYA and ors., Plain-
tiffs, Respondents.

Putni Regulation (VIII of 1819, B. C.), creation of one putni over the head of a previous putni, if legal—Assignment of the right of the zemindar to receive rent from the previous putnidar, if can be treated as a putni lease as contemplated by the Regulation—Sale under the Regulation of the interest of such assignee, if legal and if it passes any interest—Sec. 14, persons entitled to question such a sale—Creation of a fresh putni co-ordinate with a putni already in existence, if gives any legal right over the previous putni—Relationship of landlord and tenant between the new and old putnidars.

A, a zamindar, granted a putni lease of the entire 16 as. of the property to D. Subsequently B having acquired an interest in one anna share of the zamindary created a putni in respect of this one anna share in favour of F, but later on sold the interest of F under Reg. VIII of 1819 and it was purchased by P, who thereafter sued D for rent of the putni to the extent of one anna share.

Held—That the idea of a putni being created over another putni is absolutely foreign to the scheme of the Putni Regulation. The putnidar is therein described as a taluqdar of the first degree and it is difficult to imagine that a tenure can be created over a taluqdar of the first degree.

RAJ COOMAR v. PROBHAAT (1) distinguished.

(1) 9 C. W. N. 656 (1904).

(13) J. L. R. 40 Mad. 1009 (1916).

(27) [1920] Mad. W. N. 736; 12 Mad. L. W. 639.

(32) I. L. R. 38 Mad. 823 (F. B.) (1914).

(33) I. L. R. 39 Mad. 645 (1915).

(34) 17 C. W. N. 889; s. c. 17 C. L. J. 316 (1913).

(35) 18 C. L. J. 274 (1913).

(36) I. L. R. 41 Cal. 1125; s. c. 19 C. L. J. 549 (Sp. B.) (1914).

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That assuming that F's interest was superior to that of D, then it could not be sold by the Collector under Reg. VIII of 1819, and P acquired no interest by such sale. The whole scheme of the Putni Regulation is that the putnidar is the only person whose interest can be sold under the Regulation and not the interest of a person in the position of F by whatever name it may be called. The mere giving of the name of putni to the interest of F would not make it a putni as contemplated by the Regulation so as to bring into play all the provisions of the law.

That there can be no objection to the assignment of the right of the zamindar to receive rent from the putnidar which he is entitled to get under the putni settlement and the assignee would be entitled to recover rent from the putnidar by virtue of the assignment

MADHUSUDAN v DEBENDRA (2) and other cases referred to

JAHARMULL v JATINDRA (4) distinguished.

But if, ignoring the interest of D, the old putnidar, the interest created in favour of F was made not superior to but co-ordinate to that of D, then F did not acquire any lawful interests as against D.

Under the provisions of sec. 14 of the Regulation, a sale under the Regulation can only be questioned by a person affected by it, but in the present case the sale not having been held with jurisdiction, it could be questioned by D who was not affected by the sale.

RAMSONA v. SONAMULLA (6) distinguished.

This was an appeal preferred on the

(2) 34 C. L. J. 76 (1908)

(4) 34 C. L. J. 79 (1921).

(6) 13 C. L. J. 404 (1911).

14th of June 1920 against the decree of Babu Hem Chandra Bose, Subordinate Judge, Second Court, Zillah Sylhet, dated the 6th of March 1920, affirming the decree of Babu Sirish Chandra Chakravarty, Munsif, 4th Court, Hafiganj, dated the 23rd of December 1918.

The facts of the case are briefly as follows —One Abdur Rahaman was the zamindar of a certain estate. He granted a putni lease of the entire 16 as property to the predecessor of the Defendants. Subsequently one Bhuban Babu acquired an interest in one anna share of the zamindary and created a putni in respect of this one anna in favour of a lady Fatima Banu. Some time after that Bhuban Babu sold the interest of Fatima under Reg. VIII of 1819 and it was purchased by the Plaintiff. The Plaintiff brought the present suit against the Defendants for rent of the putni to the extent of one anna share. Only the Defendant No. 3 contested Plaintiff's claim and denied the relationship of landlord and tenant, and contended that the Plaintiff had acquired no interest in the property by virtue of the sale and the purchase. The lower Courts gave the Plaintiff a decree for rent and the Defendant preferred the present second appeal to the High Court.

Babu Hemendra Coomar Das for the Appellant.

Babus Surendra Nath Guha and Brojendra Nath Palit for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—This appeal is by the Defendant No. 3 and it arises out of a suit for rent brought by the Plaintiff under the following circumstances. One Abdur Rahaman was the zamindar of a certain estate. He granted a putni lease of the entire 16 annas of the property to the

RAJENDRA NARAIN CHOUDHURI v. KHAN BAHADUR MOULVI ABU NASOR AHIYA.

predecessor of the Defendants sometime in 1881. Subsequently, one Bhuban Babu acquired an interest in one anna share of the zemindary in 1895. After acquiring this interest, he created a *putni* in respect of this one anna share in favour of a lady Amatul Fatima Banu. Sometime after that, Bhuban Babu sold the interest of Amatul Fatima Banu under Reg. VIII of 1819 and it was purchased by the Plaintiff. The Plaintiff has now sued the Defendants for rent of the *putni* to the extent of one anna share.

The Defendant No 3 alone contests the Plaintiff's claim and he denied the relationship of landlord and tenant and contends that the Plaintiff has acquired no interest in the property entitling him to recover rent from him as *putnidar*.

Both the Courts below have given the Plaintiff a decree for rent. The learned Subordinate Judge relies upon the case of *Raj Coomar v. Probhat Chunder* (1) for the proposition that it was open to Bhuban Babu to create a *putni* tenure over the head of the *putni* of the Defendants.

It is contended before us by the Appellant, first, that Bhuban Babu had no authority to create a second *putni* intervening between the Defendant's *putni* and the zemindar's interest and, secondly, that assuming that the *putni* lease granted in favour of Fatima Banu, the Plaintiff's predecessor, amounted to an assignment of the right of the zemindar to recover rent from the Defendants, such interest created in favour of Fatima Banu was not a *putni* lease as contemplated by Reg. VIII of 1819 and the sale held by the Collector under that Regulation of the interest of Fatima Banu at which the Plaintiff purchased was without jurisdiction and the Plaintiff has ac-

quired no interest whatever by virtue of it. The Appellant points out that there are certain other cases which deal with this question and he refers to the cases of *Madhusudan v. Debendra Nath* (2), *Nilambar v. Mir Mahasunuddin* (3) and *Jaharmull v. Jatindra Nath* (4) and *Joras Kumari v. Hanifuddin* (5).

With regard to the case of *Raj Coomar v. Probhat Chunder* (1) on which the Subordinate Judge relies, the learned Judges who decided that case speak very guardedly about the position of a person who accepts a *putni* over the head of another *putni*. They say this:—"The creation of two *putnis*, one above the other, no doubt introduces confusion into the ordinary grades and nomenclature of sub-infeudation, yet, for the purpose of this suit, all we hold is that the Plaintiff's *putni* lease constitutes an intermediate tenure between the zemindar and the Defendants and that, therefore, the Plaintiff is entitled to demand the rent which the Defendants are bound to pay to their superior landlord."

Apart from all authority, it would appear that the idea of a *putni* being created over another *putni* is absolutely foreign to the scheme of the Putni Regulation and any one familiar with the status of a *putnidar* would consider this position as anomalous. In the Putni Regulation, a *putnidar* has been given certain rights as against the zemindar. The *putnidar* is described as a *taluqdar* of the first degree and it is difficult to imagine that a tenure can be created over a *taluqdar* of the first degree. There can, however, be no objection to the assignment of the right of

(1) 9 C. W. N. 656 (1904).

(1) 9 C. W. N. 656 (1904).

(2) 34 C. L. J. 76 (1908).

(3) 34 C. L. J. 77 (1914).

(4) 34 C. L. J. 79 (1914).

(5) 14 C. W. N. 389 (1909).

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the zemindar to receive rent from the *putnidar* which he is entitled to get under the *putni* settlement; for example, he may create an *ijara* or he may execute a mortgage and make over possession to the mortgagee. In such cases, the assignee of the zemindar's interest would be entitled to recover rent from the *putnidar* by virtue of the assignment. This position seems to have been made clear in the case of *Madhusudan v. Debendra* (2), where Mr. Justice Caspersz says that the name given to the assignee of the zemindar's interest to recover rent is immaterial. The case of *Jaharmull v. Jatindra* (4) does not really touch the question. That is a case in which the Defendant claimed a *mokurari* interest and the Plaintiff sued for rent as a superior lessee under a lease creating a superior title over the *mokurari-dar* and it will be noticed that, in that case, the learned Judges are equally guarded in their language as to the creation of a *putni* interest over another *putni*. In those cases, however, the Plaintiff could recover rent on the basis of a title derived from the zemindar as assignee of the interest of the zemindar to recover rent from the *putnidar*. But in the present case, the position seems to be somewhat more complicated and one of the complications contemplated in the case of *Raj Coomer v. Probhat Chunder* (1) has taken place. The Subordinate Judge finds that Bhuban after his purchase ignored the *putni* of the Defendants and granted a new *putni* to Fatima Banu. Therefore, the interest which was created in favour of Fatima Banu by Bhuban was on the same plane as that of the Defendants. It would appear, therefore, that Fatima Banu's interest was not superior to that of the Defendants. Then, the question comes whether, assuming that it was a superior interest, this could be sold under Reg. VIII of 1819. The Collector assumed jurisdiction for the purpose of sale under that Regulation as the lease created in favour of Fatima Banu does not mention that the interest created in her favour was an interest between the *putnidar* and the zemindar. The Regulation does not contemplate the sale of such an interest under its provisions and if it had been brought to the notice of the Collector that Fatima's interest was not that of an ordinary *putnidar* but that of one above a *putnidar*, the Collector surely would not have put the provisions of the Regulation in force to effect the sale as the Revenue Authorities do not recognise such a *putni*. The question, therefore, is, whether the Plaintiff has acquired any interest by such sale. Reference has been made on behalf of the Respondent to the case of *Ramsona v. Sonamulla* (6) in support of the proposition that a sale under the Regulation can only be questioned by a person entitled to do so under sec. 14 of the Regulation and that the title of the purchaser under the Regulation sale cannot be questioned collaterally. But the learned Judges in that case observed that the sale must be held with jurisdiction and the sole question in the present case is whether the Collector had jurisdiction to sell the interest of Fatima Banu under Reg. VIII of 1819. As has been contended by the learned Vakil for the Appellant, the Defendants do not come under the category of persons who could sue under sec. 14 of the Putni Regulation for setting aside the *putni* sale. If they had brought such a suit, the obvious answer would have been that they were not affected by the alleged sale and that they had no

(1) 9 C. W. N. 656 (1904).

(2) 34 C. L. J. 76 (1908).

(4) 34 C. L. J. 79 (1921).

(6) 19 C. L. J. 404 (1911).

RAJENDRA NARAIN CHOUDHURI v. KHAN BAHADUR MOULVI ABU NASOR AHIYA.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 127 of 1921

WITH

RULE No. 397 of 1921.

SM. HAIMABATI DEVI,

Opposite Party,

Appellant,

v.

PRAN KRISHNA BANERJEE, Petitioner, and
ors., Respondents.

CHATTERJEA, J.

CHOTZNER, J.

1921,

3, August

right to dispute it nor could any person claiming under the Defendants as *durputnidar* or a *taluqdar* of the third degree known as *seputnidar* have questioned the sale. If it were held that the interest of Fatima Banu was such as could be sold under Reg. VIII of 1819, serious complications would arise in the relation between the *putnidar* and the *zemindar* on the one hand and the Subordinate tenure-holders on the other. It seems to me that the whole scheme of the Putni Regulation is that the *putnidar* is the only person whose interest can be sold under the Regulation and not the interest of a person in the position of Fatima Banu by whatever name it may be called. The mere giving of the name of *putni* to the interest of Fatima would not make it a *putni* as contemplated by the Regulation so as to bring into play all the provisions of the law. In my opinion, therefore, the sale under Reg. VIII of 1819 at which the Plaintiff purchased was without jurisdiction and the Plaintiff has acquired no title. Then again the intention of Bhuban Babu was to grant a new *putni* ignoring the *putni* of the Defendants, as found by the Subordinate Judge, and it would appear, that the interest created in favour of Fatima Banu was co-ordinate with that of the Defendants. In that view, Fatima Banu cannot be said to have acquired any interest as against the Defendants. In my opinion the Plaintiff has no right to recover rent from the Defendants and the relationship of landlord and tenant does not exist between the parties.

The appeal must, therefore, be allowed and the suit dismissed with costs in all Courts.

WALMSLEY, J.—I agree.

J. N. R.

Appeal allowed.

Indian Soldiers (Litigation) Act (IX of 1918), sec. 10—Indian soldier serving under war conditions, application by, to set aside decree in partition suit upon petition of compromise not signed by all his attorneys to whom joint power was given—Decree set aside—Civil Procedure Code (Act V of 1908), Or. 47, r. 1—Review

Where an Indian soldier serving under war conditions, before his departure from India, executed a power of attorney in favour of his four brothers, and in a partition suit a decree was passed against him during his absence upon a petition of compromise signed on his behalf by three of his brothers and the attorney of his fourth brother, and on his return, upon an application being made by him, the Court set aside the decree:

Held—That in the circumstances of the case the Court was justified in setting aside the decree either under the latter part of sec 10 of the Indian Soldiers Litigation Act or under the general powers of review contained in Or. 47, r. 1 of the Civil Procedure Code; a joint power having been given to the four brothers there was no power given to them to act separately, and the signing of the petition of compromise by the attorney of the fourth brother did not bind the applicant.

This was an appeal against the order of Babu J. K. Mukherjee, Subordinate Judge of Zillah Nadia, dated the 29th of March 1921.

SM. HAIMABATI DEVI v. PRAN KRISHNA BANERJEE.

The material facts will appear from the judgment.

Babus Rupendra Kumar Mitter and *Mirtunjoy Chatterjee* for the Appellant.

Dr. Jadu Nath Kanjilal, Babus Jyotish Chandra Sarkar and *Harendra Kumar Sarbadhikari* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of an application under sec 10 of the Indian Soldiers (Litigation) Act (IX of 1918), and also for a review of a decree said to have been passed by consent.

It appears that the Plaintiff-Appellant brought a suit against a certain lady for partition and that on her death six persons were substituted in her place, one of them being Pran Krishna Banerjee. Pran Krishna left India to serve in Mesopotamia in August 1918 and returned to India towards the end of October 1919. The suit was disposed of on the 28th of July 1919 upon a petition of compromise filed on behalf of all the Defendants. Pran Krishna before his departure from India executed an *ammukhtearnama* in favour of his four brothers, three of whom signed this petition of compromise, the name of the fourth brother having been signed by the attorney of the latter. In November 1919 the present application was made by Pran Krishna on the ground, amongst others, that the compromise had been effected without his knowledge and authority and that the suit ought not to have been proceeded with in his absence, that his interests were not properly looked after although he had left a power-of-attorney in favour of his brothers before he left India. The Court allowed the application and set aside the decree. The Plaintiff has appealed to this Court.

The order was passed not only, under

sec. 10 of Act IX of 1918 but also upon an application for review. The review having been granted an appeal would lie only on the ground specified in Or. 47, i 7 (c), no other clauses of that Rule being applicable to the case. Cl. (c) would apply if the application for review was admitted after the prescribed period and without sufficient cause. Under sec. 10 of the Indian Soldiers (Litigation) Act an application can be made within three months from the date on which a soldier ceases to serve under war conditions. It is contended by the learned Pleader for the Appellant that the war conditions ceased in November 1918 and that, therefore, the application was out of time. On the other hand, it is contended on behalf of the Respondents that the war conditions in Mesopotamia have not yet ceased. However that may be, there is a certificate by the Adjutant-General that Pran Krishna served under war conditions from 25th July 1918 to 5th November 1919. The application was made on 3rd December 1919, *i.e.*, within a short time after he ceased to serve under war conditions. Apart from the proviso (a) to sec. 10 of the Act, the Adjutant-General's certificate that Pran Krishna was serving under war conditions would be sufficient ground for admitting the application for review after the period of limitation, and we are not inclined to hold that there was any unreasonable delay in making the application after his return to his place of residence. That being so, the appeal must fail.

It is contended, however that we ought to interfere under sec. 115 of the Civil Procedure Code. The main ground on which we are asked to do so, is that the learned Subordinate Judge was in error in holding that there was no compliance with the provisions of sec. 6 of Act

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IX of 1918. Sec. 6 of that Act lays down : " If the Collector has certified under sec. 5, or if the Court has reason to believe, that an Indian soldier, who is a party to any proceeding pending before it, is unable to appear thereon, and if such soldier is not represented by any person duly authorized to appear, plead or act on his behalf, such Court shall suspend the proceeding, and shall give notice thereof in the prescribed manner to the prescribed authority." It is pointed out that as a matter of fact, the learned Subordinate Judge did write to the Collector of 24-Parganas, who at that time was the prescribed authority in this matter, and that the latter refused to certify and left it to the discretion of the Subordinate Judge to act in the way he thought proper. Reference was made on behalf of the Respondent to certain rules published in the Calcutta Gazette in December 1918 to show that the Adjutant-General was the prescribed authority under Act IX of 1918 in place of the Collector of the 24-Parganas who was the prescribed authority under the former Act of 1915. But the correspondence between the Subordinate Judge and the Collector took place before the rules were published; and although the suit did not terminate until July 1919 it does not appear that these rules were brought to the notice of the Subordinate Judge.

But, assuming that there was no default made in complying with the provisions of sec. 6, the Court under the latter part of sec. 10 of Act IX of 1918 may make an order setting aside a decree or order against a soldier if the interests of justice require such a course in any other case. In the present case, the *ammukhtearnama* executed by Pran Krishna was in favour of his four brothers. It was a joint power given to them and there was

no power given to them to act separately. Admittedly the petition of compromise was not signed by all the four. It is contended on behalf of the Appellant that the fourth brother Sarat, although he did not sign the petition, took part in the deliberations and agreed to the terms of the compromise though he was not present at the time of signing the petition of compromise. But he was at Shillong at the time and the learned Subordinate Judge finds that " there is no satisfactory evidence to show that Sarat himself agreed to all the terms embodied in Ex 5 " In these circumstances, the signing of the petition of compromise by an *ammukhtear* of Sarat would not bind Pran Krishna.

Then, again, it appears that the pleader for Pran Krishna informed the Court by a petition in August 1918 that he had no instructions from Pran Krishna and was unable to act on his behalf. Another petition was presented on behalf of the four brothers in which they stated that the interests of Pran Krishna were not being properly looked after, that they could not properly look after his interests, and prayed that the trial of the suit might be stayed until his return. We have already stated that Pran Krishna did not return to India until October 1919. Under these circumstances, we think, that the learned Judge was justified in setting aside the decree either under the latter part of sec. 10 of the Act or, under the general powers of review contained in Or. 47, r 1, C. P. C.

The last point is whether the Court was right in setting aside the decree not only against Pran Krishna but against the other Defendants also. But where the decree or order is of such a nature that it cannot be set aside as against such a soldier only it may be set aside as against all or any of the parties against whom it

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is made Here it was a suit for partition including the family dwelling-house and evidently the Court below held that, in these circumstances, the entire decree should be set aside. We are unable to hold that the Court was wrong in doing so.

The learned pleader for the Petitioner endeavoured to show that the compromise was a fair one; but we have no power to go into the evidence on the point, and it is unnecessary to consider that question as the decree must be set aside, upon the grounds stated above.

The result is that the appeal must fail and is accordingly dismissed with costs; hearing-fee one gold mohur.

The Rule is discharged. We make no order as to costs in the Rule.

Let the record be sent down as soon as the decree is signed.

H. C. S. *Appeal dismissed*
Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 518 OF 1922.

SANDERSON, C. J.	CHANDI CHARAN MITRA,
CHOTZNER, J.	Complainant,
1922,	v.
Heard, 18, July	MANINDRA CHANDRA
and 2, August.	ROY CHOWDHURY,
Judgment,	Opposite Party.
2, August.	

Criminal Procedure Code (Act V of 1898), sec. 202—Notice upon an accused person to show cause why process should not issue against him, propriety and legality of—Locus standi of accused to appear or be represented by a lawyer before the issue of process against him.

Where the Magistrate caused notice to be served upon a person named as an accused in a petition of complaint and directed him to show cause why process should not issue against him, and on such cause being shown by a pleader on his behalf, dismissed the complaint against him:

Held—That the procedure adopted was improper and was not in accordance with the provisions of the Code of Criminal Procedure as laid down in secs. 202 and 203.

An accused person has no locus standi to appear or to be represented by a lawyer before the issue of process against him.

BALAILAL v. PASUPATI (1) referred to and followed.

This was a Rule granted on the 3rd July 1922 against an order of the Sub-Deputy Magistrate of Rungpur (Mr Huq), dated the 15th May 1922, refusing to issue process against the accused under secs. 114, 379, I. P. C., an application for revision of which order was rejected by the Sessions Judge of Rungpur (Mr. S. C. Ghosh) on 9th May 1922.

The facts of the case are briefly as follows:—

On a complaint that one Mokinuddin and some others at the instigation of their zamindar Manindra Babu cut and removed some paddy, the Magistrate summoned Mokinuddin only. The complaint being ultimately dismissed on the ground that there was not sufficient evidence to identify Mokinuddin with regard to the alleged offence, the complainant desired to proceed against Manindra Babu. The Magistrate thereupon directed notice to be served upon Manindra Babu to show cause why process should not issue against him. Manindra Babu showed cause and a pleader appeared for him and filed a petition on his behalf. Thereupon the Magistrate refused to issue process against him. Against that order the complainant moved the Sessions Judge of Rungpur and then the High Court and obtained the present Rule.

Babus Rishendra Nath Sarkar and

CHANDI CHARAN MITRA *v.* MANINDRA CHANDRA ROY CHOWDHURY.

Sudhangshu Sekar Mookerjee for the Complainant.

Babus Manmatha Nath Mookerjee and *Debendra Narain Bhattacharya* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This was a Rule issued by two of my learned brothers, Mr. Justice Walmsley and Mr. Justice C. C. Ghose, and obtained by the complainant calling upon the District Magistrate and on the Opposite Party to show cause why the orders complained of should not be set aside.

The facts of this case so far as they are necessary for one to state for the purpose of my judgment are these :—

The complainant made a complaint against certain persons with regard to the cutting and removal of certain paddy and the allegation was that the paddy was removed by certain *barkandajes* with the connivance or at the instigation of Manindra Chandra Roy Chowdhury, who was called accused No. 1. It was alleged by the complainant that one of the persons who actually cut and removed the paddy was one Mokinuddin. The Magistrate who took cognizance of this case asked for a report and on receipt of the report issued a summons against Mokinuddin only. The Sub-Deputy Magistrate, to whom the case was made over for disposal, after hearing the evidence which the complainant produced, dismissed the case against Mokinuddin on the ground, as I understand, that there was not sufficient evidence to identify Mokinuddin with regard to this alleged offence. Then the complainant desired to proceed against the accused No. 1, Manindra Chandra Roy Chowdhury, who was the zemindar of the complainant. The Sub-Deputy

Magistrate then directed notice to be served upon Manindra Chandra Roy Chowdhury to show cause why process should not issue against him. Cause was shown by Manindra Chandra Roy Chowdhury. We were informed by the learned vakil, who showed cause in this Rule, that a petition was put in by Manindra Chandra Roy Chowdhury and that a learned pleader appeared for him and showed cause why process should not issue. The result was that the Sub-Deputy Magistrate came to the following conclusion, to use his own words, "I do not find any reason to issue any process against Manindra Babu." I assume that amounted to an order dismissing the complainant's complaint as against Manindra Chandra Roy Chowdhury.

Thereupon the complainant applied to the learned Sessions Judge for the purpose of setting aside the order of the Sub-Deputy Magistrate, and that application was dismissed, although the learned Sessions Judge came to the conclusion that the procedure adopted by the Sub-Deputy Magistrate, in calling upon Manindra Chandra Roy Chowdhury to show cause why he should not be proceeded against, was improper and irregular. The learned Sessions Judge came to the conclusion on the facts that there was no case against the first accused and consequently he dismissed the application.

I agree with the learned Sessions Judge that the procedure adopted in this case as between the complainant and Manindra Chandra Roy Chowdhury was improper and was not in accordance with the provisions of the Code of Criminal Procedure. My learned brother Mr. Justice Walmsley and I had to consider a case [*Balailal v. Pasupati* (1)], in which a similar point arose. I desire to draw the atten-

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tion of the Magistrate to that case. I refer to two passages in the judgment in that case which are to be found at p. 129. They are as follows:—

“The second irregularity which is relied upon was that the learned Magistrate did not confine himself to the evidence of the complainant and the report which was made by the Police Officer, but that he allowed the accused to be represented by a learned pleader and to address him and argue the points which arose in the case and to put in a detailed statement of the points and the facts upon which the defence relied.

“To my mind this procedure is quite inconsistent with the scheme of this legislation. I do not understand how the accused person ever goes before the Magistrate until the Magistrate has made up his mind to issue process. The Magistrate is directed by the statute to enquire into the case in certain specified ways, and then having investigated the matter in one or other of the specified ways, he is to decide whether process ought to issue, and then if he thinks that process ought to issue, he should direct process to issue. Then the accused person appears, and if he has got a defence, his defence is investigated as well as the case for the prosecution. That being so, it appears to me that the learned Magistrate has not acted in this case in accordance with the procedure which is laid down by the Criminal Procedure Code.”

In this case I am of opinion that the Magistrate did not act in accordance with the provisions of the Criminal Procedure Code as laid down in secs. 202 and 203 of the Criminal Procedure Code, and the learned Sessions Judge was quite right in saying that the procedure was improper and irregular. I hope that the judgment which we are delivering in this

case and the judgment, which this Court delivered in the case of *Balailal v. Pasupati* (1), will be brought to the notice of Magistrates and that they will observe in this respect the plain provisions of the Code of Criminal Procedure. If Magistrates do not comply with the provisions in the Code, the inevitable result is that Rules are applied for in this Court and they have to be granted because the Magistrates do not follow the provisions of the Code of Criminal Procedure, and much time is unnecessarily wasted.

In this case we do not intend to send the case back for further investigation, and we propose to discharge the Rule on the ground that the two lower Courts, that is, the learned Sessions Judge and the Sub-Deputy Magistrate, both came to the conclusion on the facts of the case that there was no ground for the complaint against the first accused; and having regard to additional matters, which have been brought to our notice at the hearing of this Rule, I am of opinion that it will be mere waste of time to direct this case to be re-tried. As far as it is possible to foresee, the result would be the same if we were to send this case to the Magistrate for re-hearing. Although we are not sending the case back to the lower Court, it must not be understood that we approve of the procedure which was adopted in this case.

The Rule is discharged.

CHOTZNER, J.—I agree.

J. N. R.

Rule discharged.

(1) 21 C W N. 127 1916)

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER
OF SIND.]

LORD ATKINSON.

LORD PARMOOR.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

1922,

Heard, 27 and
28, April.

Judgment,

25, May.

DINBAT, Appellant,
v.K. B. NUSSEERWANJI
RUSTOMJI and ors,
Respondents.

Will in English language by a Parsi—Construction—Construction approved in English cases, if applicable—“My heirs,” meaning of—Exclusion of widow of son from inheritance in case son died childless, whether limited to son pre-deceasing the testator—Act XXI of 1865, secs. 5 and 6.

The testator, P, a Parsi, by his Will, which was written in the English language, provided inter alia that his son J should have a right of maintenance during the life-time of his wife should she survive him, and that after her death his executors should hold the residue upon trust to pay the net income thereof to his son J for and during his life-time and after his death upon trust for his widow and children absolutely in certain shares, but that in the event of J dying without leaving issue, the executors should pay out of the residue a sum of Rs. 10,000 absolutely to J's widow, and appropriate a moiety of the balance to certain charitable objects and divide the other moiety amongst P's “heirs according to the law of intestate among Parsis, but excluding the widow of J from getting any share in such distribution.” The testator's wife pre-deceased him, and J, who survived him, died childless and leaving a widow D:

Held—That the words “excluding the widow of J from getting a share in such distribution” would apply to funds

coming to D as representative of J, in the event of J being included in the class of heirs to the testator.

That the testator did not intend to include J as one of his “heirs” as the term was used in the above clause of the Will.

That according to the natural meaning of the terms “excluding the widow of J from getting any share in such distribution,” such exclusion was not limited to the event of J dying in the life-time of the testator leaving his widow surviving him, the clause in question appearing to contemplate conditions which would arise after the death of the testator.

In a Will written in English, the word “heirs” would naturally include heirs at the date of the testator's death, subject always to a contrary intention being declared in a particular Will.

HOOD v MURRAY (1) referred to

But in determining whether in this case the natural meaning of the term had been displaced by the context, the rules of construction which have been applied in English cases would be of no assistance.

BHAGABATI BARMAMYA v. KALI GHARAN SINGH (2) and NORENDRA NATH SIRCAR v. KAMALBASINI DAS (3) referred to.

This was an appeal from a judgment and decree of the Court of the Judicial Commissioner of Sind in its High Court Jurisdiction, dated the 20th November 1918, affirming a decree of the same Court in its District Court Jurisdiction, dated the 15th March 1915

The suit was brought by the Appellant for the construction of the Will of her father-in-law Nusserwanji Pochaji.

The testator was a Parsi inhabitant of

(1) L. R. 14 A. C. 124 (1859).

(2) L. R. 88 I. A. 54; s. c. I. L. R. 38 Cal. 468; 15 O. W. N. 393 (1911).

(3) L. R. 23 I. A. 18, 26; s. c. I. L. R. 23 Cal. 563 (1896).

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Karachi and died in August 1908 leaving a son Jamsedji, (to whose estate the Appellant has obtained letters of administration) and the Respondents as his heirs, his wife having pre-deceased him.

The testator left a Will, dated 21st June 1907, of which probate has been granted to the Respondents Nos. 1 and 2.

The material clauses of this Will are set out in the judgment of the Board.

Jamsedji survived the testator and died in May 1913 intestate, leaving the Appellant his widow and no children.

On the 26th February 1914 the Appellant instituted the present suit as administratrix of Jamsedji claiming to be entitled to his share of the moiety of the residuary estate bequeathed by the testator, in the events which have happened, to his "heirs."

The suit was tried by Mr. C. Fawcett, Additional Judicial Commissioner who by his decree of the 15th March 1915 dismissed it.

The Appellant appealed to the Court of the Judicial Commissioner in its High Court Jurisdiction and her appeal was dismissed by Kincaid and Raymond, JJ., who held that the Appellant was not an heir of Pochaji and that by his Will she was precluded from taking a share on the death of Jamsedji and said:—

"The intention of the testator was that if Jamsedji died leaving a widow but no children, the widow was to get Rs. 10,000 only.

Jamsedji could not have defeated that intention by the device of making a Will in the widow's favour.

The direction of the Will would still have had to be obeyed and by that direction half Pochaji's property would have gone to his heirs, 'excluding the widow of Jamsedji from getting any share in such distribution.'

Messrs. Upjohn, K. C. and E. B. Raikes for the Appellant—The question for decision is purely one of construction of the Will, viz.—Is Jamsedji entitled to share in the residuary estate of the testator?

Cl. 8 of the Will directs that the widow is to be excluded if she comes among the testator's heirs. This was a reference to sec 5 of the Parsi Succession Act, XXI of 1865, which relates to intestate succession.

The moiety of the residue was to pass to the testator's heirs amongst whom, under sec 5, Jamsedji's widow might be included. In that event the testator directs her exclusion.

The widow is not claiming as "heir," she is claiming as legal personal representative of Jamsedji.

The fact that Jamsedji survived his father makes sec 5 of Act XXI of 1865 applicable.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Respondents—The suit has been brought by the Plaintiff not as an administratrix but as a beneficiary and heiress of Pochaji *Hutchinson v National Refuges for Homeless and Destitute Children* (4).

The persons who were to take had to be determined not at the time of the testator's death but at the time of distribution. The word "heirs" at the end of para 8 means my heirs at the death of Jamsedji.

Para 8 does not contemplate Jamsedji predeceasing the testator. The words of para. 8 "excluding Jamsedji's widow" show a clear intention to give Jamsedji's widow Rs. 10,000 and no more.

The three Judges in the lower Court have appreciated the fact that a grant of Rs 10,000 to a childless daughter-in-law is conclusive of an intention to exclude

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heir from any further share in the testator's estate.

You cannot apply ordinary English rules and customs to a people whose customs and habits are so different and whose intentions would be so dissimilar.

Bhagabati v. Kali Charan (2)

Mr. Upjohn, K C., in reply.

There is no specific law applicable to Parsis. The ordinary rule of justice, equity and good conscience applies.

Mancharsha Ashpandiarji v. Kamrunisa Begam (5)

There is no evidence of a different intention, and in its absence, the persons who were to take had to be ascertained at the time of the testator's death.

Hood v. Murray (1) and *Wharton v. Barker* (6).

There is no express exclusion of Jamsedji from the class who are to take as heirs, and, in default thereof, he is entitled to share.

There is no connection between the gift to Jamsedji's widow and the gift to Jamsedji himself.

Jamsedji having survived the testator the gift to him vested, and his widow is entitled to it not in her own right but as being entitled to Jamsedji's estate.

Reference was also made to *Bullock v. Downes* (7) and *Ross v. Ross* (8).

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD PARMOOR — The question for decision in the appeal is the construction

of the Will of N. N. Pochaji, a Parsi inhabitant of Karachi, who died there in August 1908. The testator left a Will, dated the 21st June 1907, of which probate has been granted to the Respondents Nos 1 and 2. The Appellant is the widow of a son of Pochaji, named Jamsedji, and has obtained letters of administration to his estate. She asks for a declaration that as representative of Jamsedji, she is entitled to a half of Jamsedji's four-sevenths share of the residuary estate of Pochaji under secs 3 and 6 of the Parsi Intestate Succession Act, 1865.

The action was tried by Mr. C. Fawcett, Additional Judicial Commissioner, who held that Pochaji, by the terms of his Will, intended that the Appellant should be entirely excluded from any share in the distribution, whether as heir of Jamsedji or otherwise. It is clear that the learned Judge appreciated the case put forward on behalf of the Appellant before their Lordships. He states her claim to be that, though the Will may exclude her from sharing as an heir of the testator, it does not exclude her as an heir of Jamsedji. This decision was confirmed in the Appellate Court, the Court holding that whatever might be the construction of the Will in other respects, the Appellant was excluded from claiming any share in the residuary estate of Pochaji by the clause "excluding the widow of Jamsedji from getting any share in such distribution." The general principle to be applied in the decision of the appeal is not in dispute. The rule of law is to ascertain the intention of the testator as declared by him, and apparent in the words of his Will, and to give effect to this intention so far as, and, as nearly as may be, consistent with law. In the present instance no issue of inconsistency with law arises, so

(1) L. R. 14 A. C. 124 (1889).

(2) L. R. 38 I. A. 54 at p. 64. s. c. I. L. R. 38 Cal. 468; 15 C. W. N. 393 (1911).

(5) 5 Bom. H. C. R. (A. C. J.) 109 at p. 114 (1868).

(6) 4 Kay & Johnson 422, 488; 4 Jur. (N. S.) 552 (1858).

(7) 9 H. L. C. 1 (1860).

(8) 1 Jacob & Walk 154 (1819).

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that the only question is one of construction. Pochaji, a Parsi merchant at Karachi, made his Will in the English language. It is not necessary to set out the whole Will, but cls. 7 and 8 are as follows :—

"7. From and after the death of my wife my executors shall stand possessed of the residuary trust estate upon trust to spend from and out of the same a sum of rupees two thousand for the funeral expenses of my wife and for other ceremonies for one year after her death, and shall hold the residue upon trust to pay the net income thereof to my son Jamsedji, for and during his life-time and from and after his death upon trust for the widow and children of my son Jamsedji absolutely as tenants-in-common in such proportions that each male child shall get double the share of each female child, and the widow shall get the same share as a female child. Provided, however, that if any child of my son Jamsedji shall have died in his life-time leaving a child or children him surviving, then such child or children shall take the share which his or her parent would have taken of the residuary trust estate, if such parent had survived my son Jamsedji, and if more than one the males always taking twice the share of the females

"8 In the event, however, of the said son Jamsedji dying without leaving any issue how low so ever, but only leaving a widow, then my executors shall pay out of such residuary trust funds a sum of rupees ten thousand absolutely to such widow, and in such case and also in the event of the said Jamsedji dying without leaving any widow or issue how low so ever, my executors shall stand possessed of the balance of said residuary trust estate in trust to spend rupees two thousand for the funeral expenses of the said son Jamsedji and to appropriate a moiety of the balance to such charitable objects for the purpose of promoting liberal and religious education amongst the Parsi Zoroastrians of Karachi as my executors may in their discretion think fit, and divide the other moiety amongst my heirs according to the law of

intestate among Parsis, but excluding the widow of Jamsedji from getting any share in such distribution."

In the event of her surviving him, Pochaji appointed his wife, Khurshedbai, sole executrix and trustee of his Will; but she pre-deceased her husband. At the death of Pochaji in 1905 he left surviving him his son Jamsedji, Dinbai, Jamsedji's wife, (who is the Appellant), two daughters, and four grandsons (who are Respondents). Jamsedji died childless in May 1913, leaving his widow Dinbai surviving him. It is contended on behalf of the Appellant that Jamsedji is one of the heirs named in the Will of the testator, being thereby entitled according to the law of intestate succession among Parsis to four-sevenths of the moiety of the estate, and that his rights are now vested in the Appellant as his administratrix, and that her rights as administratrix of the estate of Jamsedji are not affected by cl. 8 of the Will.

It will be convenient to consider, in the first place, the meaning of the words "excluding the widow of Jamsedji from getting any share in such distribution." In substance the Counsel for the Appellant suggested two limitations on these words. It was argued that the distribution was completed by the allocation of the residuary estate amongst the heirs of Pochaji, and that the words did not apply to any subsequent devolution of the property. Their Lordships are unable to accept this interpretation, and see no reason for dissenting from the opinion of the Appellate Court that they would apply to funds coming to the Appellant as representative of Jamsedji, in the event of Jamsedji being included in the class of heirs to the testator. It was further argued on behalf of the Appellant that these words were directed to exclude

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claims of the Appellant which might have arisen under sec. 5 of Act XXI of 1865 if Jamsedji had died in the life-time of the testator, leaving his widow surviving him. In the first place the words construed in their natural meaning contain no such limitation, and secondly, cl. 8 appears to contemplate conditions which will arise after the death of the testator, and when the provision of sec 5, Act XXI, 1865, would have ceased to be operative. In any case there is no reason why the words "excluding the widow of Jamsedji from getting any share in such distribution" should not have their natural general meaning, and to limit them to the event of Jamsedji pre-deceasing Pochaji, is to introduce a limitation not to be found in the terms of the Will. It may be true that Jamsedji might have defeated the intention of the testator by making a Will, or in some other form alienating his interest in the residuary estate. The answer to this objection is that Jamsedji did not, in fact, either make a Will or alienate his interest, and the testator may well have thought that this was an improbable contingency, and that he had sufficiently safe-guarded the interests of the other members of his family.

It is pointed out in the judgment of the Appellate Court that on this construction of the words "excluding the widow of Jamsedji from getting any share in such distribution," it is not necessary to decide whether the words "my heirs" in para. 8 of the Will include Jamsedji among the class. This issue, however, was argued at some length before their Lordships. The Will was written in English, and there is no doubt that in a Will so written the word "heirs" would naturally include heirs as at the date of the testator's death, subject always to a contrary intention being declared in a particular Will.

It is hardly necessary to re-state so clear a principle, but reference may be made to the case of *Hood v. Murray* (1). This was a Scotch Will, and Lord Watson states the rule as follows :—

"The rule, as I understand it, is simply this, that in cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion, the rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context."

Accepting this principle in its fullest sense, the question in the present appeal is whether the natural primary meaning has been displaced by the context. Various cases were referred to in the argument which depend on rules of construction, adopted in the construction of Wills made in this country, and applicable to documents framed with the knowledge of the rules of construction which are afterwards applied to them. These cases are not of assistance in the construction of a Parsi Will made at Karachi. In *Bhagabati Barmanya v. Kali Charan Singh* (2) Lord Macnaghten, delivering the judgment, says :—

"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression preva-

(1) L. R. 14 A. C. 124 (1889).

(2) L. R. 38 I. A. 124 s. c. I. L. R. 38 Cal. 468; 15 C. W. N. 393 (1911).

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lent among those to whose language they are applied English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point of view, think differently and speak differently from Englishmen, and who have never heard of the rules in question."

A similar opinion is expressed in *Norendra Nath Sutar v. Kamalbasin Das* (3).

"To construe one Will by reference to expressions of more or less doubtful import to be found in other Wills is, for the most part, an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on Wills which cumber our English Law Reports in order to understand and interpret Wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd."

It is therefore not necessary to examine the present Will in the light of rules of construction which have been applied in English decisions. On the construction of the Will of Pochaji their Lordships agree with the Appellate Court. In their opinion the testator did not intend that his son Jamsedji should take any interest under his Will as an heir. The testator intended that the only interest in his property which Jamsedji should take or have

was a right of maintenance under para. 6 during the life-time of the testator's wife if she survived the testator, and a life interest under para. 7 in the testator's property undisposed of under the earlier paragraphs of the Will, and that he did not intend to include Jamsedji as one of his "heirs" as that term is used in para. 8. If the contention of the Appellant could be maintained, she would be entitled not only to Rs. 10,000 specifically bequeathed to her for her absolute use, but also to one-half of the four-sevenths of the moiety of the testator's residuary trust estate mentioned in the fifth paragraph of the Will.

In their Lordships' opinion this would not be in accord with the intention of the testator as declared in the terms of his Will.

Their Lordships will humbly advise His Majesty that the appeal shall be dismissed with costs to be paid out of the estate.

Solicitors: *Messrs. Watkins and Hunter* for the Appellant.

Solicitors: *Messrs. Woutner & Sons* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

PRIVY COUNCIL APPLICATIONS

Nos. 9 to 26 of 1922

SANDERSON, O. J.	BHUPENDRA NARAYAN
B. B. GHOSE, J.	SINGH, Appellant.
1922,	v.
23, June.	NURPUT SINGH,
	Respondent.

Civil Procedure Code (Act V of 1908), sec. 110, pecuniary test, if satisfied when the decree indirectly affects title to property of the statutory value but which was not the subject-matter of the suit or the appeal—Sec. 109 (a), question of wide public importance, when can be a ground for granting certificate under.

(3) L. R. 23 I. A. 18, 20 s. c. I. L. R. 23 Cal. 563 (1896).

BHUPENDRA NARAYAN SINGH v. NURPUT SINGH.

In certain applications for leave to appeal to the Privy Council, the subject-matter of the appeals, when taken together did not amount to ten thousand rupees, but the Appellants urged that the decree would indirectly affect a large number of other resumed lands which were not the subject-matter of the present suit but whose value would be over ten thousand rupees, and further that the decision involved a question of wide public importance affecting many zamindars in Bengal benefiting by the resumption of chakran lands.

Held—That on the present applications it was not possible to hold that the decree involved directly or indirectly a claim or question respecting property of the statutory value, because in order to do that, it would be necessary to investigate the terms and conditions of leases in respect of lands which were not included in these suits. Further, before it could be held that the decision involved a question of wide public importance, there should be some evidence that the rights of zamindars and putnidars in Bengal in respect of similar lands are, generally speaking, dependent upon the same facts as appeared in the present suits and that the terms of the leases regulating such rights were similar to the terms of the pattas in these suits.

These were applications preferred on the 21st June 1922 against the judgment of Greaves and B. B. Ghose, JJ., dated the 27th February 1922 in S. A. Nos. 2586 to 2603 of 1919,* which had been preferred against the judgment of Mr. P. C. De, District Judge of Birbhum, dated the 13th September 1919, affirming the judgment of Babu Ram Dulal Deb, Munsif, 1st Court at Rampurhat, dated the 30th September 1910.

* Reported in 26 C. W. N. 943

The facts material to this report are as follows :—The Appellant, Raja Bhupendra Narain Singh Bahadur made certain applications for a certificate that the cases referred to therein were fit cases for appeal to the Judicial Committee of the Privy Council. The subject-matter of the appeals, when taken together, was not however of sufficient value for the grant of the certificate under the provisions of sec 110, C. P. Code. But it was urged that the decision of the High Court would affect indirectly a large number of resumed *choukidari chakran* lands within the Appellant's estate and that he would lose at least an annual income of about Rs. 5,000 if the decision of the High Court was permitted to stand, and that the decrees involved question or claim to or respecting property of over Rs. 10,000 in value. It was further urged that the decision involved not merely a question of individual or private importance but a question of wide public importance and would affect the property and income of many zamindars in Bengal, benefited or benefiting by the resumption of *choukidari chakran* lands by the Collector under Act VI of 1870. It was therefore prayed that if the appeals did not satisfy the statutory value, they might be certified as otherwise fit cases for leave to appeal to His Majesty in Council under sec 109, cl. (c), C. P. Code.

Babus Mohendra Nath Roy and Pramatha Nath Bandopadhyaya for the Petitioner.

Mr. B. Chuckerbutty and Babu Brojo Lal Chuckerbutty for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an application for a certificate that these are fit cases for appeal to the Judicial Committee

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of the Privy Council; they are numbered Nos. 9 to 26 of 1922. The Appellant is Raja Bhupendra Narain Singh Bahadur and the Respondent is Nurput Singh. They were second appeals, that is to say, appeals to this Court from the decision of the lower Appellate Court and were disposed of by my learned brothers Greaves and Ghose, JJ, in one judgment.

It is admitted by the learned *vakil* for the Appellant that the subject-matter of the appeals, when taken together, will not be of sufficient value to justify us in granting a certificate having regard to the terms of the first clause of sec. 110 of the Code of Civil Procedure.

The grounds, upon which the application was argued, are the 8th and 9th of the petition which are as follows:—

“8. For that your Petitioner begs to submit further that the decision of this Hon'ble Court will affect indirectly a large number of resumed *choukidari chakran* lands within his estate and your Petitioner will lose at least an annual income of about Rs. 5,000 (details of which will be submitted later on) if the decision of this Hon'ble Court is permitted to stand and that the several suits aforesaid may be consolidated and the decrees involve question or claim to or respecting property of over Rs. 10,000 in amount of value.

“9 That your Petitioner further craves leave to state that the decision involves not merely a question of individual or private importance but a question of wide public importance and will affect the property and income of many zamindars in Bengal, benefited or benefiting by the resumption of *choukidari chakran* lands by the Collector under Act VI of 1870 and as such, even if the appeals do not satisfy the statutory value, may be certified 'as otherwise a fit case,' for leave to appeal

to His Majesty in Council under sec. 109, cl. (c) of the Code of Civil Procedure.”

The facts which are necessary for me to state are as follows:—“The suits were brought to recover *khas* possession of certain resumed *choukidari chakran* lands together with mesne profits. The Plaintiff claimed these lands as included in the *putni taluk* granted to his predecessors-in-interest by the predecessors-in-interest of the 1st Defendant, who is the zamindar, by a *putni patta* of the year 1853, the Bengali date being the 29th Kartik 1260. It is not disputed that the lands in question were included in the *putni patta*, but it is said that these lands were not taken into account in settling the rent payable under the *patta* and that consequently the zamindar, the Respondent, is entitled to a share of the rent derived from settling the resumed lands with tenants. No dispute arises with regard to the payment of the Government revenue which has been assessed on the resumed lands and which, under the terms of the *putni patta*, is payable by the Appellant. It is conceded that, from the time of the creation of the *putni* until the lands were resumed, the *choukidars* rendered private personal service to the *putnidar*, and not to the zamindar.”

It was argued on behalf of the zamindar that the lands, which had been resumed, that is to say, the *choukidari chakran* lands, were not taken into account when the *jama* was fixed. On the other hand, it was contended on behalf of the Plaintiff that the lands were comprised in the *putni patta* and consequently it must follow that the rents and profits of these lands belonged to the *putnidar*, and further that the rents and profits must be taken as the equivalent of the personal service, which had been

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rendered to the *putnidar* by the choukidars before the resumption.

As to the first ground, it is suggested that the decision of this Court indirectly affects a number of other resumed lands within the estate of the Appellant and that the Appellant will lose at least an annual income of rupees five thousand, the details of which were to be given later on, and that if that amount is taken into consideration, there would be a question relating to property of the value of rupees ten thousand. Before this Court could come to a decision on that question, it would be necessary to investigate whether the terms of the various leases between the Appellant on the one hand and the *putnidars* on the other in respect of the lands, which are not included in these suits, are the same as the terms of the *patta* in these cases. Further it would be necessary to ascertain the facts and conditions existing at the time those leases were granted and to inquire whether in each case the services of the choukidars were rendered to the *putnidars* or to the zamindar. It is only necessary to state these facts to see that on this application it is not possible for this Court to hold that the decree involves directly or indirectly a claim or question to or respecting property of the amount or value of Rs. 10,000. Consequently in my judgment the first ground, on which the applicant relied, must fail.

It was upon the second ground that the learned vakil for the applicant chiefly relied, namely, that the question involved in the decision of this Court is not only a question of private importance but is a question of wide public importance. It was alleged as a ground in the petition that it would affect the property and income of many zamindars in Bengal. In order to establish this allegation the

learned vakil drew our attention to 6 or 7 reported cases. These cases go to show that there have been frequent disputes between the *putnidars* on the one hand and the zamindars on the other relating to *choukidari chakran* lands which have been resumed. The fact, however, that there have been in the past many disputes in relation to such lands between the *putnidars* and zamindars, does not prove that the decision of this Court in these suits involves a question of wide public importance. On the contrary, when the reported cases are examined, it appears that the facts relating to the respective cases, vary considerably, and the cases certainly do not show that the facts proved in these suits are such as would cover the arrangements between *putnidars* and zamindars in Bengal generally. Before the Court could come to the conclusion that this decision involves a question of wide public importance, there should be some evidence that the rights of the zamindars and the *putnidars* in Bengal in respect of such lands are, generally speaking, dependent upon the same facts as appear in these suits and that the terms of the leases regulating such rights are similar to the terms of the *patas* in these suits. There is no evidence before the Court which would justify us in arriving at that conclusion.

It has been pointed out in some of the cases, to which we have been referred, that each case must depend upon its own facts; as for instance, in the case of *Moharajadhiraj Sir Bejoy Chand Mahatab Bahadur v. Krishna Chandra Mukerji* (1), it was stated that the question, whether the Plaintiffs, the *putnidars*, were entitled to have the lands on payment of the assessment payable to the choukidari fund or were liable to pay some additional rent on

WALMSLEY, J.—This appeal is prefer-

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red by Defendant No. 4. The Plaintiff's case is that the predecessors of Defendants Nos. 1 to 3 executed a mortgage in his favour in 1310, B. S. He then brought a suit on the mortgage against the representatives of the mortgagors, and against Defendant No. 4 as a purchaser in 1898 and in execution of his decree caused the property to be sold in 1909, when it was bought by Parameswar Ghose, father of Defendants Nos. 5, 7 and servant of the Plaintiff, as *benamdar* for the Plaintiff. It is beyond doubt that there was such a mortgage, that the Plaintiff obtained a decree and that the property was bought by Parameswar.

The Plaintiff went on to say that the father of Defendants Nos. 1-3 then entered into an agreement with the Plaintiff, by which the Defendants were to pay off the Plaintiff's dues by the end of 1322 B. S., meanwhile remaining in possession, and in default the Plaintiff was to take *khas* possession after the end of 1322 B. S. The Defendants Nos. 1-3 and Defendant No. 4 did as a matter of fact remain in possession and according to the Plaintiff it was by virtue of this arrangement. The Plaintiff further alleged that only part of the total sum was paid, so he claimed *khas* possession of the land, with mesne profits, or, in the alternative, a decree for the unpaid balance.

The first Court gave the Plaintiff a decree for *khas* possession, and also for mesne profits.

The Defendant No. 4 preferred an appeal which was unsuccessful, and in consequence he has preferred this second appeal.

Two points are raised on his behalf. The first is that the suit is barred by sec. 66 of the Civil Procedure Code. Both the lower Courts rejected this argument and I think rightly, for the reason that Para-

meswar and his successors have not at any stage claimed title under the sale-certificate.

The second argument is based on the provisions of Or. 21, r. 72. The Plaintiff as decree-holder did not obtain the Court's permission to bid at the sale; instead of seeking permission, he caused his servant to buy the mortgaged property *benami*. The effect of this purchase without permission was considered by both the Courts below, and they took the view that the purchase was voidable but not void, and that Defendant No. 4 could no longer avail himself of the remedy provided by cl. (3) of the rule.

In the grounds of appeal to this Court, the third and fourth deal with this matter, and we are asked now to hold that the lower Courts should have treated the written statement as an application to set aside the sale. If we were to accept that argument, we should have to remand the case, for there are at least two points which would require investigation, namely, whether the Defendant could show that his application was not barred by limitation, and whether in the circumstances the case was one in which the Court should exercise its discretionary power of setting aside the sale under cl. (3). I mention these two points merely to show the force of the Respondent's answer that the Defendant is setting up an entirely new case. I think that answer is correct, and that on that account the Appellant's contention must be overruled. The result is that the appeal must be dismissed with costs.

SUHWARDY, J.—I am of the same opinion. I think the Defendant being in possession of the property in suit would be entitled to urge by way of defence that the Plaintiff's purchase without permission of the Court was not enforceable as

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against him, even if it were voidable at the option of the Defendant only. But it depends greatly on the discretion of the Court, and in exercising such discretion, according to authorities, the Court will take into account prejudice to the Defendant, *e.g.*, inadequacy of price, etc. So it is not the absolute right of the Defendant to ask the Court to set aside such a sale, which, I take, is affected with a mere irregularity. In this case the Defendant treated the sale as absolutely void and did not ask the Court to exercise its discretion in this matter or place materials before it for the right exercise of such discretion. Even if I were asked to exercise such discretion in this case, I would, in the absence of any material, decide in favour of the Plaintiff. I agree that at this stage of the litigation the Defendant should not be allowed to make a new case.

As to see 66, Code of Civil Procedure, the heirs of Parameswar do not appear in this case and deny Plaintiff's *benami* purchase. That section only applies when the Plaintiff attempts to enforce his secret title as against the certificated purchaser. This contention therefore fails.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 87 OF 1921.

MOOKERJEE, J.	MAHAMAD MAZAHARAL
RANKIN, J.	AHAD, Defendant,
1922,	Appellant,
Heard,	<i>v.</i>
24, August.	MAHAMAD AZIMUDDIN
Judgment,	BHUIAN, Plaintiff,
14, November.	Respondent.

Suit for dower debt by wife's heirs—Limitation—Limitation Act (IX of 1908), Sec. I, Arts. 103, 104, 116—Registered instrument.

Art. 116 applies to suits for recovery of dower debt when there is a registered

dower deed. Arts. 103 and 104 would apply when there is no such registered instrument.

TRICOMDAS *v.* GOPINATH (10) referred to.

ASIATULLA *v.* DANISH MAHAMMAD (79) approved

This was an appeal preferred against the judgment of Mr Banomali Sen, Additional District Judge, Dacca, dated the 5th October 1920, affirming that of Babu Narendra Nath Ghosh, Sub-Judge, Dacca, dated the 30th March 1917.

The Plaintiff-Respondent gave his daughter in marriage to the Defendant who executed a registered dower deed on the 15th September 1908 in favour of his wife. Dower was fixed at Rs. 5,000, one moiety of which was prompt and the other deferred. The lady died in 1909. In 1915, the Plaintiff, as one of the heirs of his deceased daughter instituted the present suit against his son-in-law for recovery of his one-third share of the dower debt. The Defendant urged the dismissal of the suit on the ground of limitation. The trial Court held that the suit was governed by six years' rule of limitation and decreed the suit and this decision was upheld on appeal.

The Appellant thereupon preferred this second appeal to the High Court.

Babu Biraj Mohan Mazumdar (with him Babu Chandra Sekhar Sen) contended on behalf of the Appellant.—The suit would be governed by Arts. 103 and 104. *Mahomed Faiz v. Oomdah Begum* (69). Art. 116 which provides a general rule applicable to contracts in writing registered, cannot be applied when there

(10) L. R. 44 I. A. 55; s. c. I. L. R. 44 Cal. 759; 21 C. W. N. 577 (1916).

(69) 8 W. R. 111 (1893).

(79) 35 C. L. J. 379 (1922).

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are special articles, viz., Arts. 103 and 104 which cover the present case. When there are two articles in the Schedule to the Limitation Act which may possibly govern a case, the one more general and the other more special, the more specific article should be regarded as the one governing the case. See *Issur Chander v. Jibun Kumari* (1), *Sharoop Das v. Joggeswar Roy* (2), *Nateson v. Soundararaja* (3), *Runchordas v. Parvati Bai* (4) and *Narmadabai v. Bhavani Shanker* (5).

Babu Rajendra Chandra Guha for the Respondent—The true scope of Art. 116 has been discussed in the decision of the Judicial Committee in *Tricomdas v. Gopinath* (10), which confirmed the long line of cases on the subject and it is too late for this Court to depart from the same. Art. 116 has been held applicable by reason of the existence of written and registered instruments in cases which are *prima facie* governed by special provisions contained in the Schedules to the Limitation Act.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The facts material for the determination of the question of limitation raised in this appeal are no longer in dispute and may be briefly recited. The Plaintiff-Respondent, a Mahomedan gentleman, gave his daughter in marriage to the Defendant-Appellant. At the time of the marriage, the Defend-

ant executed and registered in favour of his wife a dower deed, on the 15th September 1908. The deed fixed the dower at Rs. 5,000; one half was prompt and payable on demand; the other half was deferred. The lady died on the 18th September 1909. On the 10th September 1915, the Plaintiff, as one of the heirs at law of his daughter, instituted the present suit against the son-in-law for recovery of his one-third share of the dower debt. The Defendant pleaded, amongst other defences, the bar of limitation. The Court of first instance held that the suit was governed not by the three years', but by the six years' rule of limitation and decreed the claim. On appeal, this decision has been affirmed by the District Judge. On the present appeal, that decree has been assailed on the ground that the suit is barred by the three years' rule of limitation. The Respondent has urged that the six years' rule is applicable, as the dower was fixed by a registered document.

Art. 103 of the Schedule to the Indian Limitation Act, 1908, provides as follows :—

“103 A suit by a Mahomedan for exigible dower shall be instituted within three years from the date when the dower is demanded and refused, or (where during the continuance of the marriage, no such demand has been made) when the marriage is dissolved by death or divorce.”

Art. 104 provides as follows :—

“104. A suit by a Mahomedan for deferred dower shall be instituted within three years from the date when the marriage is dissolved by death or divorce.”

In the case before us, as there was no demand and refusal during the continuance of the marriage, time ran, both as regards the prompt and the deferred

(1) I. L. R. 16 Cal. 25 (1898).

(2) I. L. R. 26 Cal. 564; s. c. 3 C. W. N. 464 (F. B.) (1899).

(3) I. L. R. 21 Mad. 141 (1897).

(4) I. L. R. 23 Bom. 725; s. c. 3 C. W. N. 621 (F. C.) (1899).

(5) I. L. R. 26 Bom. 430 (1902).

(10) L. R. 44 I. A. 65; s. c. I. L. R. 44 Cal. 759; 21 C. W. N. 577 (1916).

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dower, from the date when the marriage was dissolved by death. Consequently the suit should have been, *prima facie*, instituted within three years from the 18th September 1909 when the lady died. But the Plaintiff has urged—and his contention has been accepted by the Courts below—that as the dower deed was registered, he is entitled to the benefit of Art 116

Art 116 provides as follows:—

“116. A suit for compensation for the breach of a contract, in writing registered, shall be instituted within six years from the date when the period of limitation would begin to run against a suit brought on a similar contract not registered.”

This plainly refers to Art 115 which provides as follows:—

“115. A suit for compensation for the breach of any contract, express or implied, not in writing, registered and not herein especially provided for, shall be instituted within three years from the date when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) where it ceases.”

The Appellant has contended that even if we assume that the present suit for recovery of the dower debt may be treated as a suit for compensation for the breach of a contract in writing registered within the meaning of Art. 116, that article, which provides a general rule applicable to contracts in writing registered, cannot be applied when there are special articles, namely, Arts. 103 and 104, which precisely cover the case. The Appellant has, in fact, invoked the well-established principle that if there are two articles in the Schedule to the Limitation Act, which may possibly govern a case, the one more

general and the other more special, the more particular and specific article should be regarded as the one governing the case. Illustrations of the application of this doctrine may be found in the cases of *Issur Chander v. Jibun Kumari* (1), *Sharoop Das v. Joggeswar Rcy* (2), *Nateson v. Soundararaja* (3), *Runchordas v. Parvati Bai* (4) and *Narmadabai v. Bhavani Shanker* (5). The principle, *generalia specialibus non derogant, specialia derogant generalibus*, has been recognised elsewhere, and illustrations of the doctrine that general provisions do not derogate from special provisions, but that the latter do derogate from the former, are by no means rare, see *Hunter v. Knockalds* (6), *Churchill v. Crease* (7), *DeWinton v. Greson Corporation* (8) and *Preddy v. Solly* (9). The Respondent has not denied that this argument carries considerable weight; but he has urged that it is too late for this Court to depart from what has been recognised in a long line of cases as to the true scope of Art 116, including the decision of the Judicial Committee in *Tricomdas v. Gopinath* (10). As will presently appear from an examination of numerous judicial decisions, Art 116 has been held applicable, by reason of existence of a written and registered contract, in classes of cases which are *prima facie* governed by special

(1) I. L. R. 16 Cal. 25 (1888).

(2) I. L. R. 26 Cal. 564; s. c. 3 C. W. N. 484 (F. B.) (1899).

(3) I. L. R. 21 Mad. 141 (1897).

(4) I. L. R. 23 Bom. 725. s. c. 3 C. W. N. 621 (P. C.) (1899).

(5) I. L. R. 26 Bom. 480 (1902).

(6) 1 Mac. & G. 640; 84 R. R. 217 (1850).

(7) 5 Bing. 180 (1828).

(8) 26 Beav. 538, 548 (1859).

(9) 26 Beav. 606, 610 (1859).

(10) L. R. 44 I. A. 85; s. c. I. L. R. 44 Cal. 759; 21 C. W. N. 577 (1916).

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provisions' contained in the Schedule to the Indian Limitation Act.

Art. 57 provides as follows.—

“57. A suit for money payable for money lent shall be instituted within three years from the date when the loan is made.” It has been repeatedly held that a suit on registered bond for recovery of a specific sum of money is governed not by Art 57, but by Art 116, see *Navakumar v. Siru Mullik* (11), *Kalut Ram v. Lala Dhanukdhar Sahai* (12), *Shamacharan v. Debya Sing* (13), *Keri v. Ruxton* (14), *Nistarini v. Chandni Das* (15), *Ram Narayan v. Ohndranath* (16), *Bonwang Raja v. Ghellapoo Choudhry* (17), *Hussain Ali v. Hafiz Ali* (18), *Khunni v. Nasruddin Ahmed* (19), *Sushul Chunder v. Gauri Shankar* (20), *Ganesh Krishna v. Madhava Rao* (21), *Magaluni v. Narayana* (22) and *Viswanath v. S. I. Bank* (23)

Art 64 provides as follows.—

“64 A suit for money payable to the Plaintiff for money found to be due to the Defendant to the Plaintiff on accounts stated between them shall be instituted within three years from the date when the accounts are stated in writing signed by the Defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement

in writing signed as aforesaid, made payable at a future time, and then when that time arrives”

• Art 106 provides as follows —

“106 A suit for an account and a share of the profits of a dissolved partnership shall be instituted within three years from the date of the dissolution.”

With reference to these articles, it was ruled in *Ranga Reddi v. China Reddi* (24), that where a registered partnership contract binds the parties to pay the loss according to their respective shares, a suit to recover the Defendants' share of the loss, on a settlement of accounts between the Plaintiffs and the Defendants, is governed, neither by Art 61, nor by Art 106, but by Art 116. It is to be noted, however, that in *Unnar v. Pon-naya* (25), the Court expressed its unwillingness to hold that Art 116 could be stretched to cover every case in which the suit might in its origin be referred to a contractual relationship expressed in a registered agreement.

Art 74 provides as follows —

“74 A suit on a promissory note or bond payable by instalments shall be instituted within three years from the date of the expiration of the first term of payment as to the part then payable; and for the other parts the expiration of the respective terms of payment” With reference to this provision, it has been ruled that if the instalment bond has been registered, the suit is governed, not by Art 74, but by Art 116; *Dindoyal v. Gopal Saran* (26) and *Rup Narayan v. Gopinath* (27)

Art. 89 provides as follows —

“89 A suit by a principal against his

(11) 1 I. L. R. 6 Cal. 94 (1880)

(12) 11 C. L. R. 361 (1882)

(13) 1 I. L. R. 21 Cal. 82 (1894)

(14) 4 C. L. J. 50 (1903)

(15) 12 C. L. J. 423 (1910)

(16) 15 C. L. J. 17 (1911)

(17) 20 C. W. N. 408 s. c. 22 C. L. J. 311 (1915)

(18) 1 I. L. R. 3 All. 600 (F. B.) 1881

(19) 1 I. L. R. 4 All. 255 (1881)

(20) 14 All. L. J. 97 (1916)

(21) 1 I. L. R. 6 Bom. 75 (1881)

(22) 1 I. L. R. 8 Mad. 359 (1884)

(23) [1917] Mad. W. N. 879; 6 Mad. L. W. 712.

(24) 1 I. L. R. 11 Mad. 165 (1891)

(25) 1 I. L. R. 22 Mad. 14 (1893)

(26) 1 I. L. R. 18 Cal. 600 (1891)

(27) 11 C. W. N. 408 (1906)

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agent for moveable property received by the latter and not accounted for, shall be instituted within three years from the date when the account is, during the continuance of the agency, demanded and refused, or (where no such demand is made) when the agency terminates." With reference to this article, it was ruled in *Mati Lal Bose v. Amin Chand* (28) that a suit for an account by a principal against his agent on the basis of a registered agreement, is governed, not by Art. 89 but by Art. 116, the cause of action arising from the date when the contract to render accounts is broken. This view is identical with that taken in *Harendra Kishore v. Administrator-General* (29) and was followed in *Easin Sarkar v. Baroda Kishore* (30), *Jogesh Chandra v. Binode Lal* (31) and *Bhagirath v. Premchand* (32). The current of judicial opinion, however, upon this question has been by no means uniform, see *Debendranath v. Fsha Hug* (33), *Shib Chandra v. Chandra Narain* (34), *Madhusudan v. Rakhal Chandra* (35), *Nabin v. Chandra Madhab* (36), modifying *Chandra Madhab v. Nabin Chandra*, (37), *Bhabatarini v. Sheik Bahadur* (38), *Jogendra Nath v. Deb Nath* (39), *Rafizuddin v. Jadunath* (40), *Madhab Chandra v. Debendra Nath*

(28) 1 O. L. J. 211 (1902)

(29) I. L. R. 12 Cal. 357 (1885)

(30) 11 C. L. J. 43 (1909).

(31) 14 C. W. N. 123 (1909).

(32) 17 C. L. J. 201 (1912).

(33) 14 C. W. N. 121 (1908)

(34) I. L. R. 32 Cal. 719 s. c. 1 O. L. J. 232 (1905).

(35) I. L. R. 43 Cal. 248 s. c. 19 C. W. N. 1070; 22 C. L. J. 552 (1915)

(36) I. L. R. 44 Cal. 1; s. c. 21 C. W. N. 97 P. C. (1916).

(37) I. L. R. 40 Cal. 108 (1912).

(38) 30 C. L. J. 98 (1919).

(39) 8 C. W. N. 118 (1903).

(40) I. L. R. 35 Cal. 588; s. c. 12 C. W. N. 820; 7 C. L. J. 279 (1908).

(41), *Jhapajennessa v. Rash Bihari* (42) and *Pramram v. Jagadishnath* (43). These cases, however, struggle, in most instances, to escape the application of Art. 116, not so much because the article should not be applied to cases comprised within the scope of special article but rather because a suit by a principal against an agent for the relief mentioned in Art. 89 cannot properly be regarded as a suit for compensation for the breach of a contract in writing registered. This, however, does not apply to the decision in *Pramram v. Jagadishnath* (43) where the two-fold contention was accepted that (a) Art. 89 excludes the operation of Art. 115, which is applicable only to cases not specially provided for, and (b) Art. 116 must be read along with Art. 115 and be deemed restricted in operation in the same manner. This view, as will presently appear, is opposed to that indicated in *Vythilinga Pillai v. Thetchana Mutti Pillai* (41) and *Dindoyal v. Gopal Saran* (26) and adopted by the Judicial Committee in *Tricomdas v. Copinath* (10). It will be observed that the expression "not herein specially provided for" which finds a place in the first column of Art. 115 does not re-appear in the first column of Art. 116. But this plainly does not conclude the matter, and the expression "similar contract not registered" which finds a place in the third column of Art. 116 does require interpretation. Does it refer only to the first column of Art. 116 and consequently

(10) I. L. R. 44 I. A. 65 s. c. I. L. R. 44 Cal. 759; 21 C. W. N. 577 (1916).

(26) I. L. R. 18 Cal. 506 (1891).

(41) 1 C. L. J. 147 (1901)

(42) 16 C. W. N. 1049; s. c. 16 C. L. J. 288 (1912).

(43) I. L. R. 49 Cal. 250; s. c. 28 C. W. N. 81; 25 C. L. J. 111 (1921).

(44) I. L. R. 3 Mad. 76 (1880).

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mean "a contract in writing not registered"; or, does it refer to the first column of Art 115 and signify "a contract not in writing registered and not herein specially provided for?" The first alternative was adopted in *Vythilinga v. Thetchana* (44) and *Dindoyal v. Gopal Saran* (26) and apparently found favour with the Judicial Committee in *Tricomdas v. Gopinath* (10). The second alternative was adopted in *Pramram v. Jagadishnath* (43). The conflict, consequently, is between two opposing views; one maintains that Art. 116, like Art 115, applies where there is no special provision, the other maintains that Art 116 supersedes all provisions including those covered by special articles unaffected by Art 115. In this connection, reference may also be made to the decision in *Kandaswami Pillai v. Avayambal* (15) where it was ruled that a suit by an agent to recover money spent by him on account of his principal, is governed by Art 61 and not by Art 116, even though there was a registered contract of agency; the obligation was deemed as no part of the contract in writing registered, and the earlier decisions in *Krishnan v. Kannan* (46) and *Seshachala v. Varada* (47) were distinguished though they were clear authorities for the proposition that obligations not expressed in writing, but imported by the law in the case of sales, might be treated as in writing, for purposes of limitation, when the sale was made by a written instrument.

(10) L. R. 44 I. A. 65 s. c. I. L. R. 44 Cal 759; 21 C. W. N 577 (1916)

(26) I. L. R. 18 Cal. 506 (1891)

(43) I. L. R. 49 Cal. 250 s. c. 26 C. W. N. 61; 35 C. L. J. 111 (1921).

(44) I. L. R. 3 Mad. 76 (1880).

(45) I. L. R. 34 Mad. 167 (1910).

(46) I. L. R. 21 Mad. 8 (1898).

(47) I. L. R. 25 Mad. 55 (1902).

Art. 110 provides as follows:—

"110. A suit for arrears of rent shall be instituted within three years from the date when the arrears become due." It has been ruled in a long series of decisions that a suit for arrears of rent, based upon a registered lease, is governed, not by Art. 110 but by Art 116; *Vythilinga v. Thetchana Murti* (44), *Umesh Chandra v. Adarmani* (18), *Iswari Prasad v. Crowdly* (49), *Ranecgunj Coal Association v. Jadu Nath* (50), *Umrao Bibi v. Mahomet Rojabi* (51), *Ammalayani v. Vaguram* (52), *Chengiah v. Raja of Kalahasti* (53), *Sundaramier v. Muthu Ganapatha* (54), *Kannan v. Muthalpur* (55), *Mahomed Hanuf v. Moorat Mahton* (56), *Mackenzie v. Rameswar Singh* (57) and *Lalehand v. Narain* (58). The contrary view, adopted in *Ramswami v. Sokkanatha* (59) and *Ramnarain v. Kamta Sing* (60), has now been expressly disapproved of by the Judicial Committee in *Tricomdas v. Gopinath* (10). Suits for rent under the Bengal Tenancy Act have, however, escaped this fate; they have been held to be governed by the special rule contained in the schedule to that statute, which remains unaffected by Art. 110 and Art. 116, see the decision of the Full Bench in *Mackenzie v. Haji Sahed Mohammed* (61).

(10) L. R. 44 I. A. 65 s. c. I. L. R. 44 Cal 759; 21 C. W. N 577 (1916)

(44) I. L. R. 3 Mad. 76 (1880)

(48) I. L. R. 15 Cal. 221 (1887).

(49) I. L. R. 17 Cal. 469 (1890).

(50) I. L. R. 19 Cal. 489 (1892).

(51) I. L. R. 27 Cal. 205 (1899)

(52) I. L. R. 19 Mad. 52 (1895).

(53) 7 Mad. L. T. 419 (1910)

(54) 11 Mad. L. T. 276 (1912).

(55) 11 Mad. L. W. 328

(56) 4 Pat. L. W. 146

(57) 1 Pat. L. J. 37; 2 Pat. L. W. 446 (1916).

(58) I. L. R. 37 Bom. 666 (1913).

(59) 1 Mad. L. J. 137; 2 Mad. L. J. 69.

(60) I. L. R. 26 All. 138 (1908).

(61) I. L. R. 19 Cal. 1 (F. B.) (1891).

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We have not given above an exhaustive enumeration of all the judicial decisions relevant to the points mentioned; but we have stated enough to show that Art 116 has been repeatedly interpreted, in the most diverse connections, as if it were a generalised exception engrafted upon all articles which might, by strength of language, be regarded as applicable to suits comprehended within the description of "a suit for compensation for the breach of a contract." One of the earliest of these decisions, *Narakymar v. Suu Mubli* (11) goes back to 1880, and the judgment in that case as also the judgments delivered by the Full Bench in 1881 in *Hussain Ali v. Hafiz Ali* (18) were based upon a historical review of the previous legislation on the subject, but it may be observed parenthetically that some of the judgments delivered by the Full Bench also referred to inadmissible materials, such as, what happened in the Legislative Council, *Administrator-General v. Prem Lal Malik* (62). Yet, the construction then placed upon Art 116 of the Limitation Act, 1857, must be taken to have found favour with the legislature, as it has been reproduced without alteration in the Limitation Act, 1908. The legislature is presumed to know not only the general principles of law, but also the construction which the Courts have put upon particular statutes, where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment is treated as a legislative recognition of that construction; *Jogendra Chandra v. Shyam Das* (63), *Kamini Devi v. Pramathanath* (64)

and *Nagendra Mohan v. Peary Mohan* (65). The Judicial Committee in *Tricomdas v. Gopinath* (10) felt impressed by this consideration, and Lord Sumner emphasised the fact that when the Limitation Act of 1877 was replaced by the Limitation Act of 1908, the language and arrangement of the relevant articles were left unaltered. In such circumstances, no useful purpose will be served by an attempt to examine the foundations of the long series of decisions which the Judicial Committee found themselves bound to recognise.

In answer to the contention that claims of this character sound in debt and not in damages, it may be pointed out, however, that the term used in Art 115 and Art 116 is not damages but compensation, which also occurs in sec 73 of the Indian Contract Act. As Lord Esher observed in *Dixon v. Colcraft* (66), the expression compensation is not ordinarily used as an equivalent to damages, although as remarked by Fry, L J, in *Skinner's Co v. Knight* (67), compensation may often have to be measured by the same rule as damages in an action for the breach. The term compensation, as pointed out in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another; its primary signification is equivalence, and

(11) 1 L. R. 6 Cal. 91, 1880.

(18) 1 L. R. 3 All. 600 (F. B.) (1881).

(62) L. R. 22 I. A. 107 & c. I. L. R. 22 Cal. 758, 1905.

(63) 1 L. R. 38 Cal. 543 (1909).

(64) 1 L. R. 39 Cal. 33 (1911).

(10) L. R. 44 I. A. 65, & c. I. L. R. 44 Cal. 759, 21 O. W. N. 577 (1916).

(65) 1 L. R. 43 Cal. 103 (1915).

(66) [1892] 1 Q. B. 458, 463.

(67) [1891] 2 Q. B. 542.

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the secondary and more common meaning is something given or obtained as an equivalent. The derivative meaning was familiar to the Roman Jurists and re-appears in the modern Codes founded on the Civil Law. (Sohm, Institutes of Roman Law, 3rd Ed., pp. 458-463.)

The term compensation, as used in Arts. 115 and 116 is thus, perhaps not sufficiently precise, while the technical distinction between debt and damages may be too refined for the purpose.

We must hold that the decision of the Judicial Committee in *Tricomdas v. Gopinath* (10) though concerned directly with the applicability of Art. 110 and Art. 116 to a suit for arrears of rent, instituted upon a registered lease, must be regarded as of far-reaching application. We cannot ignore the principle which lies at the root of that decision and must govern the applicability of Art. 116 to cases other than those covered by Art. 110, wherever the position may reasonably be maintained that the claim sought to be enforced is a claim for compensation for breach of contract in writing registered. We must consequently examine whether a claim for exigible dower and a claim for deferred dower fall within this category.

The nature of dower debt was examined by this Court in the case of *Mir Maharut Ali v. Amani* (68) and it was ruled that, according to Mahomedan Law, when the heirs of a Mahomedan woman claim from her husband dower which was not due or payable until her death, their claim is a simple money claim, founded solely on the contract entered into by the husband. The Limitation Act then in force was Act XIV of 1859. Cl. (9) of sec. 1 provided a period of three years for the

institution of a suit brought to recover money lent or interest or for the breach of any contract. Cl. (10) of sec. 1 provided a period of three years for a suit brought to recover money lent or interest or for the breach of any contract in a case in which there was a written engagement or contract and in which such engagement or contract could have been, but had not been registered within six months from the date thereof. Cl. (16) of sec. 1 provided a period of six years for all suits for which no other limitation was expressly provided. The Court held that the suit for dower was a simple suit for the breach of a contract, within the meaning of cls. (9) and (10) of sec. 1. Reference was made to the decisions in *Mahomed Faiz v. Oomdah Begum* (69) and *Woomatul Fatima v. Meerunnissa* (70), the first had been cited as an authority for the proposition that a suit for dower was not founded on the contract, but on withholding of the widow's estate from the heirs. The second had been relied upon to support the contention that the claim to recover the dower debt was in essence to enforce a lien upon the estate of the deceased as against those entitled as heirs. These dicta were explained away and it was held that the dower, like any other debt, must be paid before the estate divisible among the heirs can be ascertained, and that the suit to recover the dower debt is nothing more or less than a suit to enforce a simple money claim founded solely on the contract entered into by the husband, see also *Wafeah v. Shaheeba* (71), *Jannee Khann v. Amatool Fatima* (72) and *Mahabu Bibi v. Amina* (73).

(10) L. R. 44 I. A. 65; s. c. I. L. R. 44 Cal.

759; 21 C. W. N. 577 (1916).

(68) 2 B. L. R. 306; 11 W. R. 212 (1869).

(69) 6 W. R. 111 (1866).

(70) 9 W. R. 318 (1868).

(71) 8 W. R. 307 (1867).

(72) 8 W. R. 51 (1867).

(73) 10 Bom. H. C. R. 430 (1873).

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The view taken in these cases is supported by the observation of Sir Montague Smith in *Khajooroonissa v. Saifool Khan* (74), namely, that prompt or exigible dower may be considered a debt always due and demandable, and certainly payable upon demand, with the result that upon a clear and unambiguous demand and refusal, a cause of action would accrue and the statute would begin to run. To the same effect is the remark of Lord Parker in *Hamra Bibi v. Zubaida Bibi* (75), that the dower ranks as a debt, and the right of the wife is no greater than that of any other unsecured creditor of her husband, subject to the reservation that if she lawfully, with the express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession, unless it is satisfied; see also *Nurunnessa Khanum v. Khaja Mahomed Sarhar* (76) and *Abidunnissa v. Fathuuddin Mahomed* (77). In view of the principles expounded and applied in the long series of decisions which have now met with the approval of the Judicial Committee in *Tricomdas v. Gopinath* (10), there is thus no escape from the conclusion that Art. 116 applies to suits for recovery of dower debt when there is a registered dower deed, although Arts. 103 and 104 would apply when there is no such registered instrument. We are not unmindful that the contrary view was, without argument, assumed to be correct

in *Ful Chand v. Nazab Ali* (78). The view which we are constrained to adopt coincides with that taken in the case of *Asiatulla v. Danish Mahammad* (79), which was brought to our notice after the argument had been closed, and has been reported since then.

The result is that the decree made by the District Judge is affirmed and this appeal is dismissed with costs.

H D C. *Appeal dismissed.*

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1351 of 1920.

WOODROFFE, J.	MONMOHON GHOSH
SUHWAI DYN, J	and ors., Plaintiffs,
1922,	Appellants,
Heard, 11, 16, 17, 18	v.
and 21, August.	SIDDHESWAR DUBAY
Judgment,	and ors., Defendants,
2, August.	Respondents.

Hindu law Private debutter property, conversion of, into secular property by consent of family members—Consent of entire family interested in the shoba necessary—Acts and dealings of shobait, whether sufficient to change the character of the debutter property—Property dedicated to a single debt, though shoba of other debts prescribed—Dedication, if absolute.

'The consent of all persons interested in a private or family debutter which may convert the debutter into secular property must be distinguished from acts which may amount to nothing more than a breach of trust.

It is not the shobait only who by their dealings can give the property a different turn. The persons who by their consent can convert the debutter property into secular property are the members of the whole family, male and female, interested

(10) L. R. 44 I. A. 65; s. c. I. L. R. 44 Cal 759; 21 O. W. N. 577 (1916).

(74) L. R. 2 I. A. 235; 15 B. L. R. 806; 24 W. R. 163 (1875).

(75) L. R. 43 I. A. 294; s. c. I. L. R. 35 All. 581; 21 O. W. N. 1 (1916).

(76) I. L. R. 47 Cal. 537; s. c. 24 O. W. N. 385 (1919).

(77) I. L. R. 41 Mad. 1026 (1917).

(78) I. L. R. 36 Cal. 184 (1908).

(79) 36 O. L. J. 379 (1922).

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in the worship of which the shebais are merely managers.

It is not dealings with the property which change the original debutter character, but it is the consent of the entire family interested in the sheba, though dealings subsequent to such consent may under circumstances be evidence of consent.

Where property was dedicated to a particular debata, and the surplus of the profits thereof was also directed to be invested in the name of or employed in acquiring other properties for the same debata, the dedication was absolute in favour of the debata, although the income was to be devoted to the sheba of other debatas also.

This was an appeal preferred on the 21st of May 1920, against the decree of Babu Lal Behari Chatterjee, Subordinate Judge, 2nd Court of Zillah Hooghly, dated the 11th of February 1920, reversing the decree of Babu Ramesh Chandra Sen, Munsif, 1st Court, Hooghly, dated the 11th of December 1918.

In a family *debutter* trust certain properties were dedicated to the deity Sri Sri Iswar Krishna Chandra Jew with a provision that if there was any surplus in the profits after performance of the *sheba* in the prescribed way, then other properties would be acquired for the Iswar Jew. The lower Appellate Court found that the *shebais*, who were members of the family, sometimes treated the properties as *debutter* and sometimes as their own personal properties. The Defendant-Respondent who in the present suit denied the *debutter* character of the properties, had taken a lease of the property in suit from one of the then *shebais*. The Munsif had held that an absolute *debutter* was created and that that character

of the property was not changed by any consent of the family members and that the dealings with the property by individual *shebais* as their personal property amounted to instances of breach of trust only. The Subordinate Judge on appeal held, as stated above, that the parties sometimes treated the properties as *debutter* and sometimes as their personal properties and thereby gave the properties a different turn and converted them into secular properties. He therefore reversed the Munsif's judgment. Against the said decree of the Subordinate Judge the present appeal was preferred.

Babus Braja Lal Chakrabarti and Nagendra Nath Ghose for the Appellants.

Babu Braj Mohan Mazumdar for the Deputy Registrar who was appointed as guardian for the minor substituted Respondent upon the death of the principal Respondent.

Dr. Jadu Nath Kanplal, who had subsequently entered appearance on behalf of the natural guardian of the minors, was heard by the Court *amicus curia*.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—The question in this appeal is whether there was an absolute or imperfect *debutter* that is a mere charge and in the former case whether property the subject-matter of the *debutter* was converted by the consent of the whole family into secular property. On reading the *niyama patra* which has been placed before us, I have no doubt whatever in holding that the Munsif was right and that an absolute *debutter* was intended to be created by that document. The provision as to the disposal of any surplus, namely, "if there be any surplus in the profits after performance of the *sheba* in the prescribed way then other property

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will be acquired for the Iswar Jew " as also the dissociation which was markedly made by the deed of this and secular properties strongly support the view which the Munsif has taken. In passing to the question to which I shall later refer as to whether or not there was a dedication to any particular *debata*, it is important to remember in this connection the provision as regards the surplus, namely, that other property which will be acquired by the surplus must be acquired for Sri Iswar Jew. It is to be observed that the Defendant who now denies the *debutter* character of this property took a lease of this property as *debutter* property.

A point has been made that there has been no particular dedication to any particular *debata*. It appears to me, however, that the dedication was to Sri Sri Iswar Krishna Chandra Jew in whose favour some of the properties were acquired and in whose name the surplus was to be invested though the income was to be spent for the performance also of the *sheba* of other *debatas*. I hold therefore that there was an absolute *debutter* in favour of the deity named.

The next question is whether the consensus of the family can give a different direction to the property. Speaking for myself, I think there are good grounds for the criticisms of Babu Golap Chandra Sarkar in his Hindu Law, p. 492 on this matter. However this be, the Privy Council appears to have held (although it has been submitted to us that the remark was *obiter*) that in the case of what it calls a private or family trust the property may be converted into secular property by consent of the whole family. The Subordinate Judge appears to have held that this had happened in the present case. At least the language of some portion of

his judgment leads me to suppose so. But the findings of fact do not support sufficiently the conclusions at which he arrived upon a wrong assumption of law. We must distinguish in the first place in this connection such consent given by all parties interested and acts which may amount to nothing more than a breach of trust. According to the Subordinate Judge the parties sometimes treated the property as *debutter* and sometimes as an individual property. This does not show such consent of the whole family. On the contrary it shows so far as it goes that there was no such consent. For if there was a consent to treat the property as secular from about the year 1880 as alleged why was the property treated as *debutter* subsequent to that date? The fact may show (at least, it is so contended), that there was no consent to treat the property as secular but an actual treatment of it as such amounting to a breach of trust. "Although" the Subordinate Judge says "the properties were described as *niskar debutter* properties the so-called *shebais* dealt with many of these as their own personal properties and have thereby given them different turn." This, however, is not sound law. It is not the *shebais* only who by their dealing give the property a different turn. It is the members of the family interested who by their consent, (according to the decision of the Privy Council) may convert the *debutter* property into secular property. Moreover the finding is not that all the properties but that many of the properties were so dealt with. The only persons who can convert the property are the members of the whole family, male and female, interested in the worship of which the *shebais* are merely managers. It is not, learned Subordinate Judge has

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held, dealings of the property which change the original character of the property but it is the consent of the family, although dealings subsequent to such consent may under circumstances be evidence of consent. Whether there is anything to show such consent in the present case is another matter.

We have been asked to remand the case if we are against the Respondent on this point. But there is no necessity in the present case to do so because the learned Judge has come to a finding of fact in the appeal that the properties were sometimes dealt with as *debutter* and sometimes as secular. But if that be so then there could not be on his finding of fact such consent as could convert the nature of the property.

The judgment and decree of the Subordinate Judge are therefore reversed and that of the Munsif restored, the Appellant being entitled to his costs of this Court and in the lower Appellate Court.

The Appellant will be entitled to add to his own costs the cost which he paid to the Deputy Registrar and will recover both costs from the estate of the deceased Siddheswar Dubay in the hands of his heirs, the minor Respondents.

Before signing our judgment a point was raised as regards the period for which mesne profits should be allowed. It is argued before us that the lease was a good lease so long as the lessor was alive and that assuming that as our judgment says it is invalid it is only so invalid beyond that period. It is then contended that the mesne profits should not run as provided in the judgment of the Munsif which we restored but from February 1920, the date of the lessor's death. This ground appears to me to be untenable because it raises a question which was not put forth in the pleadings or in the issues or in the

lower Courts or in the argument before us. Indeed the pleadings go on the basis that the Plaintiff is entitled to immediate possession. Therefore our judgment stands and the decree of the Munsif is restored.

SUHRWARDY, J.—I agree.

J. N. R. *Appeal decreed with costs.*

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

VISCOUNT CAVE.

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMER ALI.

1922,

Heard, 16 and

17, March.

Judgment,

10, April.

(Oudh) Act XXII of 1886, as amended by Act IV of 1901—*Suit by Taluqdar to assess guzara land with rent—Guzara land given by former Taluqdar to wife for life rent-free by Will—Proprietor claiming taluq under same Will, if can repudiate legacy to wife—Construction of Will—"Sirat makbuza," meaning of—"Sir," popular sense of, includes "guzara" lands as well as home-farm lands—Paper book in Privy Council appeal—Courts' duty in India to control inclusion of irrelevant documents.*

R, Taluqdar of Mahawa in District Kheri in Oudh, by Will bequeathed all his moveable and immovable properties to a nephew J, subject to certain legacies of which that to his wife was in these terms: "To my wife for life five hundred rupees per mensem besides sirat makbuza (which means 'sir land in possession') will be given from the estate":

Held—That R by his Will intended to bequeath to his wife an absolute estate for her life as a proprietor and without liability to have the same assessed to rent in the "sir land in her possession."

JAI INDRA BAHADUR SINGH v. BIJAI RAJ KUNWAR.

That the expression "sir land in her possession" covered mauza Chhauch which had been given to her for her maintenance by R in his life-time and was not confined to the home-farm lands, the special meaning assigned to the term "sir" by Act XXII of 1886, the word "sir" being generally used in Oudh to cover both classes of lands.

That J who took taluqa Mahewa under the Will could not repudiate the condition of the Will that mauza Chhauch should be held by R's widow for her life rent-free

That under the terms of the Will J would not be the "proprietor" of mauza Chhauch so long as R's wife continued to be the proprietor for life, and Act XXII of 1886, as amended by Act IV of 1901, consequently did not apply.

PARBATI KUNWAR v THE DEPUTY COMMISSIONER OF KHERI (1) distinguished.

A duty lies upon the Courts in India to exercise control upon the wholesale inclusion, in the records transmitted to England, of irrelevant documents by the parties to an appeal to the Judicial Committee, which is a scandal and a hindrance to the proper administration of justice.

These were two consolidated appeals from (a) a judgment and decree of the Board of Revenue for the United Provinces of Agra and Oudh, dated the 13th December 1916, reversing a judgment and decree of the Commissioner of Lucknow, dated the 7th January 1916, and (b) from a decree of the Court of the Judicial Commissioner of Oudh, dated the 30th August 1918, which reversed the decree of the Subordinate Judge of Kheri, dated the 12th February 1916

The facts are sufficiently set out in the judgment of the Board.

Messrs. Dunne, K. C. and Amund Jackson for Rani Bijai Raj Kunwar.

The petition of Rajindra Bahadur Singh in September 1911 and the consequent entries in the register show that Rani Bijai was intended to hold Chhauch rent-free. She did so hold it until Rajindra's death, and by his Will he provided that she should so hold it until her death.

The Will refers to the "sir" lands in her possession. There is abundant evidence as the Subordinate Judge has found "that 'sir' is used in common parlance to describe a *muafi* grant of plots of land made to a member of a Taluqdar's family for maintenance," but there is no justification for saying that it cannot include a whole village.

(Sykes's Compendium of the Law relating to the Taluqdars of Oudh at p. 167)

The ordinary meaning of the word "sir" as used by an Oudh man is very much wider than the restricted meaning given to the word by Act XXII of 1886.

The Respondent is not entitled to approbate and re-probate.

It is a condition of the Will that Chhauch should go rent-free to Rani Bijai and the Respondent whose title is derived solely through that Will is not entitled to say that he will accept the property given to him under it but repudiate the limitations of the gift.

Messrs. DeGruyther, K. C. and Kenworthy Brown for Thakur Jai Indra Bahadur Singh.—This case is governed by the decision of the Board in *Parbati Kunwar v. Deputy Commissioner of Kheri* (1).

The holding granted to Rani Bijai was a rent-free holding. Her tenure was in no way concerned with the taluqdar mahal.

(1) L. R. 45 I. A. 111 : s. c. I. L. R. 40 All. 541; 23 C. W. N. 125 (1918).

(1) L. R. 45 I. A. 111 : s. c. I. L. R. 40 All. 541; 23 C. W. N. 125 (1918).

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No proprietary interest was conferred on her by the disposition of September 1911 because there was no registered instrument of transfer.

(Sec. 122, Transfer of Property Act, IV of 1882).

Since 1793 the Government of India have decided that no one can grant lands rent-free.

(Cl. 10 of Reg. XIX of 1793).

Moreover there is always in the Taluqdar a latent power by statute to charge his grantee with a fair rent, even when he has granted the property rent-free.

(Sec. 107G of Act XXII of 1886 as amended by Act IV of 1901).

No proprietary interest in the "sir" lands was intended to be conferred by the Will. To discover the testator's intention regard must be had to the position at the time of execution. The wife had certain "sir" lands but they were part of the taluqa. The intention is merely to continue the existing state of affairs, i.e., that she should continue as a tenant free of rent.

The expression "sir lands" cannot comprise the whole village; if the whole village is intended to be transferred the expression is always "guzara," never "sir".

"Sirat mukbuza" means a grant for maintenance and the whole interest never passes in such a grant.

Furthermore, the Will contains no word such as "devise" or "bequeath" so as to import a gift.

Reference was also made to the Oudh Land Revenue Act, XVII of 1876, secs. 52, 54 and 55, United Provinces Act, III of 1901, sec. 58.

Mr. Dunne, K. C. replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are two con-

solidated appeals. In the earlier of these appeals Rani Bijai Raj Kunwar is the Appellant, and Thakur Jai Indra Bahadur Singh is the Respondent. It is an appeal from a decree or order of the 16th December 1916, made by the Board of Revenue of the United Provinces of Agra and Oudh in appeal in a suit which was brought in the Court of the Deputy Commissioner of Kheri on the 19th March 1915, by the then manager under the Court of Wards of the property of Thakur Jai Indra Bahadur Singh, then a minor, against Rani Bijai Raj Kunwar, to have Rs. 5,542-11-9 assessed as rent on mauza Chhauch under sec. 107G of Act XXII of 1886. In the latter of the two consolidated appeals Thakur Jai Indra Bahadur Singh is the Appellant and Rani Bijai Raj Kunwar is the Respondent. It is an appeal from two decrees, of the 31st January and 30th August 1918, made by the Court of the Judicial Commissioner of Oudh in appeal in a suit which was brought in the Court of the Subordinate Judge of Lakhimpur on the 27th July 1915, by Rani Bijai Raj Kunwar against Thakur Jai Indra Bahadur Singh for a declaration that she was entitled to hold mauza Chhauch for her life rent-free, under her deceased husband's Will, and that the mauza was not liable to be assessed to rent during her life-time. It is to be mentioned here that a chak which is within mauza Chhauch is known as Chak Khakra. That chak belongs to other persons; in Chak Khakra neither of the parties to these consolidated appeals has or claims interest or title. Where mauza Chhauch is later referred to in this judgment, it is to be understood that what is referred to is mauza Chhauch, excluding Chak Khakra.

After the suppression of the Mutiny of 1857, the taluqa or estate of Mahewa,

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which included mauza Chhauch, was in the Oudh Summary Settlement settled with Gajrang Singh; he died in 1860, and his brother Girwar Singh succeeded to the estate. Girwar Singh died in 1865, and Balbhaddar Singh succeeded to the estate. Balbhaddar Singh died in 1898, and on his death his widow claimed to be entitled to the estate of Mahewa; her claim was resisted by Rajindra Bahadur Singh, who was Balbhaddar Singh's son. He claimed to be entitled to the estate. These conflicting claims resulted in litigation, and ultimately the Board of the Judicial Committee of the Privy Council decided that Rajindra Bahadur Singh was entitled to the estate, and he entered into possession of the Mahewa estate in 1905 or 1906.

In the first regular Settlement in Oudh mauza Chhauch (except Chak Khakra) was, with plots of cultivated lands in eight other mauzas, recorded under the heading "sir" as in the possession of the widow of Girwar Singh. By that entry in the Register it was meant that mauza Chhauch and those other plots had been given to her by Girwar Singh for her maintenance. Before the next regular Settlement in Oudh the Revenue Authorities decided that in future in the Revenue Registers only such lands as were actually home-farm lands of the Taluqdar should be entered under the heading of "sir," and accordingly mauza Chhauch was then entered in the Revenue Register as "muafi"—that is, as rent-free land. When Raghubans Kunwar, widow of Balbhaddar Singh, took possession of the Mahewa estate under her claim of title, she was entered in the Revenue Register as *muafidar* of mauza Chhauch.

After the decision in his favour of the Board of the Judicial Committee, Rajindra Bahadur Singh, on the 26th February

1906, obtained, as owner of the Mahewa estate, possession of mauza Chhauch and of all those cultivated plots in the eight other villages.

Rajindra Bahadur Singh, as the owner of the estate of taluqa Mahewa, had powers to give, sell, mortgage or bequeath the taluqa or any part of it to whomever he pleased, but his widow, should he leave one, would be entitled to maintenance suitable to her condition as his widow. Rajindra Bahadur Singh in 1911 handed over to Ram Bijai Raj Kunwar, his wife, possession of mauza Chhauch, and on the 1st September 1911 he presented a petition to the Revenue Authorities, which, so far as is material, was as follows—

"1 The Petitioner is the absolute owner of taluka Mahewa, district Kheri, and the village of Chhauch bearing the 'hadbast' (boundary) No. 249 forms part of taluka aforesaid. The Petitioner has all proprietary powers in respect of his taluka.

"2 The Petitioner has given the entire village of Chhauch to his wife as 'muafi'. The revenue of this village would be paid from the income of the taluka and the village would, always, remain in the possession of his wife, as revenue-free 'muafi'.

"3 This application is therefore presented, and it is prayed that entries regarding mutation of names in favour of the aforesaid wife may be made in the revenue department as herein prayed for and the village may be entered as 'muafi' under cl. 6."

On that the Tahsildar reported, on the 10th November 1911, to the Deputy Collector as follows:—

"SIR,—An application was made by Thakur Raj Indar Bahadur Singh, talukdar of Mahewa, to the effect that he had given mauza Chhauch in paragana Kheri to his wife as muafi, that its revenue would be paid from the taluka, and that it might be entered in the name of the Bani as muafi. An enquiry was made. A writing from the talukdar corroborates the contents of the application. The talukdar has given

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mauza Chhauch to his wife, the Rani, as muafi. As no document has been executed, mutation proceedings cannot be taken. Of course, as reported by the office, entries can be made in papers, under clause 6. In my opinion, there is no harm in making entries in this way. Under clause 6A, under the head of muafi, in the column of remark, these words should be written. 'The whole of this village has been given by the taluqdar to the Rani as "muafi" for her maintenance.' Hence this report is submitted to sanction the entries aforesaid."

Thereupon the Assistant Collector made the following order :—

"Claim for mutation of names in respect of mauza Chhauch, pargana Kheri

"ORDER.

"I have no objection to the above being noted in the remarks column

"(Sd) M. ABDUL LATIF KHAN, Assistant Collector, 1st class

"11th December, 1912"

In the Register relating to mauza Chhauch it was accordingly entered that the village was "rent-free land granted by the zamindar," and under the heading "Remarks" that—"The whole of this village is by way of maintenance allowance of Bari Bahu Sahiba (the Rani Bijai Raj Kunwar) *muafi* on behalf of 'Taluqdar'." (Taluqdar). It is not contended, on behalf of Rani Bijai Raj Kunwar, that by the petition of the 1st September 1911, and those entries in the Register, any indefeasible title in mauza Chhauch for her life was conferred on her by Rajindra Bahadur Singh, or that he could not thereafter have sued under Act XXII of 1886 as amended by Act IV of 1901, to have rent assessed upon the mauza, but it is contended on her behalf that the petition of the 1st September 1911, and those entries in the Register consequent on it show that it was then Rajindra Bahadur Singh's intention that Rani Bijai Raj Kunwar should hold mauza Chhauch for her life free of liability to pay rent. In fact, she held the

mauza from 1911 until his death rent-free.

Rajindra Bahadur Singh died on the 1st October 1912. Rajindra Bahadur Singh had, on the 14th June 1907, made his Will, which, so far as it is material, is as follows :—

"Will

"I, Thakur Rajendra Bahadur Singh, Taluqadar of Mahewa, son of Thakur Sheo Singh, resident of Garhi Prasadpur, pertaining to mauza Madhaia, pargana and district Kheri, declare as follows.—

"This borrowed life is uncertain, and God has not as yet blessed me with a son; but I have a daughter, three years old. I have a strong hope that He will grace me with a male child. Therefore, in order to avoid a dispute in future, I make a Will to the effect that if a son is born to me, he will be the owner, and take possession of all my movable and immovable properties after my death, that in case I get more sons than one, the eldest will be the owner of all my estate according to the rule of succession to the 'gaddi,' and the remaining sons will get allowance; that if no male child is born to me, then dear Jai Indar Bahadur Singh, *alias* Jhunnu Bhaiya, son of Kunwar Sheo Indra Bahadur Singh, who is the son of my own brother, shall be the owner, and take possession of all the movable and immovable properties owned and possessed by me at the time of my death, or to which I have a right of ownership, or possession of any kind, or to which I may acquire a right in future, without the exception of anything or right; that Musammatt Jai Raj Kunwar, my wife, shall get Rs. 500 per mensem from the estate in cash, besides the 'sir' lands in her possession; that my wife shall be the owner, and take possession of all my personal goods, such as clothes, ornaments, utensils used in eating and cooking, articles of decoration of the residential house, etc.; that Rs. 250 per mensem shall be paid from the estate to my younger brother, Kunwar Sheo Indar Bahadur Singh, who is living with me up to this time, besides the 'sir' lands possessed by him, and both these two allowances in cash shall be

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a charge on the estate, and the person in possession of the estate shall be liable for the same; that the person in possession of the 'taluka' shall be responsible to pay Rs 50,000 for the expenses of each of the daughters who may be unmarried at the time of my death; that if, God forbid, dear Jai Indar Bahadur Singh, aforesaid, die intestate without leaving a male child, then his nearest male heir descending from Mahendra Bahadur Singh, Narendra Bahadur Singh and Sheo Indar Bahadur Singh, will be entitled to succeed to the 'gaddi' and to be the owner of all the estate. . ."

Thakur Jai Indra Bahadur Singh is the nephew described in the Will as Jai Indar Bahadur Singh, and Rani Bijai Raj Kunwar is in the Will referred to as Musammamat Jai Raj Kunwar, the testator's wife.

Thakur Jai Indra Bahadur Singh did not succeed by right of inheritance to the Mahewa estate or to any part of it; his title depends on the Will, and such interest in the Mahewa estate as he has depends on the Will. He took under the Will, and not otherwise. On behalf of Rani Bijai Raj Kunwar it is contended that under the Will mauza Chhauch (Chak Khakra excepted) passed to her for her life free of rent, and that mauza Chhauch will not vest in Thakur Jai Indra Bahadur Singh until she had died, and that until that event shall have happened Thakur Jai Indra Bahadur Singh will not be the proprietor of mauza Chhauch within the meaning of Act XXII of 1886 as amended by Act IV of 1901, or entitled to sue to have any rent assessed upon that mauza. That contention depends upon the true construction of the Will, which involves the meaning of words in the Will which have been thus translated by the official translator: "That Musammamat Jai Raj Kunwar, my wife, shall get Rs. 500 per mensem from the estate in cash besides the 'sir' lands in her possession." That is the official translator's rendering of the vernacular

words in the Will. In the judgment of the Board of Revenue of July 1916, the words in question are translated thus: "To my wife for life five hundred rupees per mensem besides *sirat mahbuza* will be given from the estate." In their Lordships' opinion the two translations have the same meaning. *Sirat* is the plural of *sir* and *sirat mahbuza* means *sir* lands in possession. It does not appear to have been doubted by any of the Courts in India that the "*sir* lands in her possession" passed by the Will to Rani Bijai Raj Kunwar as a rent-free estate for her life. But the question is, what did Rajindra Bahadur Singh mean by "*sir* lands in her possession" in his Will? That he intended by his Will to bequeath to Rani Bijai Raj Kunwar an absolute estate for her life in the "*sir* lands in her possession" and not merely a right of tenancy or other subordinate interest in them, and that he intended that she alone should be the proprietor of those lands during her life, their Lordships have no doubt.

The Courts in India who have had these suits before them arrived at different conclusions as to what Rajindra Bahadur Singh meant by the words "*sir* lands in her possession." The Deputy Commissioner of Sitapur, who tried the Revenue Court suit, in reference to the words "*sir* lands possessed by her," as he translated the Will, stated in his judgment that—

"These last words must be taken to refer to the 'sir' lands possessed by the Rani at the time of the testator's death. The village in suit is not 'sir' land in the strict sense of the term, but I think there can be little doubt that the word 'sir' is used by the testator in a loose sense, and signifies 'land held as "guzara."' This is not seriously disputed by the Plaintiff. It is then clear that the testator wished that the Defendant should continue to hold her 'guzara' land rent-free for her life-time."

He, however, being of opinion that

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Thakur Jai Indra Bahadur Singh was proprietor, and was thus entitled to sue to have mauza Chhauch assessed to rent, gave Thakur Jai Indra Bahadur Singh a decree assessing the rent. From his decree there was an appeal by Rani Bijai Raj Kunwar Singh to the Commissioner of the Lucknow Division, who in his judgment stated, in reference to Rajindra Bahadur Singh's Will :

"By his Will he bequeathed to his widow . . . and the 'sir' or 'guzara' land. . . . It had, before the talukdar's death, been duly entered as 'guzara' held rent-free

"The present talukdar, nephew of the late talukdar, who is under the Court of Wards, succeeded to the property under the terms of the Will. He sues now to have rent assessed, as the rent-free 'guzara' of his aunt, the widow of the testator.

"The Deputy Commissioner has decreed the claim. It appears to me that the suit should never have been brought. The present talukdar, as represented by the Court of Wards, is willing himself to be benefited by the terms of the Will. But he wishes to deprive his benefactor's widow of the benefit, which was meant to accrue to her under the same Will. We must clearly take it that the Defendant-Appellant is entitled under the terms of the grant or Will to hold this village rent-free for her life."

The Commissioner of the Lucknow Division dismissed the Revenue Court suit. From that decree dismissing the suit Thakur Jai Indra Bahadur Singh appealed to the Board of Revenue. The Board of Revenue in their judgment said :

"It is urged by the Respondent that under the Succession Act of 1865, she has devised (had devised to her) the land held by her as 'sirat makbuza,' and the effect was to give her a proprietary title for life. It is further urged that, as the village in suit was held by her in the same way as she had held the other lands at the time of the Will, that the result of the Will also was to confer on her a proprietary grant for life of

this village. It may be admitted that the words 'sirat makbuza' in the Will were certainly intended to cover the rent-free grants held by her at the time of the execution of the Will. The Appellant argues, however, that there is a great difference between a whole village and plots of land within a village, however numerous the latter might be, and that a whole village could not be termed 'sir,' however loosely the word is used, and that the fact that the previous talukdar made a separate application in 1911 about the whole village clearly shows that he meant to differentiate it from the other land, and for this argument there is a good deal to be said."

In the result the Board of Revenue held that sec. 107G of Act XXII of 1886 as amended by Act IV of 1901 applied, and made a decree assessing mauza Chhauch to rent. From that decree Rani Bijai Raj Kunwar has appealed to His Majesty in Council.

The Subordinate Judge of Kheri, before whom the civil suit first came, framed six issues, the first of which was, "Is the suit not cognizable by the Civil Court?" He held that the questions whether the Plaintiff (Rani Bijai Raj Kunwar) was "entitled to hold the village (mauza Chhauch) rent-free as a life-interest bequeathed to her under her late husband's Will and that she is not liable to assessment of rent during her life-time" were exclusively for the Court of Revenue, and by his decree dismissed the suit. Rani Bijai Raj Kunwar appealed from that decree to the Court of the Judicial Commissioner of Oudh. The learned Judicial Commissioners on the appeal held that the Civil Court had jurisdiction to entertain the suit for a declaration of Rani Bijai Raj Kunwar's legal title to mauza Chhauch under her husband's Will, but that the Civil Court had not jurisdiction to give her a declaration that mauza Chhauch was not liable to be assessed to rent during her

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life-time, and remanded the suit to the Court of the Subordinate Judge for the trial of certain issues.

The suit on the remand came before another Subordinate Judge, who apparently was not himself familiar with the popular descriptions in Oudh applied to lands held for maintenance. He recorded much evidence on the subject. One of the witnesses, who had been for some years a Naib Tahsildar in Lakhimpur, said "Every sort of cultivated land, whether rent-free or assessed to rent, and whether held by grantee, or Shankahapdar, and under-proprietor or ordinary tenant, is commonly called *sir*. I never heard a whole village called as *sir* of anybody, though I heard a whole village called a *guzara* of a *guzaradar*." The Subordinate Judge's comment on the Naib Tahsildar's evidence was: "His evidence goes to show that when a member of a Taluqdar's family cultivates *guzara* land given to him and calls it his *sir*, others also call it by the same name." Another witness said "Thakur Rajendra Bahadur Singh thought that land given to the members of a Taluqdar's family for their *guzara* are called their *sir*. He considered the village Chhauch to be *sir* of the Plaintiff (Rani Bijai Raj Kunwar)." There was much other evidence, and in conclusion the Subordinate Judge found that "the word *sir* is used in common parlance to describe a *muafi* grant of plots of land made to a member of the Taluqdar's family for maintenance, but that a whole village assigned for a similar purpose is not called by the name of *sir* . . . I find that the words '*sirat-makbuza*' were used in the Will in this sense."

On the return to the order of remand the learned Judicial Commissioners proceeded to consider what Rajendra Baha-

dur Singh meant by the term "*sirat-makbuza*" (*sir* lands in possession) which he used to describe the bequest to his wife Rani Bijai Raj Kunwar. They considered that the opinions expressed by the witnesses on that subject did not possess any particular value for the decision of that question. It has not been shown to their Lordships that the Judicial Commissioners formed an incorrect estimate of the value of that oral evidence. The learned Judicial Commissioners took, in their Lordships' opinion, safer ground for the consideration of that question in the history of the manner in which *mauza* Chhauch had been dealt with since it had been settled with Gajrang Singh, and particularly by Rajendra Bahadur Singh. They also placed great reliance on the introduction to the late Mr Sykes's well-known and valuable compendium of the law relating to the Taluqdars of Oudh, and quoted the following passage which occurs in Mr Sykes's observations on the various classes of *sir* in Oudh. Mr Sykes, in discussing that subject, stated that —

"Amongst the various classes of *sir* under-proprietors who never had the full and exclusive proprietary right of the whole village is the land frequently assigned to the junior branches of a family for their support, instead of breaking up the estate and giving them the ancestral shares to which they were entitled. Such appanages are known in Oudh by the name of *sir*. They also form one and the chief class of *Jewan Birt*, which is a name also sometimes applied to this class of *sir*. Whole villages assigned in this way were also called Bhayai villages."

In support of that statement by Mr Sykes, the Judicial Commissioner quoted a passage from Volume I of the Oudh Gazetteer of 1877, which was published under the authority of the Government, and a passage from the Fyzabad Settlement Report of 1880. The passage from the Oudh Gazetteer is as follows:—

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"Second, it was common to assign to the junior branches of a family certain lands for their support, instead of giving them the ancestral shares to which they were entitled. Such appanages were also known as *sir*."

The passage quoted from the Fyzabad Settlement Report runs thus:—

"233. *Sir* is in most cases an appanage of proprietorship, the lands constituting the home-farm of a proprietor. It is the name, too, given to the lands assigned to the junior branches of a family in lieu of the ancestral share to which they were entitled."

The Judicial Commissioners did not overlook the fact that the passages which they quoted from the Oudh Gazetteer and the Fyzabad Settlement Report had reference to the District of Fyzabad and not to Oudh generally. They observed in their judgment: "The above quotations refer to the District of Fyzabad, but the meaning of the word *sir*, given therein, appears to us clearly to be a meaning which was applied generally in Oudh." Nor did the Judicial Commissioners overlook sec. 108 of Act XXII of 1886, which enacted how the term "*sir*" should be understood officially in Oudh. In reference to that section they said: "The restricted meaning of the word *sir* given in Act XXII of 1886 is a meaning based to some extent upon the meaning of the word in the Province of Agra, and is largely the creation of the English Revenue Authorities. We consider that the learned Counsel for the Appellant (Rani Bijai Raj Kunwar) is correct in his contention that the word *sir* used by an Oudh man would bear the meaning assigned to it by Mr. Sykes, and would not be confined to the meaning which it bears in Act XXII of 1886." Their Lordships see no reason to disagree with that conclusion of the learned Judicial Commissioners.

Referring to the history of taluqa facts in these consolidated appeals, their

Mahewa, the Judicial Commissioners correctly stated in their judgment that mauza Chhauch (excepting Chak Khakra, which belonged to another and distinct family) and cultivated plots in eight other villages of the taluqa were in the possession of Rani Bijai Raj Kunwar at the time of her husband's death; that some of those plots had been handed over to her by her husband, Rajindra Bahadur Singh in 1907, and the remainder of them in 1908; that he had instructed the Patwari to have them entered in the Revenue Register in her name, and that those plots of cultivated lands had been entered into the first Regular Settlement as the "*sir*" of the widow of Girwar Singh. The Judicial Commissioners also state that the Counsel who appeared before them admitted that those plots of cultivated lands in the eight villages were *sirat makbuza*, and must be given to Rani Bijai Raj Kunwar under the terms of the Will, but he contended that mauza Chhauch could not pass to her under the description of *sirat makbuza*. The Judicial Commissioners came to the conclusion that in 1911 Rajindra Bahadur Singh had given mauza Chhauch (excepting Chak Khakra) to Rani Bijai Raj Kunwar as rent-free, and that the description *sir makbuza* included mauza Chhauch (less Chak Khakra), and that under the Will she took an estate for her life in the taluqa free of rent, and they gave her a decree declaring that she "is entitled to hold possession during her life of the village Chhauch, less Chak Khakra, pargana and district Kheri, under the Will dated the 14th June 1907, executed by Thakur Rajindra Bahadur Singh, the late Taluqdar of Mahewa." From that decree Thakur Jai Indra Bahadur Singh has appealed to His Majesty in Council.

After a careful consideration of all the

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Lordships have come to the conclusions that the words *sirat makbuza* in the Will did apply to and cover not only *sir* lands which might be accurately described as "*sir*," but also mauza Chhauch (less Chak Khakra), and that Rajindra Bahadur Singh, in confirmation of his gift of 1911 to his wife, Rani Bijai Raj Kunwar, of mauza Chhauch (less Chak Khakra) rent-free for her life, did by his Will intend to bequeath, and did bequeath, to her mauza Chhauch (less Chak Khakra) for her life as a proprietor, and without any liability to have it assessed to rent; and they also are of opinion that Thakur Jai Indra Bahadur Singh, who takes his interest in taluqa Mahewa under that Will, and whose only title to any part of taluqa Mahewa is under that Will, cannot repudiate the condition of the Will that mauza Chhauch should be held by Rani Bijai Raj Kunwar for her life rent-free.

It has been contended on behalf of Thakur Jai Indra Bahadur Singh in these consolidated appeals that the decision of the Board in *Parbat Kunwar v. The Deputy Commissioner of Kheri* (1) governs this case. That contention was based on a misconception. In that case the Plaintiff, who sued for an enhancement of rent, was the "proprietor" of the mahal there in question within the meaning of sec 107A of Act XXII of 1886 as amended by Act IV of 1901, and was suing a thikadar who held under a lease. In this case Thakur Jai Indra Bahadur Singh is not a proprietor of mauza Chhauch or of any part of it, and will not be the proprietor while Rani Bijai Raj Kunwar continues to be the proprietor for her life, and Act XXII of 1886 as amended by Act IV of 1901 does not apply.

Their Lordships will humbly advise

(1) L. R. 45 I. A. 111; s. c. I. L. R. 40 All. 541; 23 C. W. N. 125 (1918).

His Majesty that the appeal in which Rani Bijai Raj Kunwar is the Appellant should be allowed with costs, and the decree or order of the Board of Revenue of the United Provinces of Agra and Oudh of the 16th December 1916 be set aside and the decree of the Commissioner of the Lucknow Division of the 7th January 1916 be restored and affirmed, and that the appeal in which Thakur Jai Indra Bahadur Singh is the Appellant be dismissed with costs.

In parting with this case their Lordships desire to add one further observation upon a matter which in other cases has often before been animadverted upon, but apparently with small result, namely, the manner in which the record in Thakur Jai Indra Bahadur Singh's appeal has been prepared. When this record, which consisted of 1,134 pages, was received by the Registrar of the Privy Council, it appeared to him that a large part of it, consisting of lists of property in tabular form, was unnecessary for the purposes of the appeal, and he communicated this view to the London Solicitors with a suggestion that Counsel should be consulted as to eliminating this portion of the printed book. As a result the parties agreed between themselves, on the advice of their Counsel, to omit over 800 pages, which were taken out of the books and not referred to again, and this shows that they should never have been included. The persons primarily responsible for this reckless waste of money were no doubt Thakur Jai Indra Bahadur Singh and his advisers in India, and had he won the appeal he would certainly not have received any costs in respect of this part of the record. But at the same time their Lordships think that a duty lies upon the Court to exercise control upon the wholesale inclusion of irrelevant documents, a

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duty which in this case was certainly not performed. A few weeks ago, in another appeal from the same Court, their Lordships drew attention to the fact that the record contained at least 781 unnecessary pages, and they do so again with the earnest hope that the Judges of the Court of the Judicial Commissioner will take such steps as will prevent in the future the continuance of what their Lordships consider a scandal and a hindrance to the proper administration of justice.

Solicitors Messrs. James Gray & Son for the Appellant Rani Bijai Raj Kunwar.

Solicitors Messrs. T. L. Wilson & Co. for the Respondent Indra Bahadur Singh.
G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL
JURISDICTION

No. 25 OF 1922.

SANDERSON, C. J. RASH BEHARI KARURI
RICHARDSON, J. v.
1922, NARAIN DAS DORILAL.
13, December.

Indian Contract Act (IX of 1872), secs 99, 101, 102, 104, 106 and 107—Stoppage in transitu by unpaid vendor—Assignment of document of title by buyer—Onus of proof of good faith and of payment of consideration by assignee, whether on the vendor or assignee—Unpaid vendor's right of stoppage in transitu, whether a merely equitable right—General Clauses Act (X of 1897), sec 3, cl. (21)—Good faith, definition of, if applicable to Indian Contract Act (IX of 1872).

Where a vendor who has not received the price of his goods stops them while in transit to the buyer on the buyer becoming insolvent under sec. 99 of the Indian Contract Act, and, in the meantime, the buyer has assigned the document showing title to the goods to a third person:

Held—That it lies upon the assignee to prove that when the document of title to the goods was assigned to him, he was

acting in good faith and that he gave valuable consideration for the goods.

Quare —Whether the unpaid vendor's right of stoppage in transitu is a merely equitable right.

Per RICHARDSON, J —Even before the right was recognised in England by the Sale of Goods Act, the better view seems to have been that it was a common law right derived from the law merchant and both in England and in India it is now not only a legal but a statutory right.

The definition of 'good faith' in sec 3, cl (20) of the General Clauses Act (X of 1897) does not apply to the Indian Contract Act which was enacted in 1872.

This was an appeal from the judgment of Mr. Justice Buckland, sitting on the Original Side, dated the 26th January 1922.

The facts of the case will appear from the judgment.

Sir B. C. Motter (with *Mr. H. C. Mazumdar*) for the Appellant.—Under sec. 102, the onus of proof is on the seller as his right is a merely equitable right.

Refers to *Lickbarrow v Mason* (5), *Gurney v. Behrend* (6) and *Booth Steamship Company, Ltd v Cargo Fleet Iron Company, Ltd.* (1).

Mr. N N Sarkar (with *Messrs. S. C. Bose and J N Mazumdar*) for the Respondent.—Since the right to stop in transit is a right given by statute to the seller, it continues so long as it is not proved that it has ceased to exist.

I rely on sec. 101 of the Indian Contract Act. *Gurney v. Behrend* (6) and *Booth Steamship Company, Ltd v. Cargo Fleet Iron Company, Ltd.* (1) are in my favour.

(1) [1916] 2 K. B. 570 at p 579.

(5) 5 T. R. 867; Sm L. C., 12th Ed., Vol. I, p. 726 (1787).

(6) 3 El. & Bl. 622 (1854).

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Faise v Wray (7) referred to.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Defendant from the judgment of my learned brother Mr. Justice Buckland, dated the 26th January 1922. The facts of the case may be taken from his judgment at pp 268 and 269 of the paper-book, which are as follows :—

“The Plaintiff firm carry on business at Chandausi in the United Provinces. The Defendant carries on business as a *ghee* and sugar merchant in Calcutta. The goods were consigned to Joy Gopal Joy Kissen, a firm formerly carrying on business in Calcutta.

“In the latter part of April 1920, Joy Gopal Joy Kissen sent their *gomostha* Ram Charan to Chandausi where *ghee* was purchased. A consignment consisting of 457 tins of which the value is stated to be Rs 18,815-9-9 was despatched by rail to Calcutta under Railway receipt No. 19818. The Railway receipt was handed over to Ram Charan who brought it to Calcutta to his employers where it was received in the usual course of two or three days later. It is alleged that on or about the 30th April Joy Gopal Joy Kissen were closing down their business and in insolvent circumstances, and on the 2nd May a telegram was sent from Etawah where, amongst other places, business was carried on by Joy Gopal Joy Kissen, saying that that firm had failed, and instructing the firm of Harnandroy Fulchand in Calcutta to detain the *ghee*. On the next day Messrs Pugh & Co. were instructed to write a letter to the Railway Company which they did on behalf of the Plaintiff to stop delivery of the goods under the Railway receipt to the consignee, as the

latter had become insolvent. A telegram was also sent by the Plaintiff firm on the 3rd May from Chandausi to the Goods Superintendent at Howrah to stop delivery of the 457 tins. In the meantime, according to the Defendant's case, on the 2nd May the Railway receipt which was then in the hands of Joy Gopal Joy Kissen was endorsed by a *gomostha* of the firm of the name of Haranath in favour of the Defendant who is alleged to have paid Rs. 14,000 for it. On the 5th May Dorilal the *gomostha* of the Plaintiff firm arrived at Howrah for the purpose of dealing with the matter. He says he could not find Joy Gopal Joy Kissen and he went to the Railway Office. The Defendant's manager went for the goods, which he did on the 3rd, 6th and 11th May, according to his evidence, but the goods had not arrived. On the 7th May Joy Gopal Joy Kissen were adjudicated insolvents and three days later, on the 10th, a further letter stopping the goods was written by Messrs. Khaitan and Co. on behalf of the Plaintiff. That letter was superfluous, in view of what already had taken place, and on the next day the Defendant's manager says, he came to know at Howrah that Joy Gopal Joy Kissen were in financial difficulties. The *ghee* arrived at Howrah on the 16th May and on the 19th May, this suit was filed. Three days later by an arrangement which I understand was made under an order of the Court, the *ghee* was delivered to the Defendant.”

It is necessary to notice, as the learned Judge has pointed out, that the goods in question were delivered under an arrangement, which was sanctioned by the Court, to the Defendant with the result that the seller found himself in the position of the Plaintiff; and, in the suit the first prayer was for declaration that the 457 tins of

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ghee belonged to the Plaintiff firm and that the Plaintiff firm was entitled to take delivery of the same from the East Indian Railway. In the alternative, a claim was made for a decree for Rs 18,815 which was alleged to be the value of the goods in question.

The finding of the learned Judge was as follows :—

“I do not think it is established that Rs 14,000 were paid by the Defendant to Joy Gopal Joy Kissen for the Railway receipt; the circumstances are extremely suspicious, and I am by no means satisfied as to the *bona fides* of the Defendant in the transaction.”

In the course of the case a question arose as to the party upon whom the burden of proof with respect to the two matters, which are referred to in the learned Judge's decision rested, and the learned Judge stated the question in the following manner at p. 279 —

“Is it the duty of a seller-Plaintiff who has a right by law to stop the goods in transit to show that it has not ceased by reason of the conditions of the section not having been complied with, or is it the duty of the assignee-Defendant to show that it has ceased?”

And upon that point his decision is to be found at p. 280 as follows :—

“In my judgment the burden of proof is upon the Defendant whose duty it is to prove that he acted in good faith and gave valuable consideration and it is not for the Plaintiff to show that the Defendant was not acting in good faith or gave no consideration. The result is that the Plaintiff firm must succeed, for the Defendant has not established that the endorsement of the Railway receipt was made either in good faith or for consideration.”

I propose to consider the question

which relates to the burden of proof in the first instance. It was not disputed, at all events, in this Court, that the Plaintiff was in the position of a seller. He had parted with the possession of the goods. The seller had not been paid the price of the goods. Further, in this Court it was not denied that the Plaintiff gave the requisite notice to the Railway Company to stop the goods, and that at the time of such notice the buyers Joy Gopal Joy Kissen were insolvent, and it is common ground that the goods were in transit. In short, all the conditions necessary to bring the case within sec 99 of the Contract Act were fulfilled, and *prima facie* the Plaintiff had a right to stop the goods in transit. The question in this case arises by reason of the fact that it was alleged that the buyers Joy Gopal Joy Kissen had assigned the Railway receipt (which it was alleged was a document of title to the goods) to the Defendant for good consideration, and by reason of the provisions which are to be found in sec. 102 of the Contract Act. A considerable portion of the argument of the learned Counsel for the Appellant was directed to show that the right of the seller to stop the goods in transit was merely an equitable right. In my judgment it is not necessary to consider this question at any length nor is it necessary, for the reasons to which I will hereafter refer, to consider in detail the English cases which were cited to us. It will be sufficient for me to refer to the case of *Booth Steamship Company, Limited v Cargo Fleet Iron Company, Limited* (1), for the purpose of showing the origin and the nature of the vendor's right of stoppage in transit.

In the judgment of the learned Chief Justice at p. 579 this passage is to be found :—

(1) [1916] 2 K. B. 570 at p. 579.

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"The right of stoppage *in transitu* was introduced in the English law in the seventeenth century, and the first reported case on the subject is in the year 1690 [*Wiseman v. Vandeputt* (2)]. As the right arises only in the case of insolvency, it came to be recognised in our Courts in the first instance through the medium of the bankruptcy jurisdiction of the Lord Chancellor which was of statutory creation. The right is not peculiar to the law of England; it was part of the law merchant existing in most of the commercial States of Europe before it was recognised as part of our Law. In 1743, Lord Hardwicke received evidence of the custom of merchants as to stoppage *in transitu* and then applied the rule. He based his decree both upon the custom proved before him and upon the justice of the case. *Snee v. Prescott* (3). In 1841, Lord Abinger in *Gibson v. Carruthers* (4) gave a full and interesting account of the history of the introduction of stoppage *in transitu* into our law and reviewed the authorities. He referred to the opinions expressed by Courts of Equity that the right was founded upon some principle of the common law and of the practice in Courts of law to call the right a principle of equity which the common law had adopted. He pointed out the difficulty, owing perhaps to its foreign parentage, of reducing this right to some analogy with the principles which govern the law of contract as it prevails in this country between vendor and purchaser."

It was then pointed out by the learned Chief Justice that in England some of the difficulties attached to this question had been removed by the codification of the

law which is contained in the Sale of Goods Act, 1893.

Fortunately in this country the law relating to the matter in question has been embodied in the Contract Act; and in my judgment we have to decide this question having regard to the provisions of the Contract Act, which relate to the matter in question. The Contract Act provides codification of the law relating to contracts but contains a proviso in sec. 1 that "nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act."

Now, sec. 99 of the Contract Act to which I have already referred provides that "a seller who has parted with the possession of the goods and has not received the whole price may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer." Sec. 104 provides the method of stopping the goods. The section runs as follows:—"The seller may effect stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depository in whose possession they are."

Secs 106 and 107 deal with the rights of the seller after he has stopped the goods in transit. Sec. 106:—"Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid."

Sec. 107:—"Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may after giving notice to the buyer of his intention to do so, re-sell them, after the lapse of a

(2) [1690] 2 Vern. 203.

(3) [1743] 1 Atk. 245.

(4) 8 M. & W. 321, 328 (1841).

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reasonable time, and the buyer must bear any loss, but is not entitled to any profit which may occur on such re-sale." So that, in my judgment, it appears that the giving of the notice by the seller to the carrier operates to defeat the purchaser's right to possession and entitles the seller to hold the goods until the price is paid, or, in the event of the price not being paid in accordance with the contract, to re-sell the goods in accordance with the provisions of sec 107. Then arises the question, what is the position when the buyer re-sells the goods to another purchaser? Secs 101 and 102 are material to that question. Sec. 101 provides: "The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf." It is to be noted that sec 101 constitutes the general rule that the seller's right to stop does not cease on the buyer's re-selling the goods while in transit but continues until the goods have been delivered to the second buyer or to some person on his behalf. The section, however, refers to certain exceptions: and, sec. 102 is an exception, in my judgment, to the general rule which is laid down in sec 101. That section provides:—"The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer who is acting in good faith, and who gives valuable consideration for them." In my judgment, there is no doubt that the proper construction to be placed upon these sections is that when the seller has stopped the goods in transit, it lies upon the second buyer to prove that when the document of title to the goods

was assigned to him, he was acting in good faith and that he gave valuable consideration for the goods. The Defendant was in the position of the second buyer referred to in sec 102; and I agree with the decision of the learned Judge that the burden of proof was upon him to show that he acted in good faith and that he gave valuable consideration.

The question, therefore, arises whether the Defendant discharged the *onus* which lay upon him. The decision of the learned Judge in that respect is to be found at p 277 of the paper-book as follows:—

"I do not think it is established that Rs 14,000 were paid by the Defendant to Joy Gopal Joy Kissen for the Railway receipt, the circumstances are extremely suspicious and I am by no means satisfied as to the *bonâ fides* of the Defendant in the transaction."

And, consequently, the learned Judge decided in favour of the Plaintiff.

The learned Judge, when dealing with the question whether the Defendant had discharged the burden of proof, which rested upon him, stated certain facts which are to be found in his judgment, and the passage begins at the bottom of p. 272 as follows:—"What are the outstanding features of this story as related to me?" The learned Counsel for the Appellant did not dispute the learned Judge's findings of fact in this respect, but he did dispute the deductions which the learned Judge made from the above-mentioned facts.

The result is that the facts to which I have referred stand uncontested, and the *onus* rests upon the Appellant to satisfy this Court that the deductions which the learned Judge made from those facts are wrong.

Now, the main grounds upon which the learned Counsel for the Appellant relied

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were the entries in the Defendant's books. He pointed out that the finding of the learned Judge was that the books on the face of them deserved the commendation which was asked for them; that is to say, (as I understand the judgment of the learned Judge) as far as could be ascertained from the entries themselves they appear to have been made at or about the time of the alleged transaction and in the ordinary course of business; in that respect they were entitled to the commendation that was claimed. The learned Judge then went on to point out that those entries were not conclusive. It appears that the Defendant's business was carried on at Burrabazar where apparently the Defendant carried on his *ghee* business and the Defendant's son carried on another business of a financial nature and the books relating to both these businesses were kept in the Burrabazar Office, some of the monies being kept in a safe in a house at Bagbazar where apparently the Defendant and his son lived. The learned Judge pointed out that assuming for the sake of argument that this was not a *bonâ fide* transaction, it would be necessary to make entries in the books of the Burrabazar Office and to enter a substantial sum which could be put forward as the consideration for the assignment of the Railway receipt; he drew attention to the fact that the money was supposed to have been taken from the safe in the house at Bagbazar, and that there was no book of account recording the extraction of the money from the Bagbazar safe, except a copy book which was produced by the Defendant's son for the first time when he was in the witness box; and he made certain criticisms upon that book and the way in which the entries were made.

In addition to those criticisms there seems to me a further criticism which I

think was not noticed by the learned Judge. It seems to me that on the page on which this entry of Rs. 14,000 is found, the first item on the credit side, *viz*, Rs. 97,000 must have been entered after the next four items.

It was suggested by the learned Counsel for the Plaintiff that that had been done in order to make it appear that there was sufficient money on the credit side to permit the withdrawal of the Rs. 14,000 on the 19th of Baisakh.

The learned Counsel for the Appellant, in my judgment, made a pertinent observation with regard to that, namely, that the witness who produced the book had not been cross-examined upon that point, and that consequently much stress ought not to be laid upon it. I agree with that observation. At the same time it is to be remembered that that book was not disclosed by the Defendant in his affidavit of documents and the Plaintiff's learned Counsel had no opportunity of seeing it until it was produced by the witness when he was in the witness box, and, it is not surprising that in the short time which was available for examining the book, the learned Counsel did not observe the matter to which attention has now been drawn. At the same time it must be remembered that the witness had no opportunity of explaining that entry, and, consequently I do not attach an undue importance to that matter.

The main facts, (I do not intend to deal with them in detail) which emerge in this case with regard to the assignment of the Railway receipt, are these.—The representative of the Defendant whose name was Butto Lal Banerjee entered into this arrangement, apparently, according to his own account, after a short discussion. He apparently was prepared to pay the considerable sum of Rs. 14,000

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in respect of the *ghee*. I desire to draw attention to a passage in his evidence which seems to me to be material (at p. 80) which is as follows:—

“ Q. Do you know that goods are sometimes sent at owner's risk and sometimes at Railway risk?

A. Yes.

Q. You know if it is at the owner's risk and the goods are lost, you get nothing from the Railway?

A. Yes.

Q. That you have known for years?

A. Yes.

Q. Did you enquire from Harnarain and Rajmull whether these goods were coming at Railway risk or at owner's risk?

A. I did not consider it necessary to enquire about all these.

Q. Did you enquire?

A. No.

Q. If they were coming at owner's risk, supposing they were lost or destroyed or stolen, what would you have done?

A. On the strength of this receipt we would have called upon the Railway Company to explain.

Q. You have told us that you know for years that if it was at owner's risk you cannot get anything from the Railway?

A. Yes.

Q. May I take it that you had no discussion with Harnarain and Rajmull as to what would happen if the goods did not arrive or if only a portion arrived?

A. No. There was no talk with Harnarain on the subject.

Q. Or with Rajmull?

A. No.”

He is supposed to be a business man—he was buying a particular kind of *ghee* with which apparently his firm never dealt before. He had for some considerable time had no dealings with Joy Gopal

Joy Kissen. He had no sample of the *ghee*. He did not take the trouble to enquire whether it was carried at owner's risk or at the Railway risk, nor did he even enquire about the invoice price. The invoice price at Chandausi was Rs. 90-8 annas and he bought it at Rs. 80 per maund. He then, having made so little enquiry about the *ghee* or the conditions relating to its transit, is supposed to have gone up to the Bagbazar house, obtained Rs. 14,000 and paid it over to Harnath who was the representative of Joy Gopal Joy Kissen. This Harnath or Harnarain has not been called; but a man named Rajmull has been called. Rajmull was not connected with Joy Gopal Joy Kissen at the time, although he had been, as I understand, employed by this firm at some previous period; and, I personally do not understand why the services of Rajmull were called upon on this occasion, because, apparently, according to his own account, he did nothing except to introduce Harnath to the representative of the Defendant firm. The evidence shows that the Defendant firm's place of business was at a short distance from the place of business of Joy Gopal Joy Kissen. I am not at all inclined to disagree with the learned Judge's finding when he said that “ Rajmull's evidence with regard to what took place and there being need for him to attend, is not to be accepted too readily.”

The learned Judge seems to have thought that it was quite possible that as Harnath was not available as a witness it was necessary to have somebody who could speak to the transaction from the point of view of Joy Gopal Joy Kissen. I do not intend to deal with this part of the case in any greater detail.

Our attention was drawn to the evidence by the learned Counsel on both

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sides with great care, and I repeat that in this case the question involved was of fact and it was for the Appellant to satisfy the Court that the learned Judge's findings of fact and the deductions which he drew from those facts were wrong. In my judgment the Appellant has failed to discharge that onus, and I am by no means satisfied that the learned Judge was wrong when he came to the conclusion that he was not satisfied that the Rs 14,000 had been paid. Even if the learned Judge was wrong upon that point, it, by no means, follows that the Defendant should succeed, because the circumstances of this case are such as to lead me to believe that the learned Judge was right in his further decision, namely, that he was not satisfied as to the *bond fides* of the transaction.

The result is that, in my judgment, this appeal should be dismissed with costs. The injunction restraining the Plaintiff from withdrawing the sale price of the *ghee* which is in deposit in Court is dissolved.

RICHARDSON, J.—I agree. The view of the evidence taken by the learned Judge who tried the case raises the question whether in this conflict between the Plaintiff as seller claiming the right of stoppage in transit and the Defendant as second buyer claiming as assignee of the Railway receipt being the document showing title to the goods, the burden of proof rests on the seller to prove the negative, or on the second buyer to prove the affirmative, of the proposition that the second buyer acted in good faith and gave valuable consideration for the goods. The learned Judge, while he characterises the circumstances in which the document of title was assigned as suspicious, regarded the evidence as in this sense in-

conclusive, that he could not pronounce against the second buyer if the burden of proof lay on the seller nor against the latter if the burden of proof lay on the former. The learned Judge's decision was in favour of the seller because in point of law he held that the burden was on his adversary. It is not, I think, unfair to say that Sir Benode Mitter, appearing for the Appellant, the Defendant, though he also argued the appeal on the facts, addressed himself in the main to the question of law so arising.

It is not now disputed that the first buyer became insolvent so that as against him the Plaintiff as seller was entitled under sec. 99 of the Contract Act to stop the goods while they were in transit. Nor is it disputed that the goods when the Plaintiff stopped them were in transit. We are not concerned therefore, with sec. 100 of the Act which describes what is meant by transit. The relevant provisions will be found in the two following sections which run as follows:—

Sec 101: "The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf."

Sec 102: "The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer who is acting in good faith and who gives valuable consideration for them."

So far as the question of the burden of proof depends on the language of these provisions, the rights of the assignee of the document of title, though they are

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formulated in a separate section, sec. 102, would appear to be introduced by sec. 101 as an exception to the seller's general right of stoppage where the goods have been sold by the first buyer. According to the general rule, therefore, the language would appear to throw on the second buyer the burden of proving his own good faith in acquiring the document of title.

I will assume, however, that as regards the burden of proof the Act gives out no certain sound and that the question is to be decided on general principles or in the light of consideration such as those advanced by Sir Benode Mitter

Sir Benode contended in effect that the right of stoppage in transit was an equitable right, that the legal right to the goods was in the assignee of the document of title and that it was for the seller to establish want of good faith on the part of such assignee.

It appears to me, however, that it is now too late to argue that the right of stoppage is a merely equitable right. Observations on the history of the right will be found in the judgments of Lord Reading, C. J., and Scrutton, J., (as he then was) in a case to which my Lord has already referred. *Booth Steamship Company v. Cargo Fleet Iron Company* (1). Even before the right was recognised in England by the Sale of Goods Act, the better view seems to have been that it was a common law right derived from the law merchant and both in England and in India it is now not only a legal but a statutory right.

No doubt *Lickbarrow v. Mason* (5) and *Gurney v. Behrend* (6) affirm the title of

the *bond fide* transferee for value of a bill of lading endorsed by the consignee. But it has still to be remembered that the right of the assignee of the document of title is apart from any mere question of language an exception to the more general rule which appears in India in sec. 101 of the Contract Act. The general rule is that "the seller's right of stoppage does not cease on the buyer's reselling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some person on his behalf."

If sec. 102 confers upon the second buyer who comes within the section, a title which may also be described as a statutory title, still in my opinion the title is one which he must prove as against the seller who has shown that *prima facie* he had the right to stop the goods in transit.

I agree in this case with my Lord and the learned Judge that the burden lies upon the Defendant, and that he has not discharged it.

His principal witnesses are his manager Batto Lal Banerjee and his son Nando. In both cases Mr. Sircar's cross-examination at the trial was very damaging. The goods were being carried on the railway at owner's risk. No enquiry was made on this point. Batto Lal's evidence and that of the witness Padamraj Lameha as to the price of Chandausi *ghee* in Calcutta at the beginning of May 1920 is very vague. The evidence for the Plaintiff is that Chandäusi *ghee* was then selling at a price not far short of Rs. 100 a maund. The contract price was Rs. 90-8 a maund and the Defendant bought at Rs. 80 a maund. The transaction was an unusually large one for the Defendant to embark upon. He had never bought Chandäusi *ghee* before. He had had no transactions with the ori-

(1) [1916] 2 K. B. 570 at p. 579.

(5) 5 T. R. 387; 5 M. L. C., 12th Ed., Vol. I, p. 726 (1787).

(6) 3 M. & B. 622 (1854).

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ginal buyer, the firm of Joy Gopal Joy Kissen, at any rate for five or six years previously.

It is true that the account books kept at the Defendant's shop in Burrabazar purport to show that a sum of Rs. 14,000 was paid to Joy Gopal Joy Kissen's *gomostha* Haranath Modi and that these account books appear to have been kept in the regular course of business. But the story is that the money was brought from the home-safe in the family house in Baghbazar, and the evidence that the money was taken out of that safe is at least unsatisfactory. On this point it is unnecessary for me to say more than my Lord has already said.

Moreover, the firm of Joy Gopal Joy Kissen was a firm in a very large way of business. The *gadi* in Burrabazar was a very short distance from the Defendant's shop. The Railway receipt was negotiated on the 2nd May. It is admitted that Joy Gopal Joy Kissen's *gadi* was actually closed on the 4th May. The firm or its proprietor was adjudicated insolvent on the 7th May. It is to my mind improbable that no inkling of the firm's position had reached the Defendant. I agree with the learned Judge's observation made in another connection that "if it was true that Joy Gopal Joy Kissen were carrying on business until the 4th May it ought to have been easy in the case of a firm of the standing of Joy Gopal Joy Kissen who are said to have done a very large business and to have been well-known in Calcutta, to call some independent evidence to prove the fact." The learned Judge adds that there is no evidence to that effect.

I am not satisfied that the alleged payment of Rs. 14,000 was in fact made; but even if it be assumed that this sum was paid by the Defendant to Haranath Modi

on account of Joy Gopal Joy Kissen, I am unable to say that it is established that the money was paid in good faith. We were referred to sec. 3, cl. (20) of the General Clauses Act (Act X of 1897) which says that "a thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not." The definition does not apply to the Contract Act which was enacted in 1872 but in the present case the facts point to more than mere negligence; they point rather to deliberate abstention from enquiries which if made would have put the Defendant on his guard or to wilful blindness in entering upon a speculative transaction which it was expected would be profitable.

I agree that the appeal should be dismissed.

Messrs. B. N. Bose & Co., Solicitors for the Appellant.

Messrs. Khaitan & Co., Solicitors for the Respondent.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 579 AND 1168 OF 1918.

NAGENDRA LAL DAS

and ors., Plaintiffs,

Appellants,

v.

CHAUDHURI, J.

CUMING, J.

1919,

20, August

THE CHAIRMAN, CHITTAGONG MUNICIPALITY,
Defendant, Respondent.

Bengal Municipal Act (III, B. C., of 1884), secs. 290, 295, 297—Rules framed by Local Government under secs. 290—Rules 4, 9 and 24 (e), if ultra vires—Rules requiring rate-payer who takes private water connection to pay for meter and authorising cutting off of water supply in case of non-payment, reasonable and intra vires—Rules, if impose a tax.

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A Rule framed by the Local Government requiring owners or occupiers paying water rate to provide a meter at their own expense as one of the conditions for allowing them to lay down communication pipes from the service pipe of the Commissioners, for the purpose of leading water to their premises for domestic purposes, is within the powers conferred by sec. 290 of the Bengal Municipal Act, and being reasonable is *intra vires*. It is not inconsistent with sec. 295 of the Act, which makes it lawful in certain circumstances to have a meter fixed at the expense of the Municipality and to expend the Municipal funds for the purpose.

As no one is obliged to have a house connection, the rule has not the effect of imposing a charge or tax on the rate-payer.

Rule 24 (c) of the Rules framed under sec. 290 of the Act authorising the Commissioners to cut off water supply; upon the owner or occupier refusing to comply with a notice to pay fees and charges imposed in accordance with the rules, is consistent with sec. 297, reasonable and *intra vires*.

These were appeals against the decree of J. Cornes, Esq., District Judge of Zillah Chittagong, dated the 5th of April 1918, reversing the decrees of Babu Bhupendra Nath Mukherjee, Munsif, 1st Court at that place, dated the 8th February 1918.

The facts of the case were as follows :—

Certain rate-payers of the Chittagong Municipality wanted to have house connection with the main water service pipe of the Municipality. The Municipality were willing to allow the connection only on payment by them of the expense of putting up meters to measure

the amounts of water consumed. The Plaintiffs who were rate-payers sued the Municipality for a declaration that they were entitled to have the connection made without any payment, and the Municipality having permitted them to have the connection on the understanding that the Plaintiffs would pay for the meters in case their liability for such payment was established. Plaintiffs also prayed for injunctions to restrain the Municipality from cutting off the water supply with a view to enforcing the payments for the meters.

The questions which arose for decision in the suits were whether certain rules framed under sec. 290 of the Bengal Municipal Act by the Local Government, under which the Municipality purported to act were *ultra vires*.

The suits were decreed by the Munsif but dismissed on appeal by the District Judge.

Hence this Second Appeal

Messrs C. R. Das and P. Choudhury and Babu Khatish Chandra Sen for the Appellants.

The Advocate-General and Babu Ram Charan Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The facts of the suit out of which Appeal No. 879 of 1918 has arisen are simple.

The Plaintiffs are certain rate-payers of the Municipality of Chittagong, the Defendants are Commissioners of the Municipality. The Plaintiffs wished to have house connection with the main water service pipe. The Municipality were willing to allow the connection only on the condition that a water meter to measure the amount of water consumed

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was put in by the Plaintiff at their own expense in accordance with certain rules framed by the Local Government under sec. 290 of Act III of 1884 (The Bengal Municipal Act) as amended by Act IV of 1894.

The Plaintiffs contended that these rules were *ultra vires* and that they were entitled to have the house connection they asked for without paying for the meter and they asked for an injunction to restrain the Defendant Municipality from cutting off the water connection which the Municipality threatened to do if the price of the meter was not paid, the Plaintiffs having been allowed, on the understanding that they would pay for the meter if it was found that they were liable to pay for it, to make the desired house connection. The Court of first instance decreed the suit holding that the rules framed under sec. 290 were *ultra vires*. On appeal the learned District Judge decreed the appeal and dismissed the suit. He held that the rules framed under sec. 290 were not *ultra vires* and they did not conflict with sec. 295 of the same Act.

Against this decree the Plaintiffs have appealed to this Court. The question in controversy between the parties though very simple is a question of considerable importance and has been argued at some length.

Sec. 290 of the Bengal Municipal Act is as follows:—"Whenever the Commissioners deem it practicable and consistent with the maintenance of an efficient water supply, they may at a meeting and subject to such rules and conditions as the Local Government may make and impose, allow the owners and occupiers paying the water rate hereinbefore mentioned to lay down communication pipes from the service pipe of the Commissioners, for the

purpose of leading water to their premises for domestic purposes."

It is quite clear that this section by itself gives the Local Government the power to make and impose the rules and conditions under which the Municipal Commissioners may allow house connection with the service water pipes. Sec. 291, sec. 292, and sec. 293 which have been referred to by Counsel for the Appellants give the Commissioners the necessary powers to ensure the connection being properly made and kept in proper order to prevent the water being wasted. Under the powers conferred on them by sec. 290, the Local Government did make certain rules which were made final on the 24th October 1916.

The two particular rules with which we have to deal are r. 4 and r. 9 which run as follows:—

4. (1) The owner or occupier of the holding in respect of which the connection is required must bear the entire cost thereof, including the cost of the supply and fixing of the fittings referred to in r. 9.*

(2) The applicant for the connection will also be liable for the cost of such alterations in, or repairs to, roads, drains, sewers, gas or water mains, or pipes, and the cost of such other works as may be necessitated by, or result from the work of making such connection and also all charges for which the Commissioners may become liable in respect of any of the matters referred to in this sub-rule.

9. A holding connection shall comprise the following parts or fittings.

(a) A brass or gunmetal ferrule inserted in the main supply pipe.

(b) A galvanised iron communication pipe from the ferrule to the meter.

(c) A stop cock and its surface box.

(d) A meter.

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(e) Service pipes from the stop cocks to the taps.

(f) And taps.

The r. 4 provides that the owner or occupier must pay the entire cost of the fittings as defined in r. 9. R. 9 (d) provides that a meter is included as one of the fittings necessary for a household connection. It has been argued that sec. 290 gives the Local Government no power to define what are fittings; therefore the Local Government are not empowered to make a rule under that section defining what are the fittings required for a house connection.

No doubt the section does not provide that the Local Government shall define what are the fittings required for a house-connection, but it does empower the Local Government to make rules and conditions under which the occupiers or owners may have a house connection and the provision of a meter at the occupiers' or owners' expense is one of the conditions they impose.

It is quite immaterial whether a meter is called a fitting or not.

Neither can it be successfully contended that the rules in question are unreasonable.

It is the manifest duty of the Municipality to see that the public in general have their due supply of water. The capacity of any given installation is obviously limited and unless the Municipality can prevent waste, the general public distributed over a large area are bound to suffer. The installation of a meter is one of the most obvious means of preventing waste and as a house connection must be regarded more or less in the light of a luxury, it is only reasonable that the person who has the benefit of it should pay all the necessary expenses. It would obviously be inequitable that the

cost of a luxury should fall on the general body of rate-payers and not on the person who really gets the benefit of it.

It has also been contended that these rules as framed by the Local Government under sec. 290 contravene the express provision of the Act as set forth in sec. 295.

Sec. 295 provides: The Commissioners at a meeting may determine what quantity of water shall be supplied to the occupier of every house free of further charge, for every rupee paid to the Commissioners as water rate on account of such house.

If the Commissioners have reason to believe that the occupier of any house consumes more water than he is entitled to as aforesaid, it shall be lawful for them to provide a water meter at their own expense and to attach the same to the water pipes of the said house and any water which may be used over and above the quantity to which the occupier is entitled as aforesaid shall be paid for by him at such rate as the Commissioners at a meeting may determine.

It is argued that sec. 295 sets forth the circumstances under which the Commissioners may provide a meter and this section states that they may do so at their expense. It is said as this section provides that the Commissioners may have meters fixed at their expense, it is unlawful for the rules to order that a meter should be fixed at the consumers' expense. There is, however, nothing inconsistent between the rules as framed by the Local Government and sec. 295. Sec. 295 makes it lawful in certain circumstances to have a meter fixed at the expense of the Municipality and to expend the Municipal funds for the purpose. That certainly does not preclude the Local Government from making it one of the conditions of a house connection that the occu-

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pier or owner shall provide a meter at his expense.

A further argument has been put forward that by insisting that the owner or occupier should provide the meter, the Commissioners are imposing a charge or tax on the rate-payer and that no charge or tax can be imposed which is not expressly and in very clear terms authorised by the Act itself. This argument has no substance. No one is obliged to have a house connection. Therefore whether a person may, or does not, pay the charge is entirely within his own discretion. It is not a tax on the public. If the Municipality had to provide at their expense meters free of cost to the user, that would mean taxing the public. It is to prevent it that the rules seem to have been framed. It is also to be noted that the Local Government has control over the expenditure of Municipal funds under sec. 69 (1). We are therefore of opinion that the rules as framed by the Local Government under sec. 290 are *intra vires* and the occupier or owner must pay for the cost of the meter. It has lastly been contended, the Municipal Commissioners cannot cut off the water supply in default of the Plaintiffs paying the cost of the meter. The argument put forward to support the contention is that sec. 297 is the only section which authorises the Commissioners to cut off the water supply and that the section provides that the water can only be cut off on account of the non-payment of the water rate. There is some force in this contention, but the point is not a fair one to raise as these persons have been allowed to make the connection on the understanding that they would abide by the rules made under sec. 290, if it were found these rules were *intra vires*.

The same argument, however, applies

as has already been applied to the proper construction of sec. 295. Sec. 295 applies to things in *statu quo* and sec. 290 to future necessity.

The water has, we understand, not been cut off although notice may have been given to cut off under r. 24 (e) made under sec. 290. It cannot be said that this rule conflicts or is inconsistent with sec. 297.

R. 24 (e) is, we consider, *intra* and not *ultra vires*. It seems to us to be a reasonable provision.

In the view we have taken, it is needless to discuss the cases which were cited before us, the general principles enunciated in which were not disputed. The Court has received the assistance of having both points of view thoroughly argued. We think it only right to add that we ought not to interfere with rules and conditions, authority for which has been expressly provided for as in this case, unless they are clearly in conflict with some legal principle.

The result is that the decree of the lower Appellate Court cannot be successfully assailed and the present appeal must be dismissed with costs.

Our judgments also govern Second Appeal No. 1168 of 1918 (Chittagong) which is also dismissed with costs.

N. G.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT CAVE.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

1922;

Heard, 13, 14, 16 &

17, February.

Judgment,

15, May.

SRI CHIDAMBARA

SIVAPRAKASA PAN-

DARA SANNADHIGAI,

Appellant,

v.

VEERAMA REDDI *alias*

MOOKA REDDI.

Respondent.

Civil Procedure Code (Act V of 1908), sec. 103, Or 41, r. 25—Second appeal—Issue not decided in the lower Court—Discretion of High Court to decide issue on evidence on record or remit same to the lower Court—Inamdar, suit by, to eject cultivating tenant—Question whether kudiwaram in former or latter, to be decided on facts of each case—Initial presumption in favour of either party, if exists—Onus, where parties have adduced evidence—Grant of inam, if conveys kudiwaram—Zemindar or Polygar when may convey kudiwaram—Act I (Mad.) of 1908, scope of—Act whether affects rights in litigation when passed.

Under sec. 103 read with Or. 41, r. 25 of the Civil Procedure Code, the High Court, in second appeal, has power to determine an issue of fact left undetermined by the Court of first appeal on the evidence on the record, or to remit the case to the lower Court for a finding on that issue, with liberty to the parties to adduce additional evidence if they choose to do so.

When in a dispute between the cultivating tenant and an inamdar or pattadar, the question arises whether the latter is entitled to both the melavaram and the kudiwaram or whether the former have occupancy right (kudiwaram) in the land, the issue must be dealt with in each case upon its own facts with special regard to the evidence and the circumstances thereon. There is no suggestion in *SURYANARAYANA v. POTHANNA* (2) and in *SETURAINAM*

AIYER v. VENKATACHELA GOUNDAN (1) of an initial presumption in favour of the inamdar or pattadar on the one side or of the ryot on the other and the inference drawn by the Full Bench of the Madras High Court in *MUTHU GOUNDAN v. PERUMAL IYEN* (4) in favour of such a presumption is not correct.

When the entire evidence on both sides is once before the Court, the debate as to onus is purely academical.

The use of the term "iram" in a grant by a zemindar or polygar gives no indication of the intention of the donor to convey the kudiwaram to the grantee, even if he had the right to bestow it. *Prima facie*, a zemindar or polygar is a rent-receiver and his right to direct possession of the lands is confined to his private lands and the "old waste land." It does not extend to rayati land.

The question whether Act I of 1908 (Mad.) applies to rights in litigation at the time of the passing of the Act did not require decision in the case as the tenants were found to have acquired occupancy rights by prescription long before the statute came into force.

This was a consolidated appeal by special leave from a judgment and five decrees of the High Court of Madras, dated the 17th August 1915, allowing one and dismissing four second appeals from decrees of the Court of the District Judge of Trichinopoly, dated the 28th October 1908, which had affirmed three and reversed two decrees of the Court of the District Munsif of Kulitalai, dated the 28th September 1907.

The suits out of which the appeal arose were filed by the Plaintiff-Appellant in his capacity as head of a *mutt* to eject the Defendants from the lands which they

(1) L. R. 47 I. A. 76; s. c. I. L. R. 48 Mad. 567; 25 C. W. N. 455 (1919).

(4) I. L. R. 44 Mad. 558 (1921).

(2) L. R. 45 I. A. 209; s. c. 23 C. W. N. 273 (1918)

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occupied. He contended that the lands were obtained by one of his predecessors in title in 1743, under the terms of an *inam* grant, and that they had ever since been in enjoyment of both the "*mela-varam*" and "*kuduvaram*." The Defendants admitted his right to the "*mela-varam*" alone, and contended that they had the full rights of occupancy tenants.

The facts and arguments are fully set out in the judgment of the Judicial Committee.

Messrs DeGruyther, K. C. and Kenworthy Brown for the Appellant referred to the Madras Estates Land Act, I of 1908, which came into force while the present suits were under appeal to the High Court. They contended that there was no jurisdiction to entertain a second appeal on an erroneous finding of fact, *Mt Durga Choudhrai v Jawahir Singh Choudhri* (5), Code of Civil Procedure, sec. 103, and "that the onus had been wrongly placed upon the Plaintiff.

Suryanarayana v Pothanna (2), *Upadrashta Venkata Sastrulu v. Divi Sreetharamudu* (3) and *Seturatnam Aiyer v. Venkatachela Goundan* (1).

The relation of landlord and tenant does not raise any presumption of permanent tenure. In each case you must establish permanency by contract or otherwise.

Messrs. A. M. Dunne, K. C. and B. Dubé for the Respondent.—There is no presumption either way but the Plaintiff who alleges a right to eject must prove his title. Nothing done under the *inam*

commission could vest in the *inamdar* a subject-matter not already vested in him.

Secretary of State for India in Council v. Srinivasa Chariar (6).

The proof that tenants have for a number of years been in possession as occupancy tenants raises a presumption that at the inception they had occupancy rights.

Seturatnam Aiyer v. Venkatachela Goundan (1).

On the construction of the grant Viscount Cave referred to:—*Waterpark v Fennell* (7) and *Forbes v. Watt* (8).

Mr DeGruyther, K. C. in reply.

There is no ambiguity in the construction of the deed, the words are as wide as possible and there is no evidence of any subordinate interest.

Occupancy rights cannot be acquired by long occupation alone.

Scena Pena Rana Scena Mayandi Chettiyar v Chokhalingam Pillay (9).

THEIR LORDSHIPS' JUDGMENT was delivered by

MR AMEER ALI.—The several consolidated appeals arise out of five suits brought by the Plaintiff on the 27th July 1904, in the Court of the District Munsif of Kulitalai in the Madras Presidency, in his capacity of head of a Mutt, to eject the Defendants from the lands in their occupation in the Village of Karappudayanpatti which, he alleged, belonged to his Mutt. The Defendants in the suit are cultivating tenants holding separate lands unconnected with each other. Accordingly, separate suits were brought against them.

(1) L. R. 47 I. A. 76; s. c. I. L. R. 43 Mad. 567; 25 O. W. N. 485 (1919).

(2) L. R. 45 I. A. 209; s. c. 23 O. W. N. 273 (1918).

(3) L. R. 46 I. A. 123; s. c. 24 O. W. N. 129 (1919).

(5) L. R. 17 I. A. 122 at p. 127 (1890).

(1) L. R. 47 I. A. 76 at p. 86; s. c. I. L. R. 43 Mad. 567; 25 O. W. N. 485 (1919).

(6) L. R. 48 I. A. 56 at p. 67; s. c. I. L. R. 44 Mad. 421; 25 O. W. N. 818 (1920).

(7) 7 H. L. C. 650 (1859).

(8) L. R. 2 Scot. & Div. App. Cas. 214 (1872).

(9) L. R. 31 I. A. 83; s. c. I. L. R. 27 Mad. 291; 8 O. W. N. 545 (1904).

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The Plaintiff's case is that in the year 1743 the Polygar of Turayur, who owned the estate within which the village is situated, granted to the head of the Mutt at the time the village in question; and that since then the successive holders of the office have been in possession and enjoyment not only of the right to the receipt of the dues payable by the tenants to the landlord, usually called in the Madras Presidency the *melavaram*, but also of the right to the actual occupancy of the lands technically called the *kuduvaram*.

The five suits that were brought in the Munsif's Court were numbered 676, 677, 720, 721 and 722 of 1904. In suit No 676 the Plaintiff alleged that the particular tenant, for whose ejection he was suing, held the land in dispute under a *muchilika* executed by the Defendant's predecessor on the 18th June 1880, by which he bound himself to surrender the land in his occupation on failure to pay rent. In suit No 720 the Plaintiff's action related to two items of land in respect of which he alleged that the Defendant's father had executed two *muchilikas* on the 19th April 1894, and the 2nd June 1894, respectively. With regard to suits 721 and 722 the Plaintiff's suit rests on his general allegation that as under the grant he is entitled to both the rights he claimed in the land—*viz.*, the right to receive the rent as well as the right to occupy the lands—he was entitled to eject the Defendants, who were tenants-at-will. In suit No. 722 he appears to have also set up an oral lease. In suit No. 677 the Plaintiff relied upon a *muchilika* executed on the 24th July 1893 by the Defendant's brother.

The Defendants in all the cases denied the right of the Plaintiff to eject them from the lands in their occupation and

under their cultivation, they alleged that he was only entitled to the *melavaram* and not to the *kuduvaram*, and that they and their predecessors had held their lands from times immemorial and possessed and exercised the full rights of occupancy tenants to the knowledge of and with the acquiescence of, the Plaintiff and his predecessors. They further charged that the *muchilikas* produced and relied upon by the Plaintiff were fabricated documents concocted for the purpose of destroying their old and hereditary right in the lands in their occupation.

Upon the allegations the parties went to trial. The District Munsif framed two principal issues, which were common to all the cases, *viz.*—

- (1) Whether the Plaintiff is entitled to the plaint land [that is, the land in suit] itself or only to the *tiwa* (rent) thereon?
- (2) Is the Defendant entitled to the occupancy right in the land by custom and prescription?

The other issues related to the genuineness of the *muchilikas* and to the amount of rent, &c.

The first two issues being common to all the suits, by consent of parties the five actions were tried together, and, as the trial Judge states at the beginning of his judgment, the whole evidence was adduced in suit No 676, and was "used as evidence in all the connected suits."

The Inam grant on which the Plaintiff's claim rests is Ex "A." After reciting by whom and to whom the gift is made the document proceeds thus:—

"The village gifted to our Swami out of our several villages is Karappudayanpatti, to the north of Uppiliyapuram, east of Vayirichettipalayam, south of Kottapatti and west of Sokkapuram. As we have gifted it most willingly to the Swami, you shall forever have dominion over and enjoy the wet and dry lands, tope, well, betel garden, etc., water, tree, stone, treasures, etc., found

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therein and live happily. Further, what we command to be done for the Gurupooja day is this. We command that Gurupooja shall be conducted by collecting at the rate of 4 measures of grain per plough in respect of Agraharam, Sarvamanyam, Umbalam, &c, including wet and dry lands in the whole of our Turaiyur State. You shall accordingly conduct Gurupooja every year and shall not omit to collect at the rate of 4 measures of grain in respect of dry and wet lands also in the whole of Turaiyur State. You shall enjoy the whole of Karuppudayanpatti Village. Further, you shall, as ordered by our predecessors, receive always *Mahamai* and allowance of rice and money for extra expenses. The Audeenam shall, in continuous succession, have dominion over and enjoy for ever, the village, Gurupooja, kattalai, rice allowance, &c. He who helps this charity by thought, word or deed, will be blessed with happiness and live long in the same manner as one who establishes temple of several crores of *Sivulingams* in such holy places as Benares, Chidambaram, Tiruvalur, Arunachalam, Siikalahasti, Conjee, Kalugugundram, Kumbakonam, Rameswaram, etc."

The grant was recognized by the *nam* authorities in 1865. But the Inam proceedings furnish no indication regarding the extent of the rights covered by it. Both sides in support of their respective contentions produced a mass of evidence, which the District Munsif, in a singularly well-balanced and exhaustive judgment, has analyzed with great industry. He held on the evidence that the Defendants had proved they had been in occupation of their respective lands from very early times, and had been dealing with them as lands in which they had full occupancy rights, that they had been selling, mortgaging, making improvements, and that when any portion of the same was taken up for public purposes, they had claimed and received compensation from Government. He held further that the Plaintiff had utterly failed to show that the Defendants had been let into possession

by his predecessors or by himself, or to rebut the testimony they had produced in establishment of their right of occupancy. His main judgment is in suit No 676. He also found that the documents the Plaintiff had produced in support of his claim, together with the *muchilikas* on which he relied in the three cases, had been fabricated with the object of destroying the tenants' right in their lands. He accordingly dismissed the five suits save and except as regards certain claims for rent.

The Plaintiff appealed to the District Court of Tiruchinopoly against the District Munsif's decrees, and these appeals were numbered as follows:—

Appeal 39 of 1908 (suit No 676);

Appeal 11 of 1908 (suit No. 720);

Appeal 12 of 1908 (suit No. 721);

Appeal 13 of 1908 (suit No 722);

Appeal 40 of 1908 (suit No. 677)

It is necessary to give the numbers of the appeals as well as of the suits, in view of the complication that enters into the determination of the cases owing to the course the proceedings took in the subsequent stages.

In appeal No 39 (suit No 676) the officiating District Judge, Mr Thornton, dismissed the appeal on the ground "that he did not consider the Plaintiff had established he was entitled to both the *warams* in all the cultivated lands in the village, nor had he proved the terms of their tenancy." In appeal No. 40 (suit No 677), in which the Plaintiff had put forward a *muchilika* numbered in the Munsif's Court as Ex "O," the District Judge set aside the decree, and in reversal of the Munsif's order made a decree in favour of the Plaintiff for ejectment of the tenant. In appeal No 41 (suit No. 720) he agreed with the Munsif as to item covered by *muchilika* "O 1," and accordingly dis-

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missed the Plaintiff's appeal with respect to that item, but he differed from the Munsif as to the item covered by *muchi-likka* "O 2," and accordingly decreed ejectment in respect thereof. In appeals Nos. 42 and 43 (suits Nos 721 and 722) he affirmed the Munsif's decrees.

Both parties appealed to the High Court against the decrees, which operated severally against them. By the time the appeals reached the High Court, the Madras Estates Land Act (I of 1908) had come into force, and accordingly the Defendant, against whom a decree for ejectment had been made by the officiating District Judge and who was Appellant in second appeal 544 of 1909, filed, on the 27th September 1910, an additional ground of appeal against his order.

All these second appeals came on for hearing before the High Court on the 14th August 1911, but in view of the provisions of sec 6 of Act I of 1908 and the contentions of the parties, the learned Judges considered it necessary to obtain from the officiating District Judge a finding on the following point —

"Whether the grant to the Plaintiff was of the land revenue or of the *kudiamaram* also? Opinions have no doubt been expressed in the judgments of the Lower Courts on the point, but the question was never tried with reference to sec 6 of the Madras Estates Land Act"

Sec. 6 will be referred to later on.

The cases accordingly went back to the officiating District Judge, who returned the appeals to the High Court with the following "finding".—

"But it seems to me that, seeing that Ex 'A' purports to grant all the land in the village absolutely to the Plaintiff's predecessor-in-title, and that the Plaintiff is admittedly entitled to both *uarams* in 70 *cawnies* while there are no tenants on 77 of the remaining 185 *cawnies* in the village, the burden lies on the Defendants to show that

their predecessors-in-title were cultivating tenants at the time of the grant (see also the case reported at p 639, Madras Weekly Notes, 1910), and that in the absence of proof of this, there can be no presumption that there were any cultivating tenants in the village at the date of the grant or that the Zamindar was not the owner of both *warams* in the land comprised in the grant. My finding on the issue sent down with reference to sec 6 of the Madras Estates Land Act therefore is that the grant to the Plaintiff was an absolute grant of all the land in the village, and was not a grant of the land revenue alone to a person not owning the *kudiamaram* thereof."

On the return of this "finding" to the High Court, the learned Judges considered it neither satisfactory nor sufficient. They express their views in the following terms:—

"The learned District Judge has not, so far it appears to us, considered all this mass of evidence, and he seems to have based his conclusion on the language of Ex 'A' and on certain presumption which, according to him, arises from the facts that the Plaintiff is admittedly entitled to both *warams* in 70 *cawnies* of land in the village and that about 77 other *cawnies* are waste. He throws the burden on the Defendants to prove that their predecessors-in-title were cultivating tenants at the time of the grant. We are not disposed to express any opinion on the question of presumptions, because, as a matter of fact, there is considerable evidence upon which the points in issue can be decided one way or the other. But we wish to point out that there is no burden on the Defendants to show that their predecessors-in-title were cultivating tenants at the time of the grant. If they succeed in showing that at the time of the grant the land was in the occupation of cultivating tenants, that might be sufficient to raise a presumption in their favour. We would therefore ask the District Judge to return a fresh finding, on the issue remitted to him, and he will also return a finding on the second issue in the case, namely, 'Is the Defendant entitled to the occupancy right in the land by custom or by prescription?'"

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The officiating District Judge does not appear to have applied his mind to the determination of the question involved in the second issue. It was now expressly and clearly brought to his notice

On the return of the cases to the officiating District Judge, that officer, even with the fresh evidence the Plaintiff was allowed to produce, found himself unable to come to any definite conclusion. The end of his judgment shows that he was not clear at all in his mind as to the conclusion to be derived from the evidence, and he expressed his difficulty in the following words:—

“I do not see therefore how it is possible to say whether the grant to the Plaintiff was of land revenue or of *kudicaram* also”

With these remarks the appeals were re-submitted to the High Court

Upon the return of the appeals to the High Court the learned Judges again found that neither had the evidence been properly considered, nor had the issue to which the attention of the officiating District Judge had been expressly called been determined, and they expressed their view as follows:—

“We are not disposed to express any opinion on the question of presumption *because as a matter of fact there is considerable evidence upon which the issue can be decided one way or the other*

“The finding again submitted by the District Judge after this remand order does not at all show that the District Judge addressed himself seriously to a consideration of the mass of evidence considered by the District Munsif. The Judge says he is ‘in a position of some difficulty,’ and in a short paragraph (paragraph 3 of the finding paper) says that it is not possible to say one way or the other on that point. We are unable to accept the findings and we request the present District Judge to submit fresh findings on the two issues mentioned in the second remand order after detailed consideration of the evidence and

with reference to the above remarks, irrespective of the question of onus and presumption”

The case had accordingly to be remitted once more to the District Court for a proper finding. By that time the permanent incumbent of the office, Mr Harding, seems to have resumed work. He considered the case on the evidence irrespective of any presumption, and on the 30th September 1914, embodied his conclusions into definite findings of fact as required by the High Court. He found on the evidence, in agreement with the District Munsif, that the Defendant tenants had been in occupation of the lands for a very long time, that they had been dealing with their holdings and the lands in their occupation as tenants entitled to occupancy rights, that they had been transferring their holdings, partitioning the same among themselves, making improvements on the land, receiving compensation for land taken up from their holdings by Government, and that the Plaintiff had not only utterly failed to rebut the inference arising from those facts, but had fabricated the documents with which he came to support his claim. He accordingly returned the appeals with the finding as follows:—

“It is unnecessary to say more. A Zamundar could only gift the *melwarum* of occupied and both *warans* of unoccupied lands, and we find in actual fact that the holdings and dealings have been as they must be if that supposition is correct. From 1829 onwards, the ryots or tenants in many cases have partitioned their properties or sold them to Government or to one another, and Plaintiff has accepted these things from 1870 onwards at any rate. Plaintiff now holds *kudicaram* rights in many lands not by his grant but by some subsequent acquisitions. But he never held it in suit lands which are neither *pannai* nor waste, and in 1901 he was found

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by the Deputy Collector to be illegally taking possession of lands and this was upheld by the High Court. He is no doubt trying to get the *kudumiam* of the whole village but his claim thereto is entirely baseless.

"I find that the grant was of the *mel-variam* only of occupied lands and of both *variams* of unoccupied lands. Defendants or their predecessors have always had the occupancy rights in their holdings and were not affected by the gift from the Zamindar to the Inamdar.

The learned Judges of the High Court, upon the return of the above finding, held as follows.—

"It must be conceded in favour of the Plaintiff that we expected the learned District Judge to discuss the evidence at somewhat greater length than he has done, we having indicated in our remand order that the District Munsif had devoted about 85 paragraphs to the consideration of that evidence, and that we required to be reasonably satisfied that the conclusions of the learned District Judge are arrived at after a careful consideration of the whole evidence.

"But we do not think that we are entitled to hold that full consideration has not been bestowed by the District Judge on the whole evidence before he arrived at the findings now submitted by him, and we therefore accept the same.

"The result is that second appeals Nos 515 to 518 will stand dismissed with costs, while second appeal No 544 of 1909 will be allowed with costs in this and in the lower Appellate Court."

From these decrees the Plaintiff has now appealed to His Majesty in Council, and it is contended on his behalf that the High Court acted without jurisdiction in remitting the appeals to the District Judge for a proper finding. The argument proceeds on the same misapprehension of the law, as was pointed out by the Board in the case of *Seturatnam Aiyer v. Venkatachela Goundan* (1). It is to be observed

that the Indian legislature, in its anxiety to prevent the High Court from being inundated with second appeals in trifling matters, has provided in sec 100 of the Civil Procedure Code that such appeals shall lie to the High Court only on the following grounds.—

"(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:—

"(a) the decision being contrary to law or to some usage having the force of law

"(b) the decision having failed to determine some material issue of law or usage having the force of law.

"(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

At the same time, in order to avoid gross miscarriage of justice resulting from the omission by the lower Appellate Court to determine any issue of fact or to come to a definite conclusion on a set of facts, it has made two distinct provisions. By sec. 103 the High Court itself is vested with the power when the evidence on the record is sufficient, to determine any issue of fact necessary for the disposal of the appeal, but not determined by the lower Appellate Court.

By r. 25, Or. XLI, it is further provided.—

"Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

(1) L. R. 47 I. A. 76: s. c. I. L. R. 43 Mad. 567, 25 C. W. N. 485 (1919).

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"And such Court shall proceed to try such issues and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor."

The High Court had thus the power of determining the issue left undetermined by the officiating District Judge on the evidence on the record, or of remitting the case to the lower Court for a finding on that issue, with liberty to the parties to adduce additional evidence if they chose to do so. The learned Judges of the High Court chose the latter, which, under the law, was fully within their competence. The case was remitted three times because the officiating District Judge in the first instance misunderstood the order of the High Court, and in the second instance expressed himself as unable to come to a definite conclusion. The High Court did not in the present case, as in *Seturatnam Aiyer v. Venkatachela Goundan* (1), remand it under Or. XLI, r. 23, of the Civil Procedure Code, but under r. 25. The remarks that follow in the judgment in *Seturatnam Aiyer's* case (1) explain the reason why the remand in that case, as in the present, became necessary. "In the opinion of the learned Judges of the High Court," say their Lordships, "the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits; he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the Defendants were permanent or in the nature of occupancy rights."

As already observed, the Madras Act I of 1908 had come into force on the 1st

July of that year, whilst the appeals in these cases were pending before the High Court. In view of the Plaintiff's contentions, which have travelled over a wide range, and also of the question relating to the grant, it becomes necessary to examine briefly the provisions of the statute. The preamble states the object of the enactment in the following words:—

"Whereas it is expedient to amend and declare the law relating to the holding of land in estates in the Presidency of Madras; It is hereby enacted as follows, etc."

Cl (d) in sec. 3 defines the expression "estate" in the Act to mean—

"Any village of which the land revenue alone has been granted in Inam to a person not owning the *kudivaram* thereof provided that the grant has been made confirmed or recognized by the British Government or any separate part of such village"

Sec. 3 gives a definition of the words "private land" as meaning the "domain or home-farm land" [expressions borrowed from English law] of a landholder by whatever designation known, such as *hambatcam*, *khas*, *sir* or *pannai*. It defines the words "ryot" and "occupancy ryot," and declares "ryoti land" to mean "cultivable land in an estate other than private land." This definition includes other varieties of land to which no specific reference is necessary.

It also defines "old waste" as meaning any land in the estate which, not being private land,

"(1) has at the time of letting by the landholder been owned and possessed by him or his predecessors-in-title for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of this Act, or within twenty years before the passing of this Act, or

"(2) has at the time of any letting by the landholder after the passing of this Act

(1) L. R. 47 I. A. 76, s. c. I. L. R. 43 Mad 667; 25 C. W. N. 454 (1919).

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remained without any occupancy rights, being held therein at any time within a continuous period of not less than ten years immediately prior to such letting."

Sec. 8 deals with what is called "the merger of occupancy right." It declares:—

"(1) Whenever before or after the commencement of this Act the entire interests of the landholder and the occupancy ryot in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no right to hold the land as a ryot but shall hold it as a landholder; but nothing in this sub-section shall prejudicially affect the rights of any third person"

And cl. (3) provides:—

"The merger of the occupancy right under sub-secs (1) and (2) shall not have the effect of converting ryoti into private land"

Sec 10, cl. 1, declares that "all rights of occupancy shall be heritable, and shall be transferable by sale, gift or otherwise."

Cl. 2 provides —

"If a ryot dies intestate in respect of a right of occupancy and without leaving any heirs except the Crown, his right of occupancy shall be extinguished, but the land in respect of which he had such right of occupancy shall not cease to be ryoti land"

Sec. 13 declares the right of the occupancy ryot to make improvements on the land in his occupation or "in respect of his holding."

Coming now to sec. 6, cl. 1, it runs thus:—

"Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land not being old waste situated in the estate of such landholder shall have a permanent right of occupancy in his holding; but nothing contained in this sub-section shall affect any permanent right of occupancy that may have been acquired in land which was old waste before the commencement of this Act."

Chap. XII of the Act deals with the landlord's private land. Sec. 181 pro-

vides that nothing in the previous sections will confer a right of occupancy in the landlord's "private lands," but that nothing in that section shall prevent a landholder from converting his private land into ryoti land. Chap XIV provides that no contract between the landlord and a ryot shall take away the right of an occupancy ryot, or limit his right to use the land as provided by law.

In declaring the rights of the occupancy ryots and emphasizing the distinction between the landlord's "private lands" and "the ryoti" lands, the new Act affirmed the old customary law that had always been recognized by the British administration. . Apart from rules relating to procedure and the jurisdiction of the Revenue Courts, it created one new right in order to settle the constant disputes between landlords and tenants which had been going on for nearly a century; it gave occupancy rights to all ryots in occupation of lands within an "estate" at the time of the passing of the Act. It also gave some security to non-occupancy ryots in the enjoyment of their lands. In other respects, generally speaking, it declared and gave statutory recognition to existing rights and status. One important feature of the Act is worthy of note: it throws into relief the component parts which, from immemorial times, go to constitute a village; *first*, the lands in the direct cultivation of the proprietor (called by various names); *second*, lands occupied by tenants or ryots; and *third*, old waste lands over which by custom the landlord possessed certain specific rights now crystallized in the statute. These remarks do not apply to ryotwari tracts in the direct possession of Government which are let out to *mirasidari* or hereditary ryots for purposes of cultivation.

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The existence in a village of *pannai* lands in which the tenant cannot acquire occupancy rights except by contract, connotes the existence of lands in which he can acquire such rights by prescription.

In the present case the grant itself does not convey in express terms the *kudivaram* to the grantee. Nor does the term *inam*, an Arabic word meaning "a reward," give any indication of the intention of the donor, even if he had the right to bestow it on the donee. *Primâ facie* a zemindar or *polygar* is a rent-receiver; or, to use the language of sec. 4 of Act I of 1908, he has the right to collect the rent from his tenants. *Primâ facie*, his right of direct possession of the lands is confined to his "private lands" and the old waste land, it does not extend to "ryoti land."

The place of the cultivating ryots in the agricultural economy of Southern India is thus described in a proceeding of the Board of Revenue of Fort St. George (Madras), dated 5th January 1818.*

"The universally distinguishing character, as well as the chief privilege of this class of people, is their exclusive right to the hereditary possession and usufruct of the soil, so long as they render a certain portion of the produce of the land, in kind or money, as public revenue; and whether rendered in service, in money, or in kind, and whether paid to *rajahs*, *jageerdars*, zemindars, *polygars*, *motahdars*, *shrotriendars*, *inamdars* or Government officers, such as *tahsildars*, *amilars*, *aumeens*, or *tanadars*, the payments which have always been made by the ryot are universally termed and considered the dues of the Government."

It has been urged on behalf of the Plaintiff that the onus was wrongly placed upon him, and in support of this contention the judgments of this Board, in

Suryanarayana v. Pothanna (2), and in *Upadrashta Venkata Sastrulu v. Divi Sreetharamudu* (3) were relied upon.

In the first case the grant appears to have been made somewhere in the fourteenth century of the Christian era, and it was conclusively proved, on behalf of the Plaintiff, in that suit, that he and his predecessors had since then been in actual occupation of the lands extending over centuries; they had further produced documents showing they had been actually cultivating the land. It was also established from the *inam* Register that the grant not only included the revenue but also the soil. The Munsif had found on these facts in favour of the Plaintiff, but his judgment was reversed by the District Judge, whose decree was affirmed on second appeal by the High Court. The Board upon a review of the facts established in the case declared that it could not under the above circumstances be assumed that the grant was only a grant of the king's share in the produce of the soil, and did not include the *kudivaram*. It was a presumption which was certainly not warranted by the facts of the case.

In the subsequent case of *Upadrashta Venkata Sastrulu v. Divi Sreetharamudu* (3) it was again found upon the evidence that the grant included the *kudivaram*. Their Lordships say in their judgment delivered by Viscount Cave —

"There is not in any of the documents above referred to any trace of a claim by any person other than the *inamdar* to a permanent right of occupancy, and the fact that by the terms of the grant the grantee is desired to cultivate the lands and that he is referred to as residing in the village, tend to show that no such right existed in any other person."

(2) L. R. 45 I. A. 209; s. c. 23 C. W. N. 273 (1918).

(3) L. R. 46 I. A. 123; s. c. 24 C. W. N. 129 (1919).

* MS. copy of the India Office.

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* * * * *

"And when the subsequent history of the estate comes to be examined, it is found to be wholly inconsistent with the existence of any permanent occupancy rights. Tenancies have been continually granted by the inamdars for short periods and at variable rents. When tenancy lands were compulsorily acquired by Government and compensation was paid to the agramdar, no claim to compensation was put forward by the tenants. In the year 1904 all the tenants formally relinquished their lands to the Plaintiff and put them in his possession, and from that date until tenancies were granted in the year 1907 the property remained vacant."

In view of those facts the Board overruled the objection that the civil Court had no jurisdiction to entertain the suit, and that under the provisions of sec 189 of the Act the Revenue Courts only had the power to deal with the matter. In dealing with the judgments of the District Judge and of the High Court, their Lordships observed that the two Appellate Courts in India had acted on a supposed presumption of law, that an *inam* grant of a village, particularly if made to a Brahman, is *prima facie* a grant of the *melavaram* right only and does not include the *kudivaram*, and they pointed out that in the previous case, already referred to,* it was held that no such presumption exists. And then they add:—

"Each case must therefore be considered on its own facts; and in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances as far as they can now be ascertained."

The question came up again for consideration before the Board in the subsequent case of *Seturatnam Aiyer v Venkatachela Goundan* (1), to which reference

has been made before. That was a suit for ejectment by a *mirasidar* against the tenants in occupation of the lands in a village granted to him many years ago. As already observed, the *mirasidar* is himself a cultivating ryot, and the land which is granted to him is for purposes of cultivation in a ryotwari tract. The Defendants contested the claim for ejectment, and alleged that they possessed occupancy rights. A considerable body of evidence was produced on both sides. The District Munsif dismissed the suits, holding that the Defendants had established their prescriptive occupancy rights in the lands in their occupation and under their cultivation. The Munsif found that the Plaintiff's claim to eject the Defendants from the lands in actual cultivation was "barred," but decreed the claim in respect of the pasture land. The decree of the District Munsif was set aside by the District Judge, as he considered the question for consideration in the case was "whether the Defendants had shown that the Plaintiff or his predecessor-in-title had contracted the right of tenancy should be changed into a right of permanent occupancy." And his conclusion was that "in those circumstances I think it clear that the Defendants have not established any contract on the part of the Plaintiff or his predecessor-in-title to convey to them a right of permanent occupancy," and he had accordingly decreed the Plaintiff's claim for possession of the suit lands."

On the appeal of the Defendants, the High Court set aside the decision of the District Judge and remitted the case for a finding on the real point involved in the determination of the case. The learned Judges considered that the question which the District Judge had to consider was whether "on the admitted and undoubted

(1) L. R. 47 I. A. 76; s. c. I. L. R. 43 Mad. 567; 25 C. W. N. 485 (1919).

* L. R. 45 I. A.

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facts of the cases, and the evidence on both sides, the Defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy."

On the return of his finding the learned Judges of the High Court found that he had omitted to consider the question that had been remitted to him. The following remarks are pertinent to the present case. The learned Judges observed :—

"The District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court, again assumed that the Defendants' original right was that of tenants from year to year, and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy."

Without, however, remitting the matter for a proper finding, the High Court proceeded themselves to determine, upon the evidence on the record, the issue. To use the words of Sir Lawrence Jenkins, who delivered the judgment of the Board :—

"If and so far as this was an issue of fact—a point on which it is not necessary to express a definite opinion in the circumstances of this case—the Court had power to deal with it under sec. 103 of the Civil Procedure Code, 1908"

The conclusion of the High Court was that the Defendants had established occupancy rights in the land they held, and this Board affirmed its decree.

It will be noticed that neither in the case of *Suryanarayana v. Pothanna* (2), nor in *Seturatnam Aiyer v. Venkatachela Goundan* (1), is there a suggestion of a presumption in favour of the *inamdar* or *pattadar* on the one side or of the *ryot* on the other. It was further dis-

tinctly pointed out in *Upadrashta Venkata Sastrulu v. Divi Sreetharamudu* (3) that—

"Each case must, therefore, be considered on its own facts; and in order to ascertain the effect of the grant in the present case [that is the case with which the Board was dealing] resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained."

A Full Bench of the Madras High Court, however, has in a recent case [*Muthu Goundan v. Perumal Iyer* (4)] held that underlying the exposition of their Lordships such an initial presumption is to be inferred. Their Lordships cannot help observing that in drawing this inference the learned Judges are clearly in error. Each case must be dealt with upon its own facts, with special regard to the evidence and circumstances therein.

When the entire evidence on both sides is once before the Court the debate as to onus is purely academical. On this point they desire to associate themselves with the observation of the Board in *Seturatnam Aiyer v. Venkatachela Goundan* (1) : "The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them."

Dealing now with the facts of the present case, there is first the grant in favour of the Plaintiff-Appellant, the terms of which have already been set out. It does not in express terms grant to the *inamdar* both rights, *melavaram* and *kudiwaram*. It speaks of other villages held by the grantor which it might be inferred from the document were occupied by tenants.

(1) L. R. 47 I. A. 76; s. c. I. L. R. 43 Mad 567; 25 C. W. N 485 (1919).

(2) L. R. 45 I. A. 209; s. c. 23 C. W. N 273 (1914).

(3) L. R. 47 I. A. 76; s. c. I. L. R. 43 Mad 567; 25 C. W. N 485 (1919).

(4) L. R. 46 I. A. 123; s. c. 24 C. W. N. 129 (1919).

4 I. L. R. 44 Mad. 588 (1921).

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nor does it expressly say that only the *melavaram* right was granted to the donee. The Defendants contended that they had been from time immemorial in possession of their holdings. They alleged they had been transferring their holdings, whole or in part, from time to time; that the lands had descended to their heirs in succession, and the descendants of the transferees were in possession; that they had partitioned the holdings amongst themselves; that they had made improvements, sunk wells and erected buildings thereon for husbandry and dwelling purposes, and had received compensation when any portion of their holdings were taken by Government for public purposes. Under these circumstances it became essential to have the evidence on both sides in support of the propositions they advanced, and to draw therefrom the right inference. Both sides, as already stated, produced a volume of evidence. The District Munsif considered it in the most exhaustive manner. He found that the village that had been granted to the Plaintiff covered three classes of lands; one was in his own possession and cultivation, another was waste or pasturage, and the third was in the occupation of tenants. He found also that the Plaintiff had for a number of years been fabricating evidence to defeat the rights of the tenants, and had in the course of the trial suppressed material evidence. He found, further, that the Defendants had fully established their contentions that they had been in possession and occupation from before 1829 at least; they had dealt with those lands as occupancy ryots, partitioning their holdings, transferring and mortgaging them with the knowledge and acquiescence of the Plaintiff and his agents; and that they had, in fact, received compensation for lands taken up by Government for part-

of their holding which had been acquired for public purposes. From these facts and circumstances he drew the inference that the Defendants had fully established their prescriptive rights of occupancy, and accordingly dismissed the suits by the Plaintiff. His conclusion amounts to this, that, assuming that the onus was on the Defendants, they had fully discharged it.

The officiating Judge, Mr. Thornton, on appeal was apparently bewildered by the volume of decided cases, often inconsistent with each other, of his own High Court, and, therefore, unable to come to a definite conclusion on the facts as established by evidence; he accordingly dealt with the appeals, principally on the basis of onus and presumption.

A part of his judgment in Suit No. 676 (Appeal No. 139 of 1908), throws light on some of the salient facts of the case:—

"9 I do not think the mere circumstance that the Plaintiff admittedly enjoys both *warans* in the whole of the wet land considering the very small proportion this bears to land under cultivation in the village, is by any means a conclusive argument in his favour. A proprietor almost invariably has some *pannai* land, and there is no reason why in the case of the plaintiff village the wet land granted to the plaintiff *Mutt* should have not been the Zemindar's *pannai* at the time of the grant. The village consists of 255 *cawnies*, of which 22 *cawnies* are *poramboke* and 55 *cawnies* waste, and even including the land for which *muchalikas* have been executed on the terms of a year to year tenancy, the Plaintiff is not shown to have both *warans* in more than about 70 *cawnies* of the cultivable lands. As the District Munsif points out, the Plaintiff's predecessor-in-title cannot have obtained greater rights from the Zemindar in respect of the tenants who were in possession at the time of the copper-plate grant than he enjoyed himself, and it is not suggested the Turayur Zemindar owned both *warans* in other villages in his *zemin*, nor is there anything to show that he was entitled to greater

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rights in the plaint village than in other villages. Nor can the existence of *muchilikas* for about 16 *cawnies*, of which 4 *cawnies* are described in the Plaintiff's *adangal* (Exhibit VII) as *Mattam Sontham*, offer any evidence as to Plaintiff's rights in other lands in the village. The *muchilikas*, Exhibit N series, are almost all dated after 1893, and little value can attach to documents which came into existence long after the dispute about occupancy right had

"10. I do not think the Defendants can properly be described as *purakkudis*, as contemplated in XI Madras, p. 77, for both in the present case and in the connected cases, with the exception of the tenant who cultivates the land included in the registers of Uppiliapuram village, the tenants are all residents of the neighbouring village of Koppampatti, of which the plaint village is shown to form part in the Settlement Register of 1896 (Exhibit XXI). Again, though the rates of rent may be higher in the plaint village than in neighbouring villages, now it is clear from Exhibit B (1)—the Inam Register of 1864,—that the rates were fixed at the average rate prevailing in the neighbouring villages, and I agree with the District Munsif in thinking Plaintiff can derive but little support from Exhibits E, J. and H. Lastly, with regard to the land taken up by Government for the road though the Plaintiff received the full value of 96 *kuls* under Exhibit K, it is doubtful whether Exhibit K (1), which comprises the much large extent of 2 acres 78 *kuls*, relates to both *warams*. The recital in the document is that compensation is settled at Rs 100 on account of income and *tirwa* lost to the Plaintiff, and it is suggested by the Plaintiff's *vakil* that the expression income and *tirwa* should be construed to mean both the *Kudiwaram* and *Melwaram*. But I see no reason why this should not have been more definitely expressed had it been intended to award compensation for both *warams*, and the expressions used may, as urged by the Defendant's *vakil*, be construed with equal fairness to mean that compensation was paid only for the *Melwaram*. I do not consider the Plaintiff has established he is

entitled to both *warams* in all the cultivated lands in the village, and as he has not proved what the terms of the tenancy are under which the Defendants have cultivated the plaint land, I dismiss the appeal with costs throughout."

In his consideration of the Exs. O1, O2 and O3, which he differing from the Munsif, considered to be genuine, he gave little attention to the reasons the lower Court had assigned for considering them to be fabricated. In these circumstances the High Court deemed it necessary to call upon the officiating District Judge to record another finding on the evidence. The case had to go back twice for the purpose, and in the result Mr. Thornton expressed himself unable to come to any definite conclusion. The High Court were compelled to send down the case again, and it was then taken up by the permanent incumbent, who came to a definite conclusion upon the evidence of the record, and that finding has been affirmed by the High Court.

The case has now been before three Courts in India, and all the Courts have come to the conclusion upon a full consideration of the evidence and all the circumstances that the Plaintiff does not possess the *kudiwaram* which he claimed against the Defendants, in respect of the lands in their occupation. The Defendants have shown conclusively how they have been dealing with the property for at least a hundred years. They have also shown (and the Munsif has dealt with the subject most exhaustively) that they had received compensation from the Government for lands taken out of their holdings for public purposes. The Plaintiff's evidence has been found to be mostly false or fabricated. In this view of the case their Lordships do not consider it necessary to express any opinion as to whether Act I of 1908 applied to rights in litigation

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at the time of the passing of the Act. The Defendants clearly acquired their occupancy rights by prescription long before the statute came into force.

Under these circumstances their Lordships think that the conclusion of the High Court is correct, and that these consolidated appeals should be dismissed. In accordance with the terms under which special leave to appeal was granted, the Appellant will pay the Respondents' costs as between solicitor and client. Their Lordships will therefore humbly advise His Majesty accordingly.

Solicitor Mr. Douglas Grant for the Appellant.

Solicitors Messrs Chapman, Walker and Shephard for the Respondent

G. D. M.

CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 808 of 1920.

	<p>JANOKI NATH SHAHA and ors., Defendants Nos. 7 to 9, Appellants, . v. BAIKANTHA NATH GHATTAK, Plaintiff, Respondent.</p>
<p>RICHARDSON, J. SUHRAWARDY, J. 1922, Heard, 25, April. Judgment, 26, April.</p>	

Limitation Act (IX of 1908), Arts. 138, 142 and 144—Their applicability—Symbolical possession, operation of, against stranger and against judgment-debtor—Bengal Tenancy Act (VIII of 1885), Sch III, Art 3, if applicable when landlord had nothing to do with dispossession—Art. 142, application of, against Defendant whose possession commenced within 12 years, though Plaintiff out of possession for over 12 years—Independent trespassers, limitation against.

Where in a mortgage suit, immovable property was sold in execution of the decree and the purchaser was given, not actual but symbolical, possession, and his suit for recovery of possession was brought within

twelve years from the date on which he obtained symbolical possession :

Held, (a) As against the Defendant who was not a party to the mortgage suit or to the proceedings in execution of the decree, that neither Art. 138 nor Art. 142 of the Limitation Act of 1908 applied; that the only article on which the Defendant could rely was Art. 144 which threw on him the onus of showing that he had been in possession of the property adversely to the Plaintiff for twelve years before suit and that he having failed to discharge the onus the plea of limitation failed; and, (b) as against the Defendant who claimed the property through the judgment-debtor in the mortgage suit, that inasmuch as the Plaintiff was entitled as against him to treat the delivery of symbolical possession as equivalent to the delivery of actual possession, Art. 142 was applicable and that therefore the suit was not barred.

JAGABANDHU MUKHERJI v. RAM CHANDRA BYSACK (4), JAGABANDHU MITTER v. PURNANAND GOSWAMI (5) and THAKUR SRI SRI RADHA KRISHNA CHANDERJEE v. RAM BAHADUR (6) referred to.

MOHADEV SAKHARAM PARKAR v. JANU NAURJI HATH (7) and SEIDHAR MUDLAV-RAO DHOPAKAR v. GANPATI PANJA GODSE (8) distinguished.

Bengal Tenancy Act, Sch. III, Art. 3, has no application in a suit between two tenants unless the dispossession of the Plaintiff tenant can be attributed to the agency of the landlord.

HARAN CHANDRA BARAI v. MADAN MOHAN BARAI (9) referred to.

Semble :—One trespasser cannot add to

(4) I. L. R. 5 Cal. 584 (F. B.) (1880).

(5) I. L. R. 16 Cal 530 (1889)

(6) 22 C. W. N. 320 (P. C.) (1917).

(7) I. L. R. 36 Bom. 273 (F. B.) (1913).

(8) I. L. R. 43 Bom. 559 (1918).

(9) 25 C. W. N. 102 (1920).

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his own possession the previous independent possession of another trespasser; and when possession passes from one trespasser to another, there is a constructive, even if a momentary, restoration of the true title to possession. In view of this principle, even in a case to which Art. 142 applies, the Plaintiff is in time if he can show that the Defendant's possession commenced within twelve years of the suit.

This was an appeal preferred on the 18th of March 1920, against the decree of Babu Debabrata Mukherjée, Officiating Subordinate Judge, 2nd Court of Zillah Dacca, dated the 17th of December 1919, affirming the decree of Babu Bishnu Pada Roy, Munsif, 1st Court at Munshigung, dated the 16th of January 1919.

The facts of the case will appear from the judgment.

Babus Jogesh Chandra Roy and Jatindra Nath Sanyal (for Babu Sasadhar Roy II) for the Appellants

Babus Gunada Charan Sen and Bhupendra Chandra Guha for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

RICHARDSON, J.—The Plaintiff in this second appeal seeks to recover possession of certain land which had been mortgaged to him by the Defendants Nos. 1 to 3 and which he had purchased at a sale held on the 17th July 1905, in execution of a decree on foot of the mortgage. The sale was confirmed on the 18th August. On the 15th December following, possession of the land was delivered to the Plaintiff, and the present suit was brought on the 14th December 1917, that is, more than 12 years after the sale was confirmed, but just within 12 years of the date on which possession was delivered. The two Courts below have concurred in finding that possession was delivered symbolically, or

in other words, that the Plaintiff was given not actual but formal possession of the land. Both Courts have therefore concurred in rejecting the allegations of the Plaintiff that he obtained actual possession, that he took settlement of the land from the landlord and that he had afterwards been in possession through burgadars until he was dispossessed by the Defendants in Magh 1318.

The only Defendants who contested the suit were the Defendants Nos. 7, 8 and 9 who are the Appellants before us in this second appeal. One of the defences which they set up was that the suit was barred by limitation, general and special. Both Courts conclude, though their reasoning is somewhat different, that the defence of limitation is not tenable and there are therefore concurrent decrees in the Plaintiff's favour.

The learned Vakil for the Appellant has contended that the present suit is out of time under Art. 138 of the Limitation Act and that the decisions of the Courts below are therefore erroneous. The argument addressed to us makes it necessary to consider what in the circumstances is the appropriate rule of limitation.

The Plaintiff, as we must assume, was never in actual possession, and of the three Appellants-Defendants the only Defendant who claims under the mortgagor Defendants Nos. 1 to 3 is the Defendant No. 7. The Defendants Nos. 8 and 9 set up an independent title derived from the landlord by settlement in the year 1914.

As to the Defendants Nos. 8 and 9, they were no parties to the mortgage suit or to the proceedings in execution of the decree in that suit. If therefore the law is correctly laid down in the case of *Khiroda Kanta Roy v. Krishnadas Laha* (1), Art. 138 of the Limitation Act has no

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application to the present suit as against them. Inasmuch as the Plaintiff was never in actual possession, Art. 142 can have no application, and the only other article on which these Defendants can rely is the residuary Art. No. 144. Under that article the Burden was on them to show that they had been in possession of the land adversely to the Plaintiff for twelve years before suit brought. Obviously they cannot establish any such case.

The learned Vakil for these Appellants has contended that because the Plaintiff came into Court asserting possession obtained and subsequent dispossession, therefore he is bound by his pleadings and must stand or fall under Art. 142. In support of that proposition he referred to the decisions of the Privy Council in *Mohima Chandra Mozumdar v. Mohesh Chandra Neogy* (2) and *Dharani Kanta Lahiri Chowdhuri v. Gahar Ali Khan* (3). But the nature of the title set up and the claim made by the Plaintiffs in those cases necessarily involved a previous actual possession and a subsequent dispossession by the Defendants. Such cases are very different from cases like the present. Here if the Plaintiff alleged that actual possession was delivered to him by the Court, the Defendants successfully denied that allegation. Actual possession is not in the circumstances necessary to the Plaintiff's success and we are at liberty to apply the rule of limitation appropriate to the fact found, namely, that he never had more than symbolical possession.

I have dealt with the point on the lines on which it was argued but I will add that in the view I should be disposed to take,

(2) L. R. 16 L. A. 28; S. C. I. L. R. 16 Cal 478 (1888)

(3) 17 C. W. N. 389 (P. O.) (1912)

even if Art. 142 were applied, the Plaintiff would still succeed. In each of the cases cited if it had first been shown that the true title was in the Plaintiff and if it had then been proved or admitted that the possession of the Defendant trespasser had commenced within the period of 12 years before suit, the Plaintiff would, I think, have won. As I understand the principle applicable, one trespasser cannot add to his own possession the previous independent possession of another trespasser. When the possession passes from the first to the second trespasser, there is a constructive restoration, even if a momentary restoration, of the true title to possession. So here, it not being disputed that the true title is with the Plaintiff, the fact that the Defendants' possession commenced within 12 years of the suit should entitle him to succeed.

In my opinion, therefore, as against the Defendants Nos. 8 and 9 the suit is within time and the appeal, so far as they are concerned, must be dismissed.

As to the Defendant No. 7 his case stands on a somewhat different footing. It is not very clear from the judgment of the Court below but we have been told by the learned Vakil for the Appellant, and the statement has not been controverted on the other side that the Defendant No. 7 claims the land or a share in the land through or under the Defendants Nos. 1 to 3. If that be so, then as against this Defendant the article applicable would *prima facie* be Art. 138. The answer made for the Plaintiff is that if the Defendant No. 7 is actually or constructively a party to the decree in execution of which the land was sold then the Plaintiff is entitled as against him to treat the delivery of symbolical possession as equivalent to the delivery of actual possession. In virtue of such possession the article

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applicable ceases to be Art. 188 and becomes Art. 142, under which the Plaintiff is in time. As authority for this position, reference has been made to the Full Bench decisions of this Court in *Jagabandhu Mukherji v. Ram Chandra Bysack* (4) and *Jagabandhu Mitter v. Purnanand Goswami* (5) and to the decision of the Privy Council in *Thakur Sri Sri Radha Krishna Chanderjee v. Ram Bahadur* (6).

The learned Vakil for the Defendant No. 7 has endeavoured to escape from these rulings. He has cited the cases of *Mohadev Sakharam Parkar v. Janu Naurji Hath* (7) and *Sridhar Mudlavrao Dhopakar v. Ganpati Panja Godse* (8) decided by the Bombay High Court. In those cases a distinction is drawn as regards the right of the purchaser at a sale in execution of immoveable property in certain circumstances to actual possession and in other circumstances to formal or symbolical possession. The view of the Bombay High Court seems to be that the decisions of this Court and of the Privy Council to which I have referred only apply to those cases in which the purchaser at the auction sale is entitled in the circumstances to delivery of formal possession. This point, however, does not appear to have been raised in either of the Courts below. Its determination might well involve questions of fact which have not been investigated. There is no finding in the judgments of the Courts below as to the state of the possession at the time when possession was formally delivered to the Plaintiff. We do not know whether there were or were not at that time any tenants on the land under the Defendants

Nos. 1 to 3, and not bound by the decree against those Defendants in the mortgage suit.

It is conceded that there is no authority in this Court for the distinction recognized in the Bombay cases and in the present case at any rate. I am not prepared to consider whether any such distinction would be consistent with the view taken in decisions of this Court by which I am bound and which have received the approval of the Privy Council.

I hold that the suit as against Defendant No. 7 is within time inasmuch as it was brought within 12 years of the date on which formal possession was given to the Plaintiff.

As a last resort the learned Vakil for the Appellant argued that his clients are entitled to the benefit of the limitation prescribed by Art 3 of Sch. III of the Bengal Tenancy Act. As regards that argument it is sufficient to refer to the language of the article which gives the Plaintiff two years to recover possession of land which he claims as raiyat, the two years to be counted from the date on which the Plaintiff was dispossessed, and to add that the article must be read with reference to the facts of this case which I have already stated. Nor can I see any ground in the judgments of the Courts below for the suggestion that if the Plaintiff was ever dispossessed the landlord had anything to do with the matter. It is familiar law that the article in question has no application in a suit between two tenants unless the dispossession of the Plaintiff tenant can be attributed to the agency of the landlord. The cases on the subject will be found collected in *Haran Chandra Barai v. Madan Mohan Barai* (9).

For the reasons which I have en-

(4) I. L. R. 5 Cal. 584 (F. B.) (1880).

(5) I. L. R. 16 Cal. 530 (1889).

(6) 22 O. W. N. 330 (P. C.) (1917).

(7) I. L. R. 86 Bom. 373 (F. B.) (1912).

(8) I. L. R. 43 Bom. 559 (1918).

(9) 35 O. W. N. 103 (1920).

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deavoured to give, my view is that the appeal should be dismissed with costs.

SUHWARWADY, J—I agree.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 927 OF 1920.

RICHARDSON, J.
SUHWARWADY, J.
1922,

Heard, 25, May.

Judgment,

15, June.

ARJUN CHANDRA
BHADRA, Plaintiff,
Appellant,

v.

KAILAS CHANDRA DAS
and ors., Defendants,
Respondents.

Evidence Act (I of 1872), sec. 70, executant's admission of his signature, coupled with a denial of the presence of attesting witnesses, if amounts to "an admission of execution by himself," within the meaning of the section—"Execution," meaning of.

In a suit for enforcing a simple mortgage bond, the Defendant admitted his own signature on the bond but denied execution in the presence of attesting witnesses. No attesting witness was examined and the suit was dismissed on the ground that there was no reliable evidence to show that the bond was executed in the presence of two attesting witnesses.

Held, per RICHARDSON, J—That an admission of execution is sufficient proof as against the party making the admission and dispenses with the necessity for calling an attesting witness or giving any other evidence.

NIBARAN v. RAM (5) and SATISH v. JOGENDRA (4) followed

JOGENDRA v. NITAI (3) referred to.

But the case is different when the admission of the signature is coupled with an express denial that the document was

signed in the presence of the attesting witnesses. The policy of the law makes the ceremony of attestation essential to the validity of a mortgage instrument, and no admission of execution is effected under sec. 70 of the Evidence Act unless it amounts to an acknowledgment of the formal validity of the instrument. What the Defendant said in the present case amounted not so much to an admission of execution as a denial of execution.

"Execution" of a document means something more than the mere signing by the party. It must certainly include delivery, and it also includes signing in the presence of witnesses where witnesses are necessary.

SHAMU PATER v. ABDUL KADIR (1) referred to.

Per SUHWARWADY, J—Sec 70 of the Evidence Act qualifies sec 68 of the Act but does not affect or control sec. 59 of the Transfer of Property Act, which is a later enactment. Hence it follows that whatever may be the meaning, technical or ordinary, of the term "execution," the word is used in sec 70 of the Evidence Act in the sense of due execution or execution in the way in which a particular document is required to be executed, and admission of execution means execution in the manner in which a document is required by law to be executed.

This was an appeal preferred on the 12th of April 1920, against the decree of Babu Rajendra Lal Sadhu, Subordinate Judge of Zillah Jessore, dated the 22nd of December 1919, affirming the decree of Babu Jnanendra Nath Ghosh, Officiating Munsif, 3rd Court at Narail, dated the 14th of December 1918.

The facts of the case are briefly as follows:—Plaintiff sued on a bond purport-

(1) L. R. 39 I. A. 218; s. c. I. L. R. 85 Mad. 607, 16 C. W. N. 1009 (1912).

(3) 7 C. W. N. 384 (1903)

(4) I. L. R. 44 Cal. 345; s. c. 20 C. W. N. 1044 (1916).

(5) 23 C. W. N. 444 (1917).

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ing to create a simple mortgage as security for a loan. Before any witnesses were examined, the Defendant admitted his own signature on the bond but expressly denied execution in the presence of attesting witnesses and contended that it could not therefore take effect as a mortgage bond. Evidence was adduced by the Plaintiff but no attesting witnesses were examined. The trial Court dismissed the suit holding that the transaction was fraudulent and without consideration. The lower Appellate Court, however, held on the evidence that there was consideration for the bond and it was not a fraudulent document, but he dismissed the suit on the ground that there was no reliable evidence to show that the bond was executed in the presence of two attesting witnesses. Against this decision the present second appeal was preferred to the High Court.

Babu Prokash Chandra Pakrasi for the Appellant.

Babu Narendra Kumar Bose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

RICHARDSON, J.—This is a second appeal.

The Plaintiff who is the Appellant before us seeks to recover the amount due under a bond purporting to create a simple mortgage as security for a loan made by the Plaintiff to the Defendant. The plaint was filed more than six years but less than twelve years after the date fixed for repayment.

The trial Court, holding that the transaction was fraudulent and collusive and without consideration, dismissed the suit.

The learned Subordinate Judge in the lower Appellate Court found on the evidence that there was consideration for

the bond and that it was not a fraudulent and collusive document. He was of opinion, however, that there was no reliable evidence to show that the bond was executed in the presence of two attesting witnesses and he accordingly confirmed the Munsif's decree of dismissal.

It appears that at the hearing in the trial Court before any witnesses were examined, the Defendant admitted his own signature on the bond but expressly denied execution in the presence of attesting witnesses. The entry in the order-sheet, under date 2nd December 1918, is as follows :—

"Parties ready, Defendant admits to have executed the bond but contends that it was not duly attested and so it cannot take effect as a mortgage bond. Plaintiff to adduce evidence."

Evidence was adduced by the Plaintiff but no attesting witness was examined.

The bond in suit is one which under sec. 59 of the Transfer of Property Act required attestation and on the face of it, it was duly signed by the mortgagor and attested by witnesses. It is settled law, however, that such an instrument is not duly executed and cannot operate as a mortgage or create a charge unless it be in fact signed by the mortgagor in the presence of at least two attesting witnesses [*Shamu Patter v. Abdul Kadir* (1) and *Ganga Prosad Singh v. Ishri Prosad* (2)].

The short point arises, not apparently covered by authority, whether the Defendant's admission amounts to "an admission of execution by himself" within the meaning of sec. 70 of the Evidence Act.

Under sec. 68 of the Evidence Act,

(1) L. R. 39 I. A. 218; s. c. I. L. R. 35 Mad. 607; 16 C. W. N. 1009 (1912).

(2) L. R. 45 I. A. 94; s. c. I. L. R. 45 Cal. 747; 22 C. W. N. 697 (1918).

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"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence."

By sec. 71, "If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

But by sec. 70, "The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

It is not suggested on the part of the Plaintiff that there was no attesting witness available. The contention is that the Defendant's admission is sufficient proof of the mortgage as against him and that the learned Subordinate Judge was wrong in holding that it was necessary to call an attesting witness or otherwise to prove attestation.

As to the cases to which reference was made in the argument the dictum in *Jogendra Nath Mukhapadhaya v. Nitai Churn Bundapadhaya* (3) has not been followed. The learned Judges (Banerjee and Geidt, JJ.) seem to have been of opinion that an admission within sec. 70 of the Evidence Act would not dispense with independent proof of attestation. But the case went off on the finding of fact that the instrument had been duly attested, and in *Satish Chandra Mitra v. Jogendra Nath Mahala Navis* (4), Woodroffe, J., took occasion by way of observation, to express his disagreement with the view of the learned Judges. "That decision,"

he said, "is open to this construction that even when the executant admits execution his admission is proof of execution of signing only and does not dispense with proof of attestation as against him. If this be the meaning of that judgment, I am unable to agree with it, as I think that the admission of the executant has the effect of dispensing with the proof of attestation as against him. For if the admission of execution is to be understood only in the sense of admission of signing, then there was no necessity for sec. 70 at all, regard being had to the general provisions of the Evidence Act relating to admissions. This is also indicated by the last words of sec. 70, "though it be a document required by law to be attested."

In *Nibaran Chandra Sen v. Ram Chandra* (5), N. Chatterjea, J. and myself held, in accordance with the dictum of Woodroffe, J., that an admission of execution was sufficient proof as against the party making the admission and dispensed with the necessity for calling an attesting witness or giving any other evidence. But the admission there was an admission of execution plain and simple, capable of being construed as an admission of due execution in the presence of the attesting witnesses.

The case is different when the admission of the signature is coupled with an express denial, that the document was signed in the presence of the attesting witnesses. The policy of the law makes the ceremony of attestation essential to the validity of a mortgage instrument. Where the mortgagor denies his signature it is not sufficient to prove the hand-writing. It must also be proved that he affixed his signature in the presence of the attesting witnesses.

Returning to the Evidence Act, sec. 70,

(3) 7 C. W. N. 384 (1908).

(4) I. L. B. 44 Cal. 345; s. c. 20 C. W. N. 4044 (1916).

(5) 22 C. W. N. 444 (1917)

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I have little doubt that the words "the admission of a party to an attested document" mean the admission of a party to a document which is on the face of it an attested document. To say that they mean the admission of a party to a document which is proved or admitted to be an attested document (that is, proved or admitted independently of the admission of execution) makes the section, as Woodroffe, J. points out, meaningless or superfluous. Attestation can hardly be proved or admitted without proof or admission of the signature attested. On the other hand, the concluding words "though it be a document required by law to be attested" may be understood as referring back to sec 68. The admission of execution by a party to an attested document is to be sufficient proof of its execution as against him and the requirement of sec 68 that an attesting witness must be called is dispensed with. These provisions in the Evidence Act deal with the method of proof. But the force of the word "execution" has still to be considered and in my opinion no admission of execution is effectual under sec 70 unless it amounts to an acknowledgment of the formal validity of the instrument. What the Defendant said in the present case amounts not so much to an admission of execution as a denial of execution.

In Wharton's Law Lexicon, the execution of deeds is defined as "the signing, sealing and delivering of them by the parties as their own acts and deeds in the presence of witnesses," and a similar explanation is given in regard to the execution of Wills.

In the Oxford Dictionary, the meaning attributed to the verb "execute" in the present connection is, "to go through the formalities necessary to the validity of (a act, e.g., a bequest, agreement,

mortgage, etc.) Hence to complete or give validity to (the instrument by which such act is effected) by performing what the law requires to be done as by signing, sealing, etc

Sealing is not generally speaking necessary in India but the execution of a document must still mean something more than the mere signing by the party. It must certainly include delivery, and I think it also includes signing in the presence of witnesses, where witnesses are necessary. In sec 71, for instance, proving execution includes proof of the necessary formalities.

It may be said that the expression used in sec 70 is "execution by himself." The added words "by himself" seem to me to make no difference. The word used is "execution" and not "signature." Sec 69 which deals with the case where no attesting witness is available, speaks of "the signature of the person executing the document."

Where the admission of execution is unqualified it may well be equivalent to an admission of due execution or a waiver of proof of due execution within sec. 70. But the carefully guarded statement which the Defendant made in the present case does not in my opinion entitle the Plaintiff to the benefit of sec 70. It was said that it was hard on the Plaintiff that a mere technicality should deprive him of his money. On the merits, however, the Courts below took different sides and though we have no jurisdiction to question, and I do not question, the finding of the learned Subordinate Judge, that the merits lie with the Plaintiff, the principle still is that formalities imposed by the law as barriers against perjury and fraud, *Shamu Patter v. Abdul Kadir* (1)

(1) L. R. 89 I. A. 218, 228: s. c. I. L. R. 36 Mad. 607: 16 C. W. N. 1009 (1912).

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must be strictly observed. It is the Plaintiff's own fault that he did not call an attesting witness to meet the Defendant's challenge of the attestation of the document.

In the result, I would confirm the decrees of the Courts below and dismiss this appeal. As to cost I am not sure that we ought not to follow the ordinary rule but the order we make is that there should be no costs of this appeal.

SUHWARADY, J.—I am of the same opinion. Sec 59 of the Transfer of Property Act requires that a mortgage bond must be attested. Sec 68 of the Evidence Act provides for the mode of proof of a document required by law to be attested. Sec 70 of the Evidence Act provides an exception or proviso to the general rule of procedure laid down in sec 68, viz., where the executant admits that a document was executed by him, i.e., executed according to law, no further proof of execution is necessary. Sec 70 of the Evidence Act thus qualifies sec 68 of the Act but does not affect or control sec. 59 of the Transfer of Property Act which is a later enactment. Hence it follows that whatever may be the meaning, technical or ordinary, of the term 'execution,' the word is used in sec. 70 of the Evidence Act in the sense of due execution or execution in the way in which a particular document is required to be executed. The admission, therefore, as contemplated in sec. 70, is admission of execution in the manner in which a document required by law to be attested is to be executed.

In this view of the law, I agree with the conclusion arrived at by my learned brother and dismiss this appeal.

J. N. R.

Appeal dismissed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 787 OF 1922.

NEWBOULD, J. ABHOY MONDAL and ors.,
SUHWARADY, J. 2nd party, Petitioners,
v.
1922, BASU RAI and ors., 1st
22, November. party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145, Magistrate in declaring possession, if can question validity of a Civil Court decree—Symbolical possession, value of, in such proceeding.

B obtained a decree against A in a Civil Court and got symbolical possession of certain land in execution of the decree. In a subsequent proceeding between the parties under sec. 145, Criminal Procedure Code, the Magistrate declared possession with A thinking that the Civil Court decree could be ignored as the said Civil Court had no jurisdiction over the land and because the delivery of possession was symbolical:

Held—That in a proceeding under sec. 145, Cr P. C., the Magistrate could not go behind the decision of the Civil Court in the matter and could not ignore the decree though the Court passing the decree had no jurisdiction over the land. Also when the decree was inter partes, it was immaterial that the delivery of possession was symbolical only.

This was a Rule granted under sec. 107 of the Government of India Act, against an order of Mr S. C. Chatterjee, Sub-Divisional Magistrate of Bankura, dated the 8th August 1922, in a proceeding under sec. 145 of the Code of Criminal Procedure.

The facts of the case were as follows:—In the settlement record-of-rights certain lands were recorded to be in the possession of the Opposite Party. But subsequent to the publication of the record-of-rights the Petitioners obtained a decree against the Opposite Party in the Court of the Subordinate Judge of Purulia and in execution of that decree, they were put in

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symbolical possession of the disputed land. In a subsequent proceeding between the parties under sec. 145 of the Criminal Procedure Code, the Sub-Divisional Magistrate of Bankura passed the following order :—

“ The dispute has a long history. As early as 1323 B. S. there was a criminal case about this land in which Basu Rai was the complainant and Madhu Mondal and others of the second party were fined. This was followed by a damage suit by Basu Rai which was decreed and the appeal of the second party dismissed.

Then there was a civil suit instituted by Madhu Mondal and others in the Court of the Subordinate Judge of Purulia, which was decreed in their favour and against Basu Rai. The latter fought up to the High Court but to no effect.

Basu Rai, however, has got *parchas* during recent settlement and it appears from the order of the Superintendent of Survey, Purulia, (before whom Madhu Mondal and others filed a decree) that the disputed land appertains to mauza Upargara village, Bankura District. I am therefore of opinion that the decree of the Subordinate Judge of Purulia in respect of lands situated outside his territorial jurisdiction is of no value.

It appears that during recent settlement operation in this District the first party were found in possession and obtained *parchas* which have been finally published. I rely on this and find Basu Rai and others in possession of the disputed land and declare them to be in possession and hereby forbid all disturbance of the same.

I also direct the second party to pay Rs 15 fifteen as costs of this case to the first party.”

Against the above order the Petitioners moved the High Court and obtained the present Rule.

Babus Manmatha Nath Mookherjee and

Harendra Kumar Sarbadhikary for the Petitioners.

Babu Narendra Kumar Bose for the Opposite Party No. 1.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against an order of the Sub-Divisional Magistrate of Bankura declaring the first party, the Opposite Party before us, to be in possession of certain lands under sec 145, Cr. P. C. The Magistrate has passed his order on the record-of-rights published in the Settlement proceedings which recorded the possession of this party. But subsequent to the publication of this record-of-rights, it appears that the second party who are the Petitioners before us obtained a decree against the first party in the Court of the Subordinate Judge of Purulia and in execution of that decree they were put in possession of the disputed land. This Court has repeatedly held that in a proceeding under sec 145, Cr. P. C., the Magistrate cannot go behind the decision of the Civil Court in the matter. The Magistrate here has erred in thinking that the decree can be ignored because the Subordinate Judge of Purulia had no jurisdiction over this land and because the delivery of possession was symbolical. It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court. Also when the decree is *inter partes* it is immaterial whether the delivery of possession is symbolical or not. We hold that in this case in disregarding this delivery of possession the Magistrate acted with gross irregularity and in a manner that was likely to cause a failure of justice.

We accordingly make this Rule absolute and set aside the order of the Magistrate declaring the first party to be in possession

J. N. R.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

1922,

Heard, 8 and

9, May.

Judgment, 31, May.]

RAMSUMRAN PRASAD
and aur., Appellants,

v.

MUSAMMAT SHYAM
KUMARI and ors.,
Respondents.

Hindu law—Mitakshara—Woman's estate—Power of alienation—Legal necessity—Compromise by limited owner, when valid.

The necessity for which a Hindu woman in possession of property as a limited owner can alienate such property does not mean actual compulsion, but the kind of pressure which law recognises as serious and sufficient.

A compromise made bonâ fide for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner just as much as a decree on contest.

MOHENDRA NATH BISWAS v SHANSLIN-
NELSA KHATUM (5) approved.

KATAMA NATCHIAR v. THE RAJA OF
SHIVAGUNGA (1), TARINEE CHURN GANG-
GOOLY v. WATSON & Co. (2), KHUNNI LAL
v. GOBIND KRISHNA NARAIN (3) and IMRIT
KONWUR v ROOP NARAIN SINGH (4) re-
ferred to.

This was an appeal against the decree of the High Court of Judicature at Patna, dated the 9th August 1918, which affirmed the decree of the Subordinate Judge of Darbhanga, dated the 21st December 1914 and made in Suit No. 277 of 1912.

The said suit was brought by the present Appellants who were the reversionary heirs to the estate of the late husband of

the first Defendant for a declaration of their rights as such in certain property as forming part of his estate, and for other relief.

The decrees of the Indian Courts were against the Plaintiffs who preferred the present appeal.

The first Respondent was the widow of Brij Mohan Lal who died without issue on 22nd December 1895 and the Appellants were the nearest male heirs of the said deceased entitled to succeed to his estate on the death of the widow. The said parties were Hindus and it had been concurrently found that they were governed by the Mitakshara law of Benares.

The question on the appeal was as to the validity against the Appellants of a transaction (described below) by the widow in respect of part of Brij Mohan's estate in favour of others of the Respondents. The case for the Appellants was that the said transaction was beyond the power of a widow in possession of her husband's estate.

Brij Mohan Lal held two mortgages on the property now in question from the second and third Respondents who covenanted that it was unencumbered. There proved, however, to be an outstanding charge in favour of Raja Rameswar Singh. In 1895 Brij Mohan Lal brought a suit for sale on his mortgages against the mortgagors and the said Raja. He died on 22nd December 1895 pending the suit which was continued by the present first Respondent as his representative. In 1901 after the decision on appeal of *Sham Kumari v Raja Rameswar* (6), a final decree was passed for the Plaintiff against the mortgagors but it was thereby declared that the Raja's charge was entitled to priority.

Under the said decree the present first

(1) 9 M I A 539 (1863).

(2) 12 W. R. Civ. R. 413 (1869).

(3) L. R. 38 I. A. 87; s. c. 15 C. W. N. 545 (1911).

(4) 6 C. L. R. 76 (1880).

(5) 21 C. L. J. 157 (1914).

(6) L. R. 31 I. A. 175; s. c. 8 C. W. N. 786 (1904).

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Respondent discharged the prior encumbrance by a payment of Rs. 25,000 and then obtained a final order for sale of the mortgage premises as unencumbered property to realise the sum of Rs. 1,41,959 then due under the decree. The sale was held on the 20th June 1912 and the present first Respondent having obtained leave to bid thereat became the purchaser for the sum of Rs. 65,075 of the thirteen mouzas which constituted the mortgage properties. There remained a sum of Rs. 76,000 due by the mortgagors. Then followed the transaction to which the present suit related—the effect of which (shortly stated) was that the widow gave up the land for Rs. 66,000 and released all the balance of the decretal debt for a mortgage of Rs. 5,000.

Meanwhile on the 23rd August 1912 the present Appellants instituted in the said subordinate Court the present suit against the widow, Defendant No. 1, the judgment-debtors, Defendants Nos. 2 and 3 and the purchasers, Defendants Nos. 4-11. In their plaint they set out the facts of the case and prayed that the order entering up satisfaction be vacated and their rights should be declared and asked for an injunction and for further and other relief.

On the 21st December 1911, the Subordinate Judge delivered his judgment and passed a decree dismissing the suit. He thought that the Plaintiffs had not made out their claim. He was of opinion, and the High Court agreed, that the widow's main idea was to spare as far as possible the judgment-debtor. He adds, however: "In order to establish that the Plaintiffs have a right to come, they are bound to show that proceedings were sham and carried on for the purpose of destroying their rights," and thus he finds had not been proved.

Against the said decree the present Appellants preferred an appeal to the High Court, but the same was dismissed by a decree, dated the 9th August 1918.

On the said appeal, Mr. Justice Roe delivered the leading judgment. He said: "The whole question seems to me to be one of burden of proof," and he came to the conclusion on the authority of the cases cited that the burden of proof was on the Plaintiffs to show that the "compromise" entered into by the widow was entered into collusively for the purpose of conferring upon herself benefit at the expense of the estate and that they had failed to discharge such burden.

Against the said decree of the High Court the present appeal was preferred by the Plaintiffs in the ordinary course.

Messrs. DeGruyther, K. C. and *Kenworthy Brown* for the Appellants—On the purchase by the widow of the villages they became immoveable property in which the reversioners were entitled to share. She had no right to have it converted into money which she might dissipate. Further the price obtained for the villages on re-sale would have been greater had she waited for a better market.

The widow had no power to compromise.

Imrit Konwur v. Roop Narain Singh (1) and *Kanhaiya Lal v. Kishori Lal* (7).

The case of *Khunni Lal v. Gobind Krishna Narain* (3) is not an authority on the widow's power of compromise for the arrangement then upheld did not operate as an alienation. *Tarinee Churn Gangooly v. Watson & Co.* (2) and *Baboo*

(2) 12 W. R. Civ. B. 413 (1869).

(3) L. R. 38 I. A. 87; s. c. 15 C. W. N. 545 (1911).

(4) 6 C. L. R. 76 (1880).

(7) I. L. R. 38 All. 679 (1916).

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Lekraj Roy v Baboo Mahtab Chand (8) refer to compromises sanctioned under sec. 344 of the Civil Procedure Code of 1882.

The present case is not so much a compromise of a money claim as an alienation of immoveable property which the widow had obtained.

In *Mohendia Nath Biswas v Shan-sunnessa Khatun* (5) the view of the High Court was no doubt adverse to my contention but the Court was constrained to take that view through a misunderstanding of the decision in *Khunni Lal v. Gobind Krishna Narain* (3).

Even if a compromise is possible this one was not for the benefit of the estate, for admittedly the widow's motive was to benefit her poor relations.

Mr. Dunn, K. C. (with him *Mr. H. N. Sen*) for the Respondent No. 1.

Referred to - Mayne's Hindu Law, paras 624-625.

He was stopped.

Mr. 1 Majid for the Respondent No. 1 was not called upon.

Then LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE -- The question raised on this appeal is whether the reversionary heirs of one Bij Mohan Lal can recover possession of certain property which is said to have been alienated by his widow as one of the terms of a compromise of litigation originally brought by Bij Mohan Lal and continued by his widow after his death. He had begun the suit on the 18th July 1895, and died on the 22nd December. The suit was brought to enforce two mortgage bonds. There was a claim by a prior mortgagee

which eventually came up before this Board, and resulted in a decree which was generally favourable to the widow, but required her to pay into Court a considerable sum to the credit of this first mortgagee. She paid this, and then proceeded to execute a decree for recovery of what was due to her on the mortgage bonds, which was ascertained by the decree to be the sum of Rs. 141,959. Six of the properties were then put up for auction on the 20th June 1912, the widow having leave to bid; and she bought them for the sum of Rs. 65,075. Thereupon the judgment-debtors filed a petition in objection to the sale, and the widow came to the compromise which is now impeached.

By this compromise she agreed that the sale of the six properties should be set aside, and that the judgment-debtors should be allowed to sell them again to certain proposed purchasers for a sum total of Rs. 66,000 to be paid over to her. It was further provided that the two other properties should be hers to sell and make what she could of them, it being estimated that she would probably obtain Rs. 5,000. The rest of the debt, Rs. 70,259, was remitted.

The reversioners, hearing of this transaction, applied for leave to intervene in the suit and oppose, but were refused, all their rights being reserved. Thereupon the present suit was instituted by them, praying that the order entering satisfaction of the judgment debts should be vacated, for a declaration of their rights and for an injunction and further or other relief. They said that the sale was fraudulent, collusive and illegal.

The widow, the judgment-debtors and the purchasers from the judgment-debtors all appeared and defended. One of the points set up on behalf of the Defendants was that the widow's husband's family

(3) L. R. 31 I. A. 47. s. c. 15 C. W. N. 545 (1911).

(5) 21 C. L. J. 157 (1914).

(8) 14 M. I. A. 393 at p. 399 (1871).

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was governed by the Mithila School of Hindu law, which gives larger powers to a Hindu woman when an estate is vested in her than she gets under the Mitakshara. This was negatived by both Courts—and need not now be considered.

On the other hand, both Courts have found that there was no fraud or collusion, and have taken the view that the compromise should stand, and have dismissed the suit. The principal ground on which the supposed fraud rested was that the properties released being worth considerably more than Rs 66,000, the purchasers from the judgment-debtors had obtained very advantageous bargains, and that one of these purchasers was the widow's brother. Both Courts, however, having negatived fraud, it would require an exceptionally strong case to induce this Board to take a contrary view, and indeed the Appellants have not ventured to question this part of the decision.

The points further to be decided are, first of all, whether the widow or anyone holding what is known as a Hindu woman's estate, especially perhaps if that estate consists of immoveable property, can compromise in any circumstances, and secondly, whether this compromise is sufficiently reasonable for the Courts to allow it to stand.

Then Lordships have been invited in an elaborate argument which has reviewed all the authorities to hold either that there is no such power of compromise at all, or that a compromise which results in the surrender of land must be treated on the footing that such an alienation is on the same footing with other alienations of land which the holder of a Hindu woman's estate can make, namely, that they are justifiable by necessity and necessity only.

It should be observed *in limine* that

the word necessity, when used in this connection, has a somewhat special, almost technical, meaning. A widow can alienate if there are no other means available for the obligatory ceremonies to secure the repose of the soul of her husband. A holder of a Hindu woman's estate can in some circumstances alienate immoveable property to pay the last owner's debts, or (if there is no other available source of supply) for her own or infant children's maintenance. Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient.

Bearing this in mind their Lordships will proceed to consider whether an alienation, which is the result of a compromise or the mode by which a compromise is carried into effect, should, if the compromise be reasonable and prudent, and for the interest of the estate, fall within the power of the holder of a Hindu woman's estate, either as being an alienation which is to be deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity. It may be observed at once that the argument which would refuse authority to compromise in any case would have very extreme consequences. A Hindu woman might be party to a litigation concerning considerable immoveable property, might be successful in the first Court and be threatened with an appeal, and have then a suggestion from the adversary that if she would part with a single item of property or a few bighas he would let the judgment stand. She would have, if the argument were sound, to refuse the suggested compromise, and be prepared to fight the case up to the Privy Council. Or it might be put in another way. Her opponent could never suggest a compromise, because he would know that any

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compromise would be upset. It would be very undesirable in the interests of property owners that this extreme doctrine should be upheld and their Lordships, after consideration of the authorities that have been cited to them, are glad to find that they are not driven to any such extreme position.

The case of *Katama Natchuar v. The Rajah of Shiragunga* (1), decided in 1861, which has been brought to their Lordships' notice, has no direct bearing upon the point now to be discussed, but it is perhaps useful as an introductory statement. Their Lordships there held that a decree fairly and properly obtained against a widow binds the succeeding heirs because the whole estate is for the time vested in her, absolutely for some purposes, though in some respects for a qualified interest, and because until her death it could not be ascertained who would be entitled to succeed (p. 601).

In *Tarnee Churn Gangooly v. Watson & Co.* (2), decided in 1859, the High Court at Calcutta had to deal with the case of a widow who was under age and had a minor son and the judges held that if she was properly represented in the suit they must treat the matter as standing precisely as if she had been of age, and had acted on her own behalf, that it was erroneous to look upon the transaction simply as an alienation by her, and that she had full power to compromise a suit or even to have entered into a compromise before the suit was brought.

In *Khunni Lal v. Gobind Krishna Narain* (3), decided in 1911, an agreement of compromise was made between the daughters of the pre-deceased son of a

convert from Hinduism to Mahomedanism, and his heir-at-law, by which the property was divided into certain shares between the daughters and the alleged heir-at-law. After the death of the daughters, the heirs in reversion claimed the estate against the derivative purchasers from the heir-at-law, putting their case in this way, that the heir-at-law's title came under an alienation made by the daughters without justifying necessity, and that therefore neither he nor his derivative purchasers could hold the property. This Board held that the compromise on its true construction did not mean an alienation, and that it was not right to say that the heir-at-law or the derivative purchasers derived a title from the daughters. It is obvious that to put it as the Respondents in that case did, that the purchasers derived title from the daughters, was begging the question. The property belonged to one or other, or possibly both, of the parties to the dispute, and the compromise proceeded upon the footing that it was uncertain in which of them the title was. As their Lordships put it, it was based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledged and defined what that title was.

It was contended in the present appeal that this Board had laid down in the case of *Imrit Kooner v. Roop Narain Singh* (4), decided in 1880, "that it is clear that daughters could not be bound by a compromise made by the widow under any circumstances", but it must be remembered what that case really was. In a dispute between a person claiming to be an adopted son of the previous owner and the widow and her daughters who would have titles after her, the widow gave up

(1) 9 M. T. A. 539 (1863).

(2) 12 W. R. Civ. R. 413 (1859).

(3) L. R. 38 I. A. 87; s. c. 15 C. W. N. 545 (1911).

(4) 6 C. L. R. 76 (1880).

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her daughters' rights in consideration of her own remaining practically unimpaired. Such a compromise obviously could not stand; indeed it is not a compromise at all. If the language in the sentence quoted is rather wide, no one referring to the case in full could be misled by it.

Their Lordships are of opinion that the true doctrine is laid down in *Mohendra Nath Biswas v Shansunnessa Khatum* (5), decided in 1914. A compromise made *bonâ fide* for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner quite as much as a decree on contest.

Thus being so, their Lordships proceed to enquire whether this compromise is one that can be supported on these principles. At the outset it is a startling one. Assuming, as upon the whole appears to be the case, that the two reserved properties were worth the Rs. 5,000 for which they were to stand, the widow took for the estate Rs. 66,000, plus Rs. 5,000, or Rs. 71,000 in all, and gave up all but as much, Rs. 70,959. Moreover, her petition to the Court presented in pursuance of the compromise in order to effect the necessary entries on the Court register, states, and the widow herself has stated in evidence, that one of her motives was the fact that the judgment-debtors were related to her and belonged to a respectable family, which she did not wish absolutely to impoverish, and that she gave up her rights after an entreaty by one of the judgment-debtors, who said that he had no property left. On the other hand, it does not appear that the judgment-debtor or debtors had any available property; one was said to have nothing but the house he lived in, which was itself encumbered.

Then comes the question, what was the value of the property released? It would have been easy for either party to have produced evidence nearly conclusive upon this point, but they have failed to do so, and the Courts have been left to a series of inferences. The sub-sales were for Rs. 69,000, and if we are to take it that there was no fraud, it is reasonable to suppose that this would be the full value, not perhaps as between willing purchasers and willing sellers if an undisputed title were conveyed but very likely as much as the widow would have realized if she had re-sold, and if this be the case, all that she has given up is Rs. 3,000. While, therefore, giving all weight as against the validity of the compromise to the point that the widow was partially actuated by motives which, however laudable in themselves, did not entitle her to give up property in which she had only a partial interest, their Lordships do not see that a concession of Rs. 3,000 out of Rs. 69,000 to buy off the opposition of the judgment-debtors, which had crystallized into a petition of objection, was otherwise than reasonable.

Litigation in respect of this very subject-matter had already once taken the widow to the Privy Council, and though the objections of the judgment-debtors were of the stock kind and not likely to prevail, still with judgment-debtors who had little or nothing to lose it was likely that their objections would have been carried as far as the High Court.

Their Lordships do not find it necessary to consider whether the judgment of the High Court, in so far as it places the burden of proof upon the present Appellants, is absolutely and without qualification sound, but upon the facts found by both Courts in India they agree in the conclusion to which those Courts came.

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One further observation should be made. It was suggested in argument for the Appellants that there was a greater sanctity in immoveable than in moveable property forming the estate of a deceased Hindu. If this be the case, as to which then Lordships do not find it necessary to pronounce, it would be carrying technicality to an excess to consider this property as immoveable property. In the hands of the deceased and in the hands of the widow till the sale it was money secured by a mortgage on immoveable property. For a very brief period it might be said that the widow had converted the property by her purchase at the sale; but even this can hardly be said. The sale had not been confirmed and the compromise was upon the very point whether it should be confirmed that is, whether the property should be converted. In these circumstances there is no substance in the suggestion that the compromise is more difficult to uphold because it resulted in an alienation of immoveable rather than of moveable property.

Then Lordships will therefore humbly advise His Majesty that this appeal be dismissed with one set of costs.

Solicitors Messrs Watkins & Hunter for the Appellants

Solicitors Messrs Trucfitt, Francis and Pugh & Co. for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

VISCOUNT CAVE.

LORD SHAW.

SIR JOHN EDGE.

1921,

Heard, 19. December,

1922,

3, April

Judgment, 27, April.

SARJU PRASAD

MISSIR and ors.,

Appellants,

v.

MAKSUDAN CHOW-

DHURY and ors.,

Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 278, order under, but to suit after it has become final, even though wrong.

Certain properties were mortgaged to L by a deed of 10th January 1882. On 21st March 1885 the properties were again mortgaged to L by a deed which expressly provided that the mortgage of 10th January 1882 should continue. L sued on both mortgages and got a decree under sec 88 of the Transfer of Property Act for sale of the mortgaged properties on 12th February 1886 and had the properties attached on 20th May 1886. Meanwhile one K had obtained a money decree against the mortgagor on 2nd April 1884 and having attached the properties on 27th June 1884 in execution thereof had the properties sold and purchased them on 16th August 1884. On 8th September 1886, K objected to the attachment by L under sec 278 of the Civil Procedure Code. On 14th September 1886, the Court passed order exempting the properties purchased by K from L's attachment. L did not appeal against the order. On 10th January 1912, the Plaintiffs, who meanwhile had purchased L's decree, executed it and purported to purchase the properties in execution thereof in proceedings to which K or his representatives were not parties, sued to recover from the latter possession of the properties on the strength of such purchase:

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Held That it was unnecessary to enquire whether the order of 11th September 1886 was right or wrong. Not having been appealed from, the order became final and binding upon L and upon those who claimed title under L.

These were consolidated appeals from two decrees of the High Court at Patna, dated the 30th July 1917, which reversed a decree of the District Judge of Darbhanga, dated the 21st May 1914, and dismissed the suit brought by the Plaintiffs who were the present Appellants.

The said suit was brought for recovery of possession of certain property known as mauza Bhandarson and for mesne profits.

The facts are fully set out in the judgment of the Board.

Messrs. DeGruyther, K. C. and Dubé for the Appellants.

Mr. J. M. Parikh for the Respondents

THE LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are two consolidated appeals by the Plaintiffs from two decrees, dated the 30th July 1917, of the High Court at Patna, which reversed a decree, dated the 21st May 1914, of the District Judge of Darbhanga and dismissed the suit of the Plaintiffs.

The suit was brought by the Plaintiffs, the Appellants here, on the 10th January 1912, in the Court of the Subordinate Judge of Darbhanga for certain declarations as to title and for a decree for possession of certain immoveable property and for mesne profits. That immoveable property will in this judgment for the sake of brevity be referred to as the property in dispute. The property in dispute was originally the property of one Sadik Ali Khan, the Plaintiffs claim title through one Lalji Lal, the Defendants claim title

through one Kamal Narain Choudhri. The facts will later be briefly stated, but then Lordships may here say that in their opinion the fate of these consolidated appeals depends upon the effect of an order of the 14th September 1886, of the Subordinate Judge of Tirhoot, which was made in certain execution proceedings to which Kamal Narain Choudhri, as an objector to an application for the attachment of the property in dispute, and Lalji Lal, as the applicant for the attachment, were with Sadik Ali Khan parties.

Sadik Ali Khan, on the 10th January 1882, by deed mortgaged the property in dispute, and much other immoveable property with which this suit is not concerned, to Lalji Lal for Rs. 40,000, and interest which might become due thereon. On the 27th September 1883, Kamal Narain Choudhri brought in the Court of the Subordinate Judge of Muzaffarpur a suit for money due to him against Sadik Ali Khan. On the same day that suit was transferred to the Court of the District Judge of Darbhanga. On the 24th November 1883 Kamal Narain Choudhri obtained from the District Judge an order for the attachment before judgment of the property in dispute, and that property was attached. On the 2nd April 1884, Kamal Narain Choudhri obtained from the District Judge a decree against Sadik Ali Khan for the money owing to him. On the 27th June 1884, Kamal Narain Choudhri obtained from the District Judge attachment of the property in dispute. On the 21st March 1885, Sadik Ali Khan by deed further mortgaged to Lalji Lal for Rs. 90,000 the property in dispute, and much other property with which this suit is not concerned.

The Rs. 90,000 included the debt due under the mortgage of the 10th January 1882, and it was expressly agreed by the

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mortgage of the 21st March 1885 that Lalji Lal's security under the mortgage of the 10th January 1882 should continue. On the 11th December 1885, Lalji Lal brought under sec. 88 of the Transfer of Property Act, 1882, against Sadik Ali Khan a suit in the Court of the Subordinate Judge of Muzaffarpur to recover the money due to him under the mortgages of the 10th January 1882 and the 21st March 1885, amounting together to Rs 98,519-13-6, and further interest. On the 12th February 1886, Lalji Lal obtained in that suit a decree under sec. 88 of the Transfer of Property Act, 1882, for sale of the properties mortgaged if the decretal money should not be paid to him by Sadik Ali Khan within four months from the date of the decree.

The property in dispute being under attachment in execution of Kamal Narain Choudhri's decree of the 2nd April 1884, Lalji Lal, on the 20th February 1886, presented to the Court of the District Judge of Dharbhanga a petition for the execution of his decree of the 12th February 1886, in which he stated the nature of the assistance from the Court for which he asked thus :—

“That in the above-mentioned case, though postponement for four months has been granted to the judgment-debtor to pay the entire decretal amount, but there is very little chance of the judgment-debtor paying the entire decretal money within the time allowed. The judgment-debtor owes a considerable amount, and besides this his properties have been advertised for sale in satisfaction of several decrees. If proceeding for execution of this decree would be taken by your Petitioner after expiry of the four months' time allowed by the Court, then the decretal money due to him cannot be realised in any way; for this reason it is very necessary to take out the execution proceedings. Therefore it is prayed that the case may be registered that proceedings for attachment of the properties of the

judgment-debtor may be taken that sale proclamation may be issued and date for sale of the properties may be fixed by the Court after the time allowed and that the decretal money due to your Petitioner may be realised. Inventory of the properties is given below.”

On the 20th May 1886, Lalji Lal obtained in the Court of the Subordinate Judge of Muzaffarpur an order of attachment, under his decree of the 12th February 1886, of the property in dispute, and the property in dispute was accordingly attached.

On the 16th August 1886, the right and interest of Sadik Ali Khan in the property in dispute were put up for sale at public auction in execution of Kamal Narain Choudhri's money decree against him of the 2nd April 1884, and Kamal Narain Choudhri, who had previously obtained permission to bid at the sale, purchased the right and interest of Sadik Ali Khan in the property in dispute. On the 8th September 1886, Kamal Narain Choudhri presented to the Court of the Subordinate Judge of Tirhoot a petition of objection to the attachment of the property in dispute, which Lalji Lal had obtained. To that proceeding by petition of objection Lalji Lal and Sadik Ali Khan were made parties. That petition, so far as it is material, was as follows :—

“That objection on behalf of the objector in the execution case of Lalji Lal Sahu, decree-holder, against Sadik Ali Khan, judgment-debtor, is as follows :—

“1. That a Title Suit No 18 of 1883 was filed by the objector on the 9th Kartik, 1291, corresponding to the 25th October 1883, in the Court of the District Judge, and the properties of Babu Sadik Ali Khan, the Defendant judgment-debtor, situated in mauza Bhandarson *ash* with *dakhil*, together with the tolas, pargana Loam, were attached, and on the 2nd April 1884, a decree was passed in favour of the objector; in the execution of decree on the 24th Asarh, 1291

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F S., corresponding to the 2nd July 1884, the said property was attached, and on the 16th August 1886, after having been sold by the District Judge, was purchased by the objector

"2 That the judgment-debtor, after the attachment mentioned above, mortgaged the said property under a bond, dated the 12th (21st) March 1885, to Lalji Sahu. Hence the said mortgage under the provision of sec 276 of the Civil Procedure Code is null and void

"3 That subsequent to attachment by this objector Babu Lalji Lal Sahu attached the said property on the 7th Jeth, 1293, alleging a lien under a decree obtained on confession of judgment, and the date for the sale of the said property is fixed for the 15th September 1886

"4 That when the said property had been sold they cannot now be sold under the provisions of sec 285

"5 That the said property, having been sold, is purchased by this objector, the Court has no jurisdiction to sell the property again and the said property under sec. 278 is fit to be exempted, and it is prayed that by allowing this objection mauza Bhandarson, *ash*, together with *dakhl*, and the tolas in pargana Loam, be exempted from sale

"I, Kamal Narain Choudhri, objector, do declare that the contents of this petition of objection are true to my knowledge

"(Signed) KAMAL NARAIN CHOUDHRI,

objector,

"By my own pen"

There appears to be some confusion in para 1 of the petition of objection as to facts and dates. The decree of the 2nd April 1884 was made by the District Judge in the suit which was brought on the 27th September 1883, and the order for the issue of the writ of attachment was made on the 27th June 1884. It is to be observed that there is nothing in that petition of objection which would suggest to the Subordinate Judge that Lalji Lal had held any mortgage of the property in dispute except the mortgage of the 21st March 1885, or would draw the attention

of the Subordinate Judge to the fact that by the mortgage of the 21st March 1885, the security which Lalji Lal had obtained by the mortgage of the 10th January 1882, was maintained, or to the fact that the mortgage of the 10th January 1882, was made before Kamal Narain Choudhri had obtained his attachment of the property in dispute. Those facts do not appear to have been brought to the attention of the Subordinate Judge by or on behalf of Lalji Lal or by anyone. On the 14th September 1886, the Subordinate Judge on that petition made the following order: "It is ordered that the objection of the objector be so far allowed that mauza Bhandarson *ash* bearing No 22 (the property in dispute) in the inventory of the decree-holder (Lalji Lal), be exempted from the sale." As their Lordships construe that order, it was an order that the property claimed should not be sold under the decree, which Lalji Lal had obtained on the 12th February 1886. Lalji Lal did not appeal against that order of the 14th September 1886, of the Subordinate Judge, and it became final. On the 19th November 1886, Kamal Narain Choudhri obtained his sale certificate in respect of his purchase at the auction sale on the 16th August 1886, of the right and interest of Sadik Ali Khan in the property in dispute, and obtained possession as the purchaser

On the 21st February 1895, the Plaintiffs in this suit, who are the Appellants here, in a suit to which the Respondents here, who are the representatives of Kamal Narain Choudhri, were not parties, obtained a money decree against Lalji Lal. In execution of that money decree the Plaintiffs, Appellants here, purchased the mortgage decree which Lalji Lal had obtained on the 12th February 1886, and eventually, in execution of that mortgage decree of the 12th February 1886, applied

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for the sale of the property in dispute, which was sold and was purchased by them on the 16th February 1907, and a certificate of sale was granted to them on the 29th May 1908. The Defendants, Respondents here, were not parties to those proceedings. This suit was brought by the Plaintiffs (Appellants) on the 10th January 1912 to obtain declarations of title to and possession of the property in dispute, and mesne profits. The suit was tried by the District Judge of Dharbhanga and went on appeal to the High Court at Patna. There are concurrent findings of these Courts which determine a question which arose as to the identity of the property in dispute.

The District Judge being of opinion that the order of the Subordinate Judge of Tirhoot of the 14th September 1886, was made without jurisdiction, as Lalji Lal's decree was a decree for sale under the Transfer of Property Act, 1882, and that Lalji Lal's decree of the 12th February 1886 was binding on the property in dispute, gave the Plaintiffs, Appellants here, a decree for possession, subject to a right of the Defendants, Respondents here, to redeem, and decreed that Plaintiffs were entitled to mesne profits. From that decree the Plaintiffs and the Defendants appealed to the High Court at Patna.

The learned Judges of the High Court, before whom those appeals came, were of opinion that Lalji Lal had not obtained, under sec. 89 of the Transfer of Property Act, 1882, an order absolute for sale, had, in ignorance of his rights, elected to surrender his rights under his mortgage of the 10th January 1882, and had proceeded to execute his decree of the 12th February 1886 as a money decree, had attached the property in dispute under sec. 274 of the Code of Civil Procedure, 1882, had gone to trial on the objection

of Kamal Narain Choudhri under sec. 278 of that Code, and had acquiesced for twenty years in the decision of the 14th September 1886, against him under sec. 278; and they allowed the Defendants' appeal and dismissed the Plaintiffs' appeal and then suit. From those decrees these consolidated appeals have been brought.

At the hearing of these consolidated appeals counsel were unable to show that any order absolute for sale under sec. 89 of the Transfer of Property Act, 1882, was made, but their Lordships are aware that even in 1886 the necessity for an order absolute under that section was sometimes overlooked in suits for sale, and sales proceeded in suits for sale under an ordinary order for execution such as would be made for the execution of a money decree. Their Lordships do not draw the same conclusion as the High Court that Lalji Lal elected to surrender his rights under the mortgage of the 10th January 1882. Lalji Lal had got the property in dispute attached in order to bring it to sale, and on the petition of Kamal Narain Choudhri the Subordinate Judge made his order of the 14th September 1886, which, as their Lordships construe it, was an order that the property in dispute should not be sold in the suit of Lalji Lal. It appears to their Lordships to be unnecessary to consider whether that order should or should not have been made. The petition of objection was a petition which the Subordinate Judge had to consider and dispose of, and any party to that proceeding who was dissatisfied with the order which the Subordinate Judge might make could have appealed from it. Lalji Lal was a party to that proceeding and he did not appeal and the order became final and binding upon Lalji Lal and upon those who claim title under him. From 1886 Kamal

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Naram Choudhri or the Defendants who represent him have been lawfully in possession of the property in dispute under the certificate of sale of the 19th November 1886, and the Plaintiffs did not bring this suit disputing that title until the 10th January 1912. Their Lordships are of opinion that the decrees of the High Court were right.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed. The Appellants must pay the costs of these consolidated appeals.

Solicitors. Messrs. Watkins and Hunter for the Appellants.

Solicitors: Messrs. Truefitt and Francis for the Respondents

G. D. M

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 775 of 1920.

WALMSLEY, J.	SUBADHANI DUTTA
SUBRAWARDY, J.	and anr., Plaintiffs,
1922,	Appellants,
Hear'd, 16 and	v.
17, May.	SITOO SHEIKH and
Judgment, 17, May.	anr., Defendants,
	Respondents.

Civil Procedure Code (Act V of 1908), sec. 47—Power of execution Court to enlarge or alter the decree by consent of parties—Sec. 47, if bars a Defendant in a fresh suit from setting up a defence which could have been made a ground of objection under the section—The section, if applies when the fresh suit is based on a different cause of action—Sec. 11, res judicata, the principle, if applies to a new suit when one of the parties to the suit was not a party to the compromise in the execution proceeding.

Certain persons having sued for recovery of four pakhis of land, got a decree for three pakhis of land measured according to a certain standard rod. During execution proceedings before the Commissioner, by consent of the parties, excepting one who

was absent, the decree-holders were given possession of three pakhis of land measured according to a different standard rod, the result being that they got $3\frac{1}{2}$ pakhis of land measured according to the standard in the decree. They were subsequently dispossessed by the judgment-debtors and brought a suit for recovery of the $3\frac{1}{2}$ pakhis of land:

Held—That sec 47 of the Civil Procedure Code had no application as the suit was based upon a different cause of action

That it was competent to the Defendants to set up a defence based upon an objection which could have been taken under sec. 47.

NILKAMAL v. JAHNABI (1), BHIRAM v. GOPI (2), DURGA v. KARAMAT (3) and CHANDRAMONI v. HALIJUNNESSA (4) followed.

That as one of the Defendants was not a party to the agreement in the execution proceeding, and the length of the measuring rod was not in issue in the previous case before a Court of justice and there was no adjudication on that point, the elements constituting res judicata were wanting and hence the principle underlying sec. 11, C. P. C., was not applicable to these proceedings.

The executing Court is not competent to enlarge, extend or modify the decree, even by consent of parties subsequent to the decree, unless it is in adjustment of the decree, and the only adjustment of decrees of which the execution Court can take cognizance is the adjustment contemplated by Or. 21, r. 2, C. P. C.

KANHYA LALLA v. THE COURT OF WARDS (5) followed.

(1) 1 L. R. 26 Cal. 946 (1899).

(2) 1 L. R. 24 Cal. 355 (1897)

(3) 7 C. W. N. 607 (1908)

(4) 9 C. L. J. 464 (1908).

(5) 16 W. B. 275 (1911).

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This was an appeal preferred on the 1st of March 1920 against the decree of Babu Matilal Roy, Officiating Additional Subordinate Judge of Zillah Faridpur, dated the 15th of August 1919, modifying the decree of Babu Ashutosh Roy, Munsif, 1st Court at Goalando, dated the 23rd December 1918.

The facts of the case are as follows :—

The Appellants brought a suit for the recovery of possession of $3\frac{1}{2}$ *pakhis* of land which was granted to them in execution of a decree in a suit in 1907. In the execution proceedings there was some dispute before the Commissioner regarding the length of the measuring rod. But the parties came to terms and all the judgment-debtors except one gave their consent in writing to the Commissioner's allotment. The report of the Commissioner was confirmed by the executing Court and the Plaintiffs were given possession of the land allotted.

The Plaintiffs were subsequently dispossessed by the Defendants. Hence the present suit which was decreed in full by the first Court. On appeal the Subordinate Judge found that the Plaintiffs were in possession of $3\frac{1}{2}$ *pakhis* of *nal karsha* land, while they were entitled to only $3\frac{1}{2}$ *pakhis* under the decree. He accordingly modified the decree of the first Court and gave Plaintiffs decree for 3 *pakhis*. The present second appeal was with regard to the $\frac{1}{2}$ *pakhi* which was disallowed by the lower Appellate Court.

Babu Nirmal Chandra Chatterjee (for Babu Rupendra Kumar Mitter) for the Appellants.—The question as to what land was covered by the decree is *res judicata*. The executing Court had jurisdiction to determine the question. Reads sec. 47, C. P. C. And that Court having decided the matter and the Defendant not having appealed against that order, it is no longer

open to them to raise the question once more in a separate suit. Cites *Biru Mahata v. Shama Churn* (6). Even if excess lands are awarded to the decree-holder, the judgment-debtor cannot reopen the question in a separate suit.

[WALMSLEY, J.—In that case the judgment-debtor sued for the recovery of excess lands. But in this case the decree-holder sues for restoration.]

Yes, on a new cause of action brought about by the wrongful dispossession of the decree-holder after delivery of possession through Court. Sec. 47, C. P. C., is a bar to such a suit.

Cites *Hassan Raja v. Kailas Chandra* (7), *Muddun Mohan v. Kanai Das* (8) and *Jogendra Narain v. Rancee Surno Moyee* (9).

The Defendants are in this case bound by estoppel as they were consenting parties to the Commissioner's report.

[WALMSLEY, J.—One of the Defendants did not consent.]

But I am at least entitled to joint possession with him.

On the question of costs, as the Plaintiff has substantially won his case, 3 *pakhis* out of $3\frac{1}{2}$ claimed by him—at least proportionate costs should be awarded.

Babu Phanindra Nath Moitra for the Respondents.—Sec. 47, C. P. C., does not apply in this case. It operates as a bar to the Plaintiff's suit. But it does not bar the trial of an issue raised by the Defendant in a suit brought against him.

Cites *Bhiram Ali v. Gopi Kanth* (2), *Nilkamal v. Jahhaji* (1) and *Durga Charan v. Karamat Khan* (3).

(1) 1 L. R. 26 Cal. 948 (1899).

(2) 1 L. R. 24 Cal. 355 (1897).

(3) 7 C. W. N. 607 (1903).

(4) 1 L. R. 22 Cal. 483 (1895).

(5) 8 C. W. N. 49 (1903).

(6) 12 B. L. R. 201 (1878).

(9) 12 B. L. R. 208n (1870).

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Nor is the matter *res judicata* under sec. 11, C P C. The question in issue is what should be the length of the measuring rod? That is not a question as to execution and was not the matter in issue in the previous execution case.

Regarding compromise one of the Defendants did not consent. The Commissioner had no jurisdiction to give the Plaintiff more than what was in the decree—even by settlement between the parties. A decree cannot be modified or enlarged by consent of parties. *Kanhya Lall v. The Court of Wards* (5)

There can be no adjustment outside Court after the decree has been drawn up.

Reads Or 23, r. 4, C P C. and Or 21, r 2, C. P. C.

Regarding costs the Plaintiff should not get more, simply because some of the Defendants were consenting parties.

Babu Nirmal Chandra Chatterjee in reply—The essential elements which constitute *res judicata* are present in the case. The issue really was what was the area covered by the decree? And that is the very issue in the present suit. The issue was finally decided by the executing Court which confirmed the allotment made by the Commissioner by virtue of the authority delegated by the executing Court. And the executing Court had jurisdiction to decide the matter as it was a question relating to the execution of the decree within the meaning of sec. 47, C. P. C.

[SUHRAWARDY, J.—But does sec. 11, C. P. C., apply to execution proceedings?]

The Judicial Committee has decided the point. The principles of *res judicata* underlying sec. 11 do apply to execution proceedings.

Cites *Ram Kirpal v. Rup Kuari* (10).

[SUHRAWARDY, J.—But that means that a matter once decided at one stage of an execution case cannot be re-opened at a later stage of the same execution case.]

That decision, I submit, becomes *res judicata*, i.e., conclusive between the parties not only in the same execution case but also in a different suit. The Judicial Committee has held that the principles of *res judicata* apply also to interlocutory orders.

Cites *Hook v. Administrator-General of Bengal* (11).

The case of *Kanhya Lall v. The Court of Wards* (5) does not apply in this case. It was not a case of modification or adjustment of a decree. It was a question of construction of a decree. The Commissioner has found in this case that the plot allotted in the execution case would be $3\frac{1}{2}$ *pakhis* according to Defendant's standard and only 3 *pakhis* according to that of the Plaintiff.

THE JUDGMENT OF THE COURT was as follows—

SUHRAWARDY, J.—This appeal arises out of a suit for recovery of possession of certain parcels of land on the allegation that the Plaintiffs got a decree in respect of them in 1908 but from which the Defendants subsequently dispossessed them. The facts are that in 1908 the Plaintiffs brought a suit against the Defendants and other persons for recovery of 4 *pakhis* of land measured according to the standard called *nal karsha* rod. In that litigation they finally got a decree for 3 *pakhis* of land according to that measurement, namely, *nal karsha* measurement.

(5) 16 W. R. 275 (1871).

(10) L. R. 11 I. A. 37; s. c. I. L. R. 6 All. 269 (1883).

(11) 25 C. W. N. 915 (P. C.) (1921).

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They put that decree in execution when a Commissioner was appointed by the executing Court to deliver possession to the Plaintiffs. The Commissioner felt some difficulty in regard to the measurement to be applied and the Plaintiffs set up a *pallai* rod of 14 cubits 1 inch, while the Defendants set up the *nal karsha* of 13 cubits. The Commissioner made a compromise with the consent of the parties by which the length of the rod was fixed somewhere between these two figures and according to that measurement he delivered possession to the Plaintiffs of 3 *pakhis* of the land which according to *nal karsha* measurement came to $3\frac{1}{2}$ *pakhis*. Subsequently the Defendants dispossessed the Plaintiffs from the whole of $3\frac{1}{2}$ *pakhis*. The Plaintiffs got a decree for 3 *pakhis* according to *nal karsha* measurement, and the only point in issue is with regard to the Plaintiffs' right to recover the $\frac{1}{2}$ *pakhi* remaining.

The trial Court gave a decree to the Plaintiffs holding that the Defendants are bound by the result of previous litigation. On appeal, the Subordinate Judge reversed that decree holding that the Plaintiffs in the previous suit brought a claim for 4 *pakhis* of *nal karsha* land while they got a decree for 3 *pakhis* of *nal karsha* land, and therefore so much of the order of the executing Court as purported to put the Plaintiffs in possession of $3\frac{1}{2}$ *pakhis* was not right and could not be enforced. In this view of the matter he held that the Plaintiffs are entitled to 3 *pakhis* and dismissed the suit for the remaining $\frac{1}{2}$ *pakhi*.

On appeal several objections were taken to the decision of the Court of appeal below. It is urged that under sec. 47, C. P. C., the Defendants are not entitled to object to the Plaintiffs' right to recover the whole $3\frac{1}{2}$ *pakhis*. I may here men-

tion that one of the Defendants, namely, Defendant No 3 was not a party to the agreement before the Commissioner in the previous execution proceeding as to the length of the rod used in measuring the land decreed to the Plaintiffs in that suit. With regard to this contention, it is enough to say that the present suit is not a continuation of the previous litigation but is based upon a subsequent cause of action, namely, dispossession by the Defendants long after 1908. The Plaintiff therefore must succeed on the strength of his title. The learned Court of appeal below was perfectly right in the statement of facts that the Plaintiffs had brought a suit for 4 *pakhis* and got a decree for 3 *pakhis* and they are not, under the provisions of the law, entitled to the remaining $\frac{1}{2}$ *pakhi*. This contention of the Plaintiffs has been met by the learned Judge by observing that sec. 47, C. P. C., bars the suit but it does not prevent the Defendants from setting up a defence based upon an objection which could have been taken under sec. 47, and in support of this view reliance is placed on the case of *Nilkamal Mukerjee v. Jahnnabi Choudhram* (1), which follows the case of *Bhram Ali Sheikh Shikdar v. Gopi Kanth Saha* (2). These cases are again followed in the cases of *Durga Charan Agradin v. Karamat Khan* (3) and *Chandramoni Saha v. Halijunnessa Bibi* (4). It therefore seems to be settled so far as this Court is concerned that an objection which could not have been raised in a suit by the Plaintiffs, under sec. 47, can be made the ground of defence in a subsequent suit. The result therefore in my judgment is that in the first place, sec

(1) I. L. R. 26 Cal. 946 (1899).

(2) I. L. R. 24 Cal. 385 (1897).

(3) 7 C. W. N. 607 (1903).

(4) 9 C. L. J. 464 (1908).

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47 has no application because the present suit is based upon a different cause of action and secondly it is competent to the Defendants to set up the defence as in this case without violating the provisions of sec. 47, C. P. C.

The next ground of attack is that it ought to have been held that the Defendants are barred by the principles of *res judicata* from raising this question and disputing the Plaintiffs' title to the $\frac{1}{2}$ *pakhi*. So far as one of the Defendants is concerned, namely, Defendant No 3, this objection has no force because he was not a party to any compromise between the other Defendants and the Plaintiffs in the previous litigation. Then the elements constituting *res judicata* do not seem to be present in this case. It is conceded that sec 11, C P C., does not apply, but according to the recent decision of the Judicial Committee the principle which underlies sec 11 is applicable to these proceedings. Admitting that to be so it does not appear that the question of the length of the rod was a point in issue in the previous case before a Court of justice, or that there was adjudication on that point. The Commissioner, it appears, unnecessarily raised difficulties in this matter by suggesting that he could not decide what rod was to be used to measure the land though the decree was for 3 *pakhis* of land according to *nal karsha* measurement.

There was no dispute that this *nal karsha* rod was of 13 cubits. Both parties set forward certain measurements and they came to an arrangement by which the length of the rod was taken as of more than the *nal karsha* rod and the Plaintiffs got more than they were entitled to. In this state of facts, I think the principle of *res judicata* is not applicable.

The next attempt is to make these Defendants bound by the previous compro-

mise. It is argued in answer that the executing Court is not competent to enlarge, extend or modify the decree, even by consent of parties subsequent to the decree unless it is in adjustment of the decree. In my opinion this view of the law ought to prevail. It seems reasonable that the Court which takes upon itself to execute the decree is authorized by law only to execute the decree as it stands irrespective of any other circumstance, as for example, the agreement between the parties to modify the decrees. Take for instance, a decree is passed for the sum of Rs. 5,000 in favour of the Plaintiff; it is absurd to assume that the Court in execution would be justified to execute a decree for Rs. 10,000 because the parties agree between themselves that the judgment-debtor should pay Rs. 10,000 to the decree-holder. It seems to me that any such compromise may afford a cause of action for a separate suit, but it cannot invest the executing Court with jurisdiction to execute a decree which it was not called upon to do. In connection with this contention the case of *Kanhya Lall Pandit v. The Court of Wards* (5) would seem to be in point. It may also be observed that Or. 23 which deals with adjustment of suits is not applicable to execution proceedings. The only adjustment of decree of which the execution Court can take cognizance is the adjustment contemplated by Or. 21, r. 2. In this view of the matter we do not think that there is much force in this contention. As I have observed one of the Defendants was not a party to the arrangement in the previous suit by which the Plaintiffs got more than they were entitled to, and in the present case it is difficult to divide the interests of the several Defendants.

One other point has been raised,

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namely, that the order of the Court of appeal below that the parties should bear their own costs throughout is bad on principle. I am of opinion that considering the course the litigation has taken it was in the right exercise of the discretion of the Court of appeal below that this order was passed. I do not see any reason to interfere with it.

As all the objections taken by the Appellants fail this appeal must be dismissed with costs.

WALMSLEY, J.—I agree.

J. N. R. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 48 OF 1921.

WOODROFFE, J.	HARE RAM SINGH CHOUDHURY, Appellant,
CUMING, J.	v.
1922,	RAM RAM SINGH CHOUDHURI and an.,
17, May	Respondents.

Probate and Administration Act (V of 1881), sec. 17, withdrawal of renunciation of executorship, how far allowable—Date of grant, which is.

One of several executors appointed under a Will applied for probate on issue of notice to the other executors named in the Will, one of whom stated that he was willing to be an executor but finally attacked the Will and refused to be an executor. Thereupon probate was granted to the applicant and about two months after the date of grant the executor who had renounced made an application for withdrawing his renunciation and for being appointed one of the executors.

Held—That at the time when the application for withdrawal of the renunciation of executorship was made, the grant of probate had already been made and therefore the application came too late.

The date of grant of probate is the date on which the order granting the probate is passed and not the subsequent date on which an order is passed that probate should issue.

IN RE GOLAP SUNDARI DASSI (1) *distinguished.*

This was an appeal preferred on the 4th of January 1921, against the decree of J. A. Ross, Esq., District Judge of Zillah Murshidabad, dated the 8th of October 1920.

One Gobinda Sundar Singh Chaudhuri left a Will appointing his sons Ram Ram and Hare Ram along with some others as executors. Ram Ram applied for probate and notices were issued to the other executors requesting them either to renounce the executorship or to join in the application. Thereupon, Hare Ram made an application that he was willing to be an executor and also filed objections. On a subsequent date Hare Ram made an application that he did not agree to be an executor and that he would bring a suit for setting aside the Will. On the 7th of August 1920, an order was passed granting probate. Hare Ram's name was not included among the probate-holders. On 27th September 1920, Hare Ram prayed that he might be allowed to withdraw his renunciation. The prayer was refused. Against this order the present appeal was preferred to the High Court by Hare Ram.

Babus Dwarka Nath Chakrabarti and Kali Kinkar Chakrabarti for the Appellant.

Mr. B Chakrabarti and Babu Nagendra Nath Ghose for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

A preliminary objection was raised in this appeal as to its competency. It has

(1) 5 G. W. N. 41 (1901).

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been contended, that the appeal is directed against an order refusing an application for a review (that is, taking it that the probate was granted by the Court on the 7th of August 1920) It is not necessary in my opinion to decide that point because I think the appeal fails upon the second ground.

The Appellant is a son of the testator one Gobinda Sundar Singh Chaudhuri. The Respondent also is another son. These two sons were appointed executors under the Will of their father. There were also other persons, executor and executrix. An application for probate was made by the Respondent Ram Ram Singh on the 8th June 1920. On the 12th June 1920, the application was registered and notice was directed to issue to the persons named in the order of that date requesting them either to renounce the executorship or to join in the application. On the 3rd July an application was made by the Appellant before us stating that he was willing to be an executor under the Will. In that petition, however, he further stated that it would be necessary to file a petition of objection to the suit. On the 17th July 1920 he made an application asking for further time until the 27th July 1920 for the purpose of filing objections. Then on the 27th of July the date up to which he had got an adjournment, an application was made by the Appellant in which he said contrary to his previous statement that he did not agree to be an executor under the Will. In that petition he also says that he has come to know that the Will contains various illegal provisions and that he will have to bring a suit for setting aside the Will, that he does not admit the clauses of the said Will, nor does he intend or agree to be an executor thereof. He prayed that his objections might be

noted (on protest) and the suit might be decided. Then after certain other orders to which I need not refer, on the 7th of August an order was passed, as I read it, granting probate. This Appellant's name was not included among the probate-holders. Then there were some further orders and on the 27th of September 1920 the Appellant prayed that he might be allowed to withdraw his application of the 27th July 1920 and be appointed an executor along with his two brothers. That application was supported by a petition in which it was stated that the objector, that is the Appellant, was always ready and willing to be an executor and that he had never refused to do so. This application was opposed and on the 8th of October 1920 the learned Judge gave his decision holding that he was not satisfied that the petition of the Appellant renouncing executorship was filed through mistake as alleged. He also pointed out that the Appellant did not file his petition of withdrawal until two months after the petition of renunciation had been filed. He accordingly dismissed the petition. Against that order the present appeal has been made.

I think the decision of the learned Judge must be supported on the ground that at the time when the Appellant asked to withdraw his renunciation of the executorship the grant of probate had already been made on the 7th of August 1920 and therefore that his application came too late. It has been argued that we should hold that the probate was granted on the 8th of October 1920. On that date the order was that probate should issue. The probate had been granted some time previously. This distinguishes the present case from that cited to us (1). Therefore the

(1) *In the goods of Srimati Golap Sundari Dasu*, 5 C. W. N. 419, 1901.—*REP.*

HAHE RAM SINGH CHOUDHURY v. RAM SINGH CHOUDHURY.

appeal fails and must be dismissed with costs. Hearing fee five gold mohurs.

J. N. R. Appeal dismissed with costs.

CIVIL REVISIONAL JURISDICTION.]

RULE No. 383 OF 1922.

C. C. GHOSE, J.

MESSRS. DAMANIA

PANTON, J.

BROTHERS & Co.,

1922,

Petitioners,

Heard,

v.

17, November.

MESSRS. V. JASTON

Judgment,

& Co., Opposite

21, November.

Party.

Calcutta Rent Act (III of 1920, B. C.), sec. 18, jurisdiction of the President of the Improvement Tribunal to revise order of the Rent Controller where the Petitioners had contended before the Controller that the subject-matter of the order did not come within the definition of "premises"

In a standard rent case the landlord contended that the room in question could not be described as "premises" within the meaning of the Calcutta Rent Act and as such the Controller of Rents had no jurisdiction to fix a standard rent. The Controller fixed a standard rent and on the landlord's application to the President of the Improvement Tribunal for revision of that order under sec. 18 of the Calcutta Rent Act, the President held that he had no jurisdiction in the matter inasmuch as the Petitioner himself had contended that the room did not come within the definition of "premises" in the Act:

Held—That under sec. 18 of the Calcutta Rent Act, the landlord Petitioner was entitled to a decision from the President of the Tribunal as to whether or not the Controller had jurisdiction to fix any standard rent in the case which was brought before him.

This was a Rule granted on the 2nd June 1922 against an order of the President of the Calcutta Improvement Tribunal (Mr. S. C. Banerjee), dated the 3rd March 1922, rejecting the application for revision

of the order of the Controller of Rents (Mr. B. D. Banerjee), fixing the standard rent of the room in question.

The facts of the case are as follows:—

The Opposite Party held a room in certain premises under the Petitioners at a rent of Rs. 70 per mensem. In the letter of attornment the Opposite Party described the room as a godown. In 1920 the Opposite Party agreed to pay enhanced rent at the rate of Rs. 99 per mensem but subsequently filed an application before the Controller of Rents for fixing a standard rent for the room. The landlords Petitioners pleaded that the subject-matter of the case was a godown and not an office and that the same could not be described as "premises" and that as such the application for fixation of standard rent was incompetent. Against the Controller's order fixing standard rent, the landlords moved the President of the Calcutta Improvement Tribunal for revision under sec. 18 of the Rent Act. The President of the Tribunal in dismissing the application passed the following judgment:—

"This is an application by the landlord purporting to be made under sec. 18 of the Calcutta Rent Act. The only ground on which this application is based is that the property in respect of which the Controller has purported to fix a standard rent is a godown and not a premises within the meaning of the Act and that therefore the Rent Act does not apply. On the statements in his petition it is therefore clear that there has been in this case, according to the Petitioner's contention, no fixing of the standard rent for any premises within the meaning of sec. 18 of the Rent Act and consequently the Petitioner has no right to make this application.

"The Controller was moved in this by the tenant and the landlord objected that

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the property in question was not a premises and that the Controller had no jurisdiction to fix any standard rent for it. The Controller has overruled that objection, finding that the property was not a godown but a shop or office and therefore a premises within the meaning of the Act.

"On the present application it is contended by the learned vakil for the Petitioners that the property is a godown and that consequently neither the Controller nor I have any jurisdiction in respect of it. But he contends that as the Opposite Party does not admit that the property is not a premises, I cannot reject this application on the ground that it does not come under the Act without giving my finding on the issue whether the property is a godown or not. I do not think that their contention is sound. The jurisdiction of the Court under sec. 18 of the Rent Act is neither an appellate nor a revisional jurisdiction as those expressions are ordinarily understood. Sec. 24 of the Act lays down that an application under sec. 18 has to be dealt with, as nearly as may be, as a regular suit—which means, and I have always acted on that view, that it must be disposed of entirely on evidence given before me and the Petitioner before me has to be treated as a Plaintiff in a regular suit, his application has to be treated as a plaint (except for purpose of Court-fee and other matters specially provided for in the Act). When a plaint shows on the face of it that the Court in which it is presented has no jurisdiction to entertain it, I do not think that it is necessary to raise or try any issue about the jurisdiction and the plaint in such a case must, unless it is amended, be rejected as in contravention of the provisions of Or. 7, r. 1 (f).

"Looking at that matter from another point of view it seems to me that what the

Petitioner wants to question in this case is not the Controller's order fixing the standard rent but his order or finding that he had jurisdiction to deal with this property under the Act. I do not think that an application made for the purpose comes within the meaning of sec. 18 of the Rent Act.

"I am told by the learned vakil for the Petitioner that he is not prepared to amend his petition to show that the property is a premises within the meaning of the Act so as to give me jurisdiction.

"The application is therefore dismissed as incompetent.

"The Petitioner will pay to the Opposite Party Rs. 25 as costs."

Against this order of the President, the landlords moved the High Court and obtained the present Rule.

Babus Mohendra Nath Roy and Paresh Nath Mookerjee for the Petitioners.

The Advocate-General and Babu Narendranath Choudhury for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

The Petitioners before us are lessees of certain premises in Calcutta, No. 40/1 Strand Road, and the Opposite Parties are sub-tenants under the Petitioners occupying, to use a neutral expression, a certain room on the ground floor of the said premises. The Petitioners allege that the room in question is a godown and that the Opposite Parties executed on the 29th August 1919 a letter of attornment in their favour whereby they agreed to pay rent at the rate of Rs. 70 a month to the Petitioners. It is alleged that in the letter of attornment, the room was described by them as a godown on the ground floor of premises No. 40/1 Strand Road. It is further alleged by the Petitioners that on

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or about the 29th January 1920, the Opposite Parties agreed to pay enhanced rent at the rate of Rs. 99 per month from January 1920 in respect of the said godown. It appears that on the 31st May 1920, the Opposite Parties filed an application before the Controller of Rents in Calcutta for fixing a standard rent of the said room, alleging that the room in question constituted an office and that the standard rent thereof could not be more than Rs. 77 per month. The Petitioners on being served with notice of this application contended before the Controller of Rents that the subject-matter of the demise was a godown and not an office and that the same could not be described as "premises" within the meaning of the Calcutta Rent Act, and that as such the application of the Opposite Parties before the Controller of Rents was incompetent. The Controller of Rents inspected the room in question and came to the conclusion that the same was an office, that it was used "as a shop, an office as well as for the purpose of storing goods for sale in a portion" and fixed the standard rent thereof at Rs. 70. The Petitioners being dissatisfied with the order of the Controller of Rents fixing the standard rent of the said room at Rs. 70 applied to the learned President of the Calcutta Improvement Tribunal for revision of the order of the Controller of Rents, fixing the said standard rent, under sec. 18 of the Calcutta Rent Act. The learned President held that inasmuch as the Petitioners before him had contended in their application for revision that the Controller of Rents had no jurisdiction whatsoever to fix a standard rent in respect of the subject-matter of the demise the same not being "premises" within the meaning of the Act, the Petitioners on their own showing were disentitled to any relief by way of revision

under sec. 18 of the Act. The argument of the President is that inasmuch as the Controller of Rents had, according to the Petitioners, no jurisdiction to interfere in the matter, the President had equally no jurisdiction because, in his opinion, sec. 18 of the Calcutta Rent Act is only attracted to cases where admittedly the Controller has jurisdiction to fix a standard rent. We are unable to assent to this view of the matter. We are of opinion that under sec. 18 of the Calcutta Rent Act, the landlords, in this case the Petitioners, were entitled to a decision from the President of the Calcutta Improvement Tribunal as to whether or not the Controller of Rents had jurisdiction to fix any standard rent in the case which was brought before him. In our opinion, the fact that the Petitioners before the President of the Tribunal contended that the Controller had no jurisdiction in the matter, could not be construed to be a point against the Petitioners disentitling them to any relief at the hands of the President under sec. 18 of the Calcutta Rent Act for revision of an order fixing a standard rent, because if that reasoning were held to be sound, then in no case of this description could relief be given under sec. 18 of the Calcutta Rent Act. We think that the President has taken an unduly narrow view of sec. 18 of the Calcutta Rent Act. In this view of the matter, we set aside the order of the President of the Calcutta Improvement Tribunal and remit the case to him for consideration of the questions urged in the petition of the Petitioners before us. There will be no order as regards the application under sec. 115 of the Code of Civil Procedure Code.

The Petitioners will get their costs of the first Rule which we assess at three gold mohurs.

J. N. R.

Rule made absolute.

CRIMINAL REVISIONAL JURISDICTION.]

JURY REF. No. 56 OF 1922.

C. C. GHOSE, J.

CUMING, J.

1922,

KING-EMPEROR

v.

Heard, 20 and

TINCOURI DHOPI.

21, July.

Judgment, 21, July

Indian Penal Code (Act XLV of 1860), sec. 86, a habitual gunja smoker committing murder in a temporary state of intoxication, is entitled to the benefit of the provisions of—High Court's power to consider accused's unsoundness of mind in passing sentence, when no such plea taken under sec. 84, I. P. Code—Criminal Procedure Code (Act V of 1898), sec. 401.

In a case of murder committed suddenly and without any provocation, there was some evidence that the accused was a habitual gunja smoker. There was no evidence of any motive for the crime, but the accused did not take any plea of unsoundness of mind under the provisions of sec. 84 of the Indian Penal Code.

Held—That having regard to the way in which the murder was committed and the fact that there was practically no evidence of motive, it ought to be inferred that the accused at the time when he committed the murder was suffering from some severe mental derangement and that he was not responsible for the act which he committed, though insanity was not pleaded. The case, however, did not come under sec. 84 or sec. 85, but fell under sec. 86. But in view of accused's mental condition, the capital sentence was not the proper sentence to pass in the case.

The accused was sentenced to transportation for life and the matter was reported to the Local Government for consideration under sec. 401, Cr. P. C.

This was a Reference under sec. 307, Cr. P. C., by the Sessions Judge of 24-Pergunnahs (A. G. R. Henderson, Esq.), dated the 21st June 1922, disagreeing with

the verdict of the jury who had found the accused not guilty of the charge found against him under sec. 302, I. P. C.

The facts were briefly as follows:—Two females with three boys were proceeding from one village to another. The boys were walking ahead and the women who were talking to each other were at some distance behind. The accused suddenly came out of a garden and tried to catch a bundle which one of the boys was carrying on his head. He raised an alarm and the accused let go his hold on him but caught the next boy up by the legs and dashed him several times on the ground. The women ran up but the accused took to his heels and, being chased, got into a clump of bamboos and then into a tank where one of the women caught him as he was coming out of the tank, and made him over to the villagers who had assembled.

One of the prosecution witnesses deposed that the accused used to smoke gunja in the morning and in the evening every day. No plea was, however, taken on behalf of the accused under the provisions of sec. 84 of the Indian Penal Code, that the accused at the time of doing the act was in an unsound state of mind. The jury brought in a verdict of not guilty, and the Additional Sessions Judge of 24-Pergunnahs, disagreeing with the unanimous verdict of the jury, referred the case to the High Court under the provisions of sec. 307, Cr. P. Code.

Babu Amulya Chandra Sen for the Accused.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is a Reference under the provisions of sec. 307, Cr. P. C., by the learned third Additional Sessions Judge of the 24-Pergunnahs, disagreeing with the un-

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animous verdict of the jury in a trial which was held for an offence under sec. 302, I. P. C. The accused Tincouri Dhopi was charged under the provisions of sec. 302, I. P. C., with having committed the offence of murder in that he had killed a child named Pulin. He was tried before a jury and the jury brought in a verdict of not guilty. The learned Sessions Judge was of opinion that the verdict was against the weight of evidence and that it was necessary for the ends of justice to make a reference to this Court and has accordingly laid the matter before this Court. The learned Deputy Legal Remembrancer appears in support of the reference and has placed the evidence in the case before us. We also have had the advantage of hearing Mr. Amulya Chandra Sen on behalf of the accused.

The facts shortly are as follows.—On or about the 29th Falgun 1328, the prosecution witness No. 3, Swarnamoni Bewa, with her daughter Tustumoni Bewa (prosecution witness No. 4) and two boys named Jiten and Pulin went to the house of a relative of theirs on the occasion of the Dol festival. They stayed there for four or five days and then went to the house of one Sasthi Mondal. They stayed in Sasthi's house for a night or two and set out for home on the afternoon of Saturday the 18th March. The party on the return journey consisted of the witness No. 3 Swarnamoni, witness No. 4 Tustumoni, witness No. 5 Jitendra Nath Gayen, witness No. 6 Bhim Chandra Haldar and the deceased Pulin. It appears that during the return journey the boys Jiten and Pulin and Bhim walked ahead of the others and the women who were talking to each other were at some distance behind the boys. It is alleged that the accused suddenly came out of a garden and tried to catch a bundle which the witness No. 5

Jiten was carrying on his head. Jiten raised an alarm and the accused let go his hold on Jiten and he caught Pulin up by the legs and dashed him several times on the ground. The witnesses Jiten and Bhim thereupon ran away. The witnesses Nos. 3 and 4 Swarna and Tustu ran up to the place where Pulin was being assaulted in the manner described above by the accused. Before, however, Swarna and Tustu could actually reach the place, the accused had taken to his heels. The witnesses Swarna and Bhim gave chase and it was found that the person who had been chased had got into a tank which is known as Naram's tank. Naram, who is witness No. 16, states that he was splitting some bamboos in his house. He saw a woman walking fast. She shouted out that a child had been murdered by a man. She asked if a man had passed that way. Then a boy said that a man had gone into the tank. He asked the woman if she would be able to recognize the man. She said "yes." The witness Swarna then went to the bank of the tank and caught the accused as he was coming out of the tank and made him over to the villagers who had assembled on the bank of the tank on hearing her cries, and she went back to the place where Pulin was lying dead. The dead body was sent to the Diamond Harbour Hospital in charge of a constable, and Sarat Gaven, witness No. 2, who is a nephew of Swarna, thereafter lodged the first information at the thana.

The medical officer who held the post mortem examination found a contused lacerated wound below the point of the chin and another similar but large wound on the back of the head through which the skull bone and brain substance were protruding. The skull bone on the back and the side bones were smashed to pieces and

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the line of fracture extended to the base of the skull. In the opinion of the medical officer, death was due to the shock resulting from fracture of the skull and he further states that the boy Pulin could have come by the injuries found on him and from which he died, if a man held him by the legs and dashed him on the ground.

The occurrence was witnessed by Swarna and Tustu. Swarna states that as soon as her attention was drawn to the fact that Pulin was being assaulted in the manner described above, she asked her daughter to look after the injured boy while she ran after the accused. She followed him for about half a mile and the accused then jumped into the tank. A boy who was standing there asked her what was the matter. She told him she was chasing a man who had killed her nephew Pulin and who had gone into the tank. As the accused came out of the tank she threw her *sari* round his neck and caught him. Many villagers had come up and she made over the accused to them.

Tustumoni in her deposition says in so many words that she saw the face of the accused and she heard what Jiten had said, namely, that his bundle was being pulled by a man. After Jiten had raised the alarm and after the accused had let go his hold on Jiten, she saw the accused seize Pulin by the legs, pick him up and dash him to the ground three times. Then they, that is Swarna, Tustu and witness No 6, started to run. The accused then threw the boy down and ran away. She says further that after her mother Swarna had started chasing the man, she stayed at the place where the boy was done to death and waited till her mother returned.

The witness No. 6 Jiten says that a man came from Satis doctor's garden and approached them; there was a bundle of

clothes on his head; the man who came tried to seize the bundle. Thereupon he shouted out to his great aunt and held on to the bundle. The man let go his hold upon him and seized Pulin by the legs. Jiten dropped the bundle and began to run towards his great aunt. The man dashed Pulin to the ground several times.

Witness No 6 Bhim Chandra Halder states that he was ahead of Pulin and Jiten. The accused came up to them and seized Jiten's bundle. The witness ran after Jiten and looked over his shoulder and saw the accused dash Pulin to the ground. He was going towards the north and reached the Musalmanpara before Jiten did; and he says further that he was standing at the side of the tank when Swarna reached the place of occurrence. When she followed the accused he threw clods of earth at her. The accused ran towards their village and the accused was lost sight of when he ran into a clump of bamboos.

The witness No 11 Krsto Mohan Mandal says that he saw the accused run up and plunge into a tank. His aunt Swarna followed him. She was shouting all the time "Pulin has been killed." His aunt seized the accused when he came out of the tank. Other people came up and secured him. The accused was wearing a *gamcha* which was blood-stained. In cross-examination he says he saw the accused sitting in the *verandah* of Hossein (Narain's) house afterwards. He was wearing a *gamcha*. It was tied round his waist. His aunt caught him by putting the corner of the cloth (*sari*) round his neck. The accused said he did not kill the boy. He was sitting when they came into the house.

. Then we have the evidence of Rash Behari Neogi who says he heard a woman shouting "my son has been murdered by

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a man who is running away." A man was running in front of her. This witness was in a position to identify the accused and he did identify the accused in the Sessions Court. He says further that the man who was running was going towards Khunkali. The witness followed him. He stumbled and fell. Later he found the man under arrest in the house of Ram Kanta Mondal. He was taken away to the place where the dead body was lying.

Ram Kanta Naskar witness No. 14 states that Swarna came to his house with her aunt and two boys Pulin and Jiten in Falgoun and went away about the 4th Chaitra taking his daughter-in-law Tustu with them.

Then we have the evidence of Uttam Chandra Mistri who says the accused was employed under him as a labourer and he used to smoke *gunja*. He used to take it in the morning and in the evening.

Then we have the evidence of Naran Chandra Mistri who has already been referred to above. Lastly we have the evidence of Kunja Lal Naskar and Ramanath Mondal who speak to the fact that they knew the accused. They saw Swarna run up shouting that murder had been committed and that the murderer was running away. There was a boy standing near the bank of the tank who had seen the accused run away. The witness Kunja asked the boy about the man. He said that the man had plunged into the tank. They went towards the east through Karim's compound. The man was leaning against the wall of the *verandah*. The woman, that is, Swarna, identified him as the murderer and asked them to arrest him. He was arrested by a man named Khajan Mal.

This is practically all the evidence in the case and on this evidence there can-

not be any manner of doubt that the boy Pulin was killed by the accused and that the act of killing such as has been described above amounted to murder. It would therefore appear that the accused was guilty of having committed an offence punishable under the provisions of sec. 302, I. P. C.

It has been urged, however, that the identity of the accused has not been sufficiently established. On this point it is sufficient to refer to the evidence of Swarna and Tustu, of the witness Jiten and of the witness Bhim Halder. In addition to this body of evidence there is the testimony of Krista Mondal, Rash Behary Neogi and Kunja Naskar. We see no reason whatsoever to reject the evidence of these persons and to come to the conclusion that the identity of the accused has not been established. In our opinion the evidence which has been referred to above, that is to say, the evidence of the eye-witnesses and the evidence of the other persons whose names have been referred to above point conclusively to the fact that it was the accused and the accused only who was responsible for the death of Pulin.

It is next said that the story of the chase is such that no reliance can be placed on it. We have examined the evidence and we are unable to say that the story of the chase is so unnatural as it has been alleged by the defence that no reliance can be placed on the same. We think under the circumstances that the chase was perfectly natural and there are no reasons whatsoever for thinking that the story of the chase as related by the witnesses whose names have been mentioned above is untrue in any particular.

The medical evidence shows that the deceased having regard to the injuries which had been inflicted on him could

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have come by his death by being dashed on the ground several times. The only thing that can legitimately be urged on behalf of the accused in a case of this description is that having regard to the way in which the murder was committed and having regard to the fact that there is practically no evidence of motive, it ought to be inferred that the accused at the time when he committed the murder was suffering from some severe mental derangement and that he was not responsible for the act which he committed. As will be seen later, we have taken this plea into our consideration, and we think there is good reason for coming to the conclusion that the accused must have been at the time, having regard to the fact that he was a habitual *gunja* smoker, in such a state of mind that he was not responsible for his action.

The accused has not taken any plea under the provisions of sec. 84 of the Indian Penal Code, and having regard to the evidence on the record this is not a case which comes under the provisions of sec. 84, I. P. C., or of sec. 85 but falls within the provision of sec. 86, I. P. C. We think that the ends of justice will be met if a sentence of transportation for life is passed on the accused. This is obviously not a case where the capital sentence should be passed and as has just been indicated we do not propose to pass the capital sentence on the accused. But we think that the accused ought to be convicted under sec. 302, I. P. C., and sentenced to suffer transportation for life and we direct that the accused Tincouri Dhopi be transported for life.

Having regard, however, to the facts of this case we think that the attention of the Local Government may be drawn to this case under the provisions of sec. 401, Cr. P. C., and the Local Government may

be invited to take such action as it think proper under the provisions of that section, and we direct that the records of this case together with a copy of our judgment be forwarded to the Local Government for their consideration.

J. N. R.

PRIVY COUNCIL.**[APPEAL FROM PATNA.]****LORD PHILLIMORE.**

LORD CARSON.

SIR JOHN EDGE.

1922,

Heard, 2 and

4, May.

Judgment, 25, May.

RAI RADHA KRISHN,

and ors., Appellants,

v.

BISHESHAR SAHAY

and ors., Respondents

Civil Procedure Code (Act XIV of 1882), sec. 29—Leave to bid refused to decree-holder—Purchase by decree-holder in benami of another, if a nullity—Sale voidable—Questions which arise upon proceeding to set aside sale—Limitation—Limitation Act (IX of 1908), Art. 12.

A purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. The fact that the decree-holder had actually applied for permission and had been refused would make no difference. The question upon an application to set aside such purchase is not whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside; if it had, then it did not matter that the decree-holder bought without permission or that he had applied and been refused.

The sale being voidable only and not void, Art. 12 of the Limitation Act applies and the suit must be brought within one year.

This was an appeal from a decree,

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dated the 27th February 1919 of the High Court at Patna which reversed a decree, dated the 27th November 1916 of the Court of the Subordinate Judge of Muza-faipur.

The suit in which this appeal arose was instituted by Mahabir Pershad (who represents the interest of Rai Gudar Sahay, deceased) against the principal Respondent, Bisheshar Sahay and others.

Rai Gudar Sahay was the owner of the village of Kataya, which in 1873 he mortgaged in favour of Bisheshar and others.

On 31st May 1886 the mortgagees obtained a decree for sale in a suit to recover their debt and the entire mortgaged property was sold by the Court on the 18th April 1899.

One Hari Narain was declared by the Court purchaser of the village in dispute and was granted a certificate under sec. 316 of the Civil Procedure Code, Act XIV of 1882.

Rai Gudar Sahay having died in 1897, his widow applied under sec 311 of the Civil Procedure Code to set aside the sale on the ground that the execution proceedings were fraudulent. This application was dismissed by the Court on the 7th July 1899 and an appeal by the widow to the High Court was also dismissed.

Rai Gudar Sahay's estate devolved in 1910 on Rai Mahabir Pershad who instituted the suit in which this appeal arose.

In his plaint he alleged that the execution proceedings which resulted in the auction sale were collusive and fraudulent, that Bisheshar in spite of being prohibited from bidding by the Court had purchased the village *benami* in the name of Hari Narain and that the sale was accord-

ingly void. On the death of the Plaintiff the suit was continued by his sons.

The principal Defendant in his written statement denied that Hari Narain was a *benamidar* and pleaded that the suit was barred by limitation and was *res judicata*.

The Subordinate Judge held that Hari Narain was a *benamidar* for the Appellant, he negatived the pleas of "*res judicata*" and limitation and held that, inasmuch as the purchase had been made in defiance of the Court's refusal of permission to the purchaser to bid, the sale was void *ab initio* and inoperative. In the result he allowed the Plaintiff's claim to recover possession of the whole village, and made a decree accordingly.

From that decree the Respondents appealed to the High Court of Judicature at Patna and their appeal was heard by Atkinson and Das, JJ., who delivered their judgment on the 27th February 1919.

The learned Judges held that Hari Narain was not a *benamidar* for the Respondent, that in any event the sale would not be void but voidable, and that any suit to set it aside was barred under Art 12 of the Indian Limitation Act. They were further of opinion that the Plaintiffs' remedy, if any, was not by a fresh suit but by an application under sec. 244 and sec. 294 of the Civil Procedure Code of 1882.

In the event they set aside the decree of the Subordinate Judge and made a decree dismissing the suit of the Plaintiffs with costs.

The Plaintiffs now appealed from the decree of the High Court to His Majesty in Council.

Mr. DeGruyther, K C (with him Messrs. Parikh and Majid) for the Appellants.—The evidence here tends to show that the transaction was *benami*.

Hari Narain was a pauper, he had been

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a *benamidar* on a previous occasion and was not the type of man likely to make so shrewd a bargain.

By Art. 12 of the 1st Schedule to the Limitation Act a suit to set aside a sale must be brought within a year, but no limitation can run against the reversioners unless it is shown that they knew of the *benami* nature of the transaction.

They did not know of it owing to the fraud of the purchaser and the article of the Limitation Act that is applicable is Art. 95 which allows three years after the discovery of the fraud.

Syanlal Mandal v. Nilmony Das (1) and *Srimati Sarat Kumari v. Nimai Charn Dey* (2).

Moreover, the sale was not voidable but void. Bidding at the auction in spite of the order prohibiting it was an abuse of the process of the Court—and no sale could be effected in favour of a bidder to whom leave had been refused.

S M. Kamini Debi v. Ramlochan Sirkar (3), *Mahomed Gazee Chowdhry v. Ram Loll Sen* (4) and *Mahabir Pershad Singh v. Macnaghten* (5).

Mr. Dubé for the Respondents—The evidence that the transaction was *benami* is far from conclusive. It has been held that more suspicious circumstances are insufficient to prove the *benami* nature of a transaction.

Sreemanchunder Dey v. Gopaulchunder Chuckerbutty (6) and *Hakim Maulvi Muhammad Mahbub Ali Khan v. Bharat Indu* (7).

Sec. 294 of the Civil Procedure Code clearly states that a sale may be set aside

upon application and for just cause. In the absence of any such application within the period of limitation laid down by Art. 12 of the Limitation Act the sale though voidable before becomes good. There is no foundation for the suggestion that it was void *ab initio*.

Mr. DeGruyther, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—*Rai Gudar Sahay*, a landowner in the District of Muzaffarpur, borrowed from a joint family of money-lenders to whom the Defendants belong, a sum of Rs. 16,000 on the 2nd May 1873, and mortgaged for it his village Mouza Kataya. The family afterwards separated, and upon the partition of their property various fractions in the mortgage became allotted to the different members. They, however, all joined in a suit brought in 1886 to enforce the mortgage, and in the ordinary course obtained a decree on the 31st May 1886, under which if the money was not paid the property was to be brought to sale.

For a time no steps were taken to realise this decree, and the judgment-debtor paid off portions by purchasing, through a *benamidar*, the shares of some of the decree-holders, for prices which it is noteworthy were considerably less than the nominal values. In January 1889, he bought a share nominally worth Rs. 7,140 for Rs. 3,266. In March 1891, a share nominally worth Rs. 15,209 for Rs. 5,000, and in November 1894, shares nominally worth Rs. 24,619 for Rs. 7,476. This left something under five annas of the judgment unsatisfied, and these were held in severalty by the Respondent Bisheshar Sahay and two of his brothers. In 1898 Bisheshar, on behalf of himself and the remaining decree-holders, took

(1) 1 L. R. 34 Cal. 241 (1907).

(2) 5 C. W. N. 265 (1900).

(3) 5 B. L. R. 450 (1870).

(4) 1 L. R. 10 Cal. 757 (1894).

(5) L. R. 16 I. A. 107 (1899).

(6) 11 M. I. A. 28 at p. 42 (1868).

(7) 23 C. W. N. 321, 325 (1918).

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proceedings to have the decree executed, and the property was sold by the Court on the 18th April 1899. By that time the judgment-debtor was dead, and his widow was proceeded against in his place. Upon the record of the execution proceedings one Hari Narain was declared purchaser of the village, and he obtained a certificate of sale and possession. The widow applied to set aside the sale on various grounds, but failed. She died in 1904 and was succeeded by her daughter, who died in 1910. Upon the daughter's death the estate of the original judgment-debtor devolved upon the Appellants as the next heirs, and they in 1914 instituted the present suit, alleging that the proceedings at the sale had been collusive and fraudulent, that they had recently discovered that Bisheshar had applied to be allowed to bid and had been refused leave, but in spite of the refusal had purchased the village in the name of Hari Narain, who was his *benamidar*. The present Appellants made certain other points which were disposed of in the course of the proceedings.

The Respondent Bisheshar denied that Hari Narain was his *benamidar*, and said that Hari Narain was the true purchaser, who had since sold and transferred to him. He also took the point of the Statute of Limitations.

It must be taken to be true that he had applied to the Court for leave to bid and had been refused. Hari Narain purchased the property for Rs. 625 only and sold it, or purported to sell it, to Bisheshar, on the 9th December 1902, for Rs. 1,500. The case came before the Subordinate Judge, who by his decree, dated the 27th December 1916, decided in favour of the Plaintiffs, the present Appellants. He held that the purchase by Hari Narain was made by him as *benamidar* for Bis-

heshar Sahay, and he thought that the Statute of Limitations did not apply, because he held that it was not a suit to set aside a voidable sale, but a suit to recover possession of immoveable property by the heirs in reversion on the death of the last female heir, and was therefore covered by Art. 141 of the Indian Limitation Act.

Bisheshar appealed to the High Court, which by its judgment, dated the 27th February 1919 reversed the decision, held that Hari Narain was not a *benamidar*, and further held that the suit was barred by Art. 12 of the Indian Limitation Act as being a suit to set aside a sale in execution of a decree by a Civil Court, for which the period of limitation is one year from the date when the sale is confirmed or would otherwise have become final and conclusive. If either of the defences raised by Bisheshar be established the judgment of the High Court at Patna would be right and the suit would fail.

Their Lordships will consider first the question whether it was proved that the transaction was *benami*. There is, as admitted in the judgment of the High Court, ground for suspecting that the transaction might be of this nature. The Judge of first instance took it as established, though there is some question as to the regularity of the proof, that Hari Narain was in position a servant and a servant to a brother of Bisheshar, and one not likely to have money, though there was some evidence that he had engaged in commercial transactions. The sum for which the property was sold was exceedingly low. In the view of the Subordinate Judge it was worth Rs. 1,500 or Rs. 1,600 a year gross, from which should be deducted the revenue cesses amounting to about Rs. 400 a year. Not only, therefore, was the original price

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absurdly low, but Hari Narain, if he were the real purchaser, though making a considerable profit on the re-sale, nevertheless sold to Bisheshar for much less than he might have expected to get for the property.

But, on the other hand, the widow of the original judgment-debtor, who seems to have been advised, made a number of objections to the sale and never raised this one, and the matter waited for upwards of 15 years, by which time Hari Narain was dead, before these proceedings were taken. It may be said that the widow and her advisers would not know who Hari Narain was, but the fact that the price was as low as it was would have put them upon inquiry, and indeed the witness for the Plaintiffs, Khub Lal, if he is to be believed, told the widow's brother about it from the first. The fact that the decree-holders were content to take so small a proportion of the nominal value of their shares in the decree seems to point to there being a deficiency in the mortgaged property. Moreover, Bisheshar's two brothers got in respect of their shares, which together were larger than Bisheshar's, only their small proportion of the net proceeds of the sale, and as they would certainly have known who Hari Narain was, they must either have been satisfied that the sale was good and that no more could have been realised, or they must have been parties to the fraud, which has not hitherto been suggested. Except the witness Khub Lal, whose evidence, taken as a whole, was unfortunate for the side which called him, and another witness whom the High Court thought unworthy of belief, there was nothing like affirmative evidence of a *benami* case.

Upon the whole, their Lordships agree with the view of the High Court that it

has not been proved that Hari Narain was *benami* for Bisheshar. This is sufficient to dispose of the appeal.

With regard to the point on the Statute of Limitations as it was presented before the Courts in India, their Lordships are also of opinion that the decision of the High Court was right. The applicable section of the Code of Civil Procedure regulating sales in execution by the Court is as follows:—

“294 No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property

“When a decree-holder purchases with such permission, the purchase money and the amount due on the decree may, if he so desires, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

“When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale, and the costs of such application and order, and any deficiency of price which may happen on the re-sale, and all expenses attending it, shall be paid by the decree-holder”

Upon the construction of this section it is evident that a purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be injurious to those interested in the sale if a decree-holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure, if at later periods they were liable to be treated as

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nullities. A sale is to be set aside upon application and upon cause shown.

This position is well established and seems to have been accepted by the Subordinate Judge; but in his view the fact that the decree-holder had applied for permission and had been refused made a distinction. Their Lordships, however, cannot see that this makes any difference. He is still a decree-holder who has not obtained permission to bid. He is that and nothing more. If indeed an application were made under the last paragraph of the section, his conduct might be one of the points which the Court would take into consideration in determining whether it would avoid the sale or not. It is doubtful even then whether it would be of any importance. The question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside, if it had, then it mattered not that the decree-holder bought without permission or that he had applied and been refused. If, then, the sale is voidable only and not void, Art. 12 in the Act of 1908 applies, and the suit must be brought within one year. Therefore it was too late.

Counsel for the Appellants took a further point. He urged that this case might be treated as one of concealed fraud, to which sec. 18 of the Act and Art. 95 would apply, and that the fraud consisted in concealing from the Court that the decree-holder who had been refused was in fact buying through his *benamidar*. Their Lordships deem it unnecessary to consider this contention, which was never put forward or discussed in the Courts in India, and the foundation for which is deficient. There is indeed allegation but there is no proof of

the time when the fraud, supposing that there were fraud, became known to the Plaintiffs (Appellants). Moreover, for this purpose the widow would represent the estate, and the Court would have to be satisfied that she did not know. In this connection the evidence of Khub Tal would have to be further considered, as well, perhaps, as that of other witnesses for the Plaintiffs.

For these reasons their Lordships deem it unnecessary to express any opinion upon this contention, and, upon the whole, they will advise His Majesty that this appeal should be dismissed with costs.

Solicitors - Messrs. Trucfitt & Francis for the Appellants. .

Solicitors - Messrs. Barrow Rogers & Nerill for the Respondents.

G. D. M. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD BUCKMASTER.

LORD ATKINSON.

LORD SUMNER.

LORD CARSON.

SIR JOHN EDGE. J.

1922,

Heard, 22 and 23, May.

Judgment, 23, May.

NARAIN DAS,
Appellant,

v.

ABINASH CHAN-
DAR and anr.,

Respondents.

Infant, lease on behalf of—Alteration of terms so as to make it reasonable in order to bind minor, if permissible—Incomplete tender—Liability to pay interest—Rate of interest, what is reasonable in India.

A lease which taken as a whole was an unfair and inequitable transaction could not be altered and reduced into a proper and reasonable form in order to make it binding on an infant on whose behalf it was executed, when the objectionable features of the lease did not admit of separation from its general structure as

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an independent bargain between lessor and lessee.

A tender of payment accompanied by a condition which prevented it from being a perfect and complete tender does not relieve the payee of the obligation to pay interest.

Award of interest at 12 per cent. per annum was upheld as such a rate, though considered high in England, may be a very proper and reasonable rate to impose in the local conditions of India.

This was an appeal against the decree of the High Court of Judicature at Aliahabad, dated the 21st January 1919, which reversed the decree of the Additional Judge of Gorakpur, dated the 28th September 1916, and made in Original Suit No. 108 of 1915.

The said suit was brought on behalf of the present first Respondent for a declaration that a lease-deed executed on the 12th September 1913 by his father to the present Appellant, who was the first Defendant in the suit, was not binding on the Plaintiff, and for possession. The Subordinate Judge dismissed the Plaintiff's suit but on appeal the High Court passed a decree for him. The present appeal has been preferred by the first Defendant.

The Plaintiff, now the first Respondent, is the infant son of Shekhar Chand who was the second Defendant and is the second Respondent. During his minority Shekhar Chand's estate was under the management of the Court of Wards and when it was released to him on 28th August 1905 on his coming of age, it was worth about Rs. 24,000 a year. He was admittedly a man of weak character addicted to extravagance if not to vice and not competent to manage the estate. The Appellant Narain Das is a relative of the family who used to stay with him and look

after his household affairs and certainly had a good deal to do with the management of the estate prior to the execution of the lease in question which comprised most of the lands. According to his own case he advanced considerable sums of money to Shekhar Chand who, to employ the language of one of the judgments referred to below, was under his thumb.

On the 12th September 1913, the Appellant obtained three deeds from Shekhar Chand; one was a sale-deed of part of the family property for Rs. 31,000, another was a mortgage for Rs. 50,000—both of these deeds have been set aside as against the minor as stated below—the third deed was the lease now in question which comprised all that remained of the estate. The High Court said, “the lease was a very improvident and inequitable one so far as the lessor was concerned, but it was still more unjust and inequitable and improvident so far as it related to the interest of the minor Plaintiff . . . It was for a term of 15 years. The gross rent reserved was Rs. 16,775 out of which the lessee was in the first place to pay Rs. 5,721 Government revenue; he was then to pay Rs. 5,000 to the Benares Bank on account of a mortgage made by Shekhar Chand, in the next place Rs. 3,755 was to be retained by the lessee to meet interest on the mortgage of even date. All that the lessor was to get for himself and his son was Rs. 3,804 per annum.” The provisions of the lease were submitted by the High Court to a detailed examination which led to their conclusion above stated that it was unfair and inequitable. The present Appellant stated before the High Court that he was ready to submit to the elimination of many objectionable provisions if he were permitted to retain possession but the suggestion was rejected.

Soon afterwards two suits were insti-

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tuted on behalf of the minor by his next friend, *viz.*, Suits No. 382 of 1913 and No 84 of 1914 for decrees setting aside altogether the sale-deed and mortgage above mentioned as well as another sale-deed which the present Appellant had obtained from Shekhar Chand in 1912. While these suits were pending, *viz.*, on the 9th November 1914, a partition-decree was obtained against the father in Suit No 218 of 1914, dividing the entire family property in moieties. On the same day the two first-mentioned suits came on in the same Court and (on an application in which the present Appellant joined) the deeds there in question were set aside as against the minor's moiety only; and by a sale-deed of the same date Shekhar Chand conveyed to the present Appellant most of his own share in consideration of *inter alia* the amount secured by the mortgage of 12th September 1913, and the lease now in question. The present Appellant having thereafter declined to give up the lease and surrender possession the present suit became necessary.

On the 12th March 1915, the present suit was instituted on behalf of the minor, *viz.*, the present first Respondent against Narain Das, joining also his father as second Defendant, for a declaration that the lease was not binding on him and for possession and mesne profits and other relief. The plaint set out the facts of the case referring *inter alia* to the previous litigation above mentioned and stating in paras. 5, 6 and 9 as follows:—

“(5). The Plaintiff and Babu Shekhar Chand were the members of a joint family and the entire family and ancestral property was jointly held by the father and the son. Babu Shekhar Chand had no power to transfer any property without any lawful necessity.”

“(6). The Plaintiff, having seen this

state of affairs, brought a claim in this Court for the cancellation of the sale-deed and mortgage-deed in favour of Narain Das, along with a claim for partition of the family property.”

“(9). The lease in dispute has altogether been dishonestly executed with the object that Narain Das may become the owner of the property leased out, entered in list (B) annexed hereto, as will appear from the hard conditions given below. He himself did not execute any ‘*qabuliat*.’”

A written statement of defence was put in by the present Appellant in which he says *inter alia*:

“(6). As regards para. 6 of the plaint it is admitted that half of the property was released and that the claim in respect of the mortgage-deed was relinquished. The rest of the allegations is not admitted.”

“(9). Thus Defendant has realised from Defendant No 2 the amount due to him under the hypothecation bond, dated the 12th September 1913, sale-deeds, dated the 5th August 1912, and the 12th September 1913, by means of the sale-deed, dated the 9th November 1914. Babu Shekhar Chand has become liable for the other debts due to the Benares Bank, etc. As regards this the conditions laid down in the lease have become ineffectual. The complaint made by the Plaintiff in the plaint in respect of those conditions is improper and has no bearing on the case.”

And he pleaded that the transaction in question could not be impugned on behalf of the minor.

On these pleadings seven issues were framed of which the most material are the following:—

(2) Whether or not the Plaintiff can, during his minority, have the lease grant-

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ed by the manager of the family set aside by suing through a next friend?

(3) If the Plaintiff be not bound by the "*theka*" in question, whether because the villages are joint, and are not yet actually partitioned, the Plaintiff cannot recover actual possession?

(4) Whether the "*theka*" in dispute was given in bad faith, and its terms are unreasonable and injurious to the family, and the Plaintiff is not bound by it?

(5) Is the Plaintiff entitled to have the said "*theka*" set aside as regards his half share of the property?

The suit having come on for hearing the Additional Judge delivered his judgment on the 28th September 1916, and passed a decree dismissing the suit. The second issue he found in favour of the Plaintiff. On the third issue he appears to hold that the fact that the land had been divided into separate moieties was a bar to the suit. On the fourth issue he says "I hold that the terms of the '*theka*' were not hard or unreasonable, nor injurious to the family, and because the '*theka*' was given when the family was joint, by the father, who was the head and manager of it, the Plaintiff is bound by it, and is not entitled to set it aside." He consequently decided the fifth issue against the Plaintiff.

Against the said decree an appeal was preferred to the High Court in which judgment was pronounced on the 21st January 1919. Referring to the mortgage, interest on which was provided for by the lease in question, the learned Judges say —

"A glance at the details of this consideration at once suggests that it was highly improbable that the joint undivided family property could have been mortgaged to pay off these debts. They had been incurred very recently after Shekhar Chand

had come into possession of a very substantial property recently released from the charge of the Court of Wards. It seems the father of the Plaintiff was squandering the family property. The Plaintiff instituted a suit against Narain Das, contending that the mortgage could not bind the family estate. He brought another suit contending that the sale-deed for Rs. 31,000 did not bind the estate, and he brought a further suit for partition. It would appear that it was felt that it was impossible under the circumstances to resist the Plaintiff's claim and to maintain the mortgage and sale-deed as alienation of the family property justified by Hindu law. The result was that so far as the minor Plaintiff's interest in the property was concerned, the mortgage and sale-deed were set aside. The partition suit was settled upon the same lines, the Plaintiff was to have half of the property. The debts were to remain upon the father's share."

And they add:—

"We further think that the maintenance of the lease is quite contrary to the spirit, if not to the letter, of the compromise and settlement that was come to in respect of the suit for partition and the two suits to set aside the mortgage and sale-deed respectively."

The learned Judges' judgment as to the character of the lease appears from the citation contained in para. 4 above. In conclusion they passed a decree to the effect that the lease did not bind the Plaintiff's interest in the property, decreeing possession of a moiety of the land with mesne profits.

Against the said decree the present appeal has been preferred by the first Defendant, the second Defendant being joined as a Respondent with the minor

The first Respondent humbly submits

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that the appeal should be dismissed with costs.

Messrs. L. DeGruyther, K. C. and Wallach for the Appellant.

Sir Geo. Lowndes, K. C. and Mr. Kenworthy Brown for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Their Lordships do not desire to hear the Respondents in this case, for in their opinion the principle upon which it falls to be determined is one that is plain and can be simply stated.

The Appellant, Babu Narain Das, is the lessee under a lease granted to him on the 12th September 1912, by one Babu Shekhar Chand. The lease in question affected a joint family estate that was held by Shekhar Chand and his infant son, the first Respondent. Contemporaneously with the lease two other documents were executed; one was a sale of a part of the family property and the other a mortgage for Rs. 50,000, both in favour of the present Appellant. The lease was an unusual document, and it certainly does some credit to the ingenuity of the pleader who drew it, for he contrived to secure that the lease should at the same time serve the purpose of a lease and a collateral security for the mortgage-debt, for the terms provided that out of the rent payable by the lessee under its terms the interest that was due to him upon his mortgage-debt should be deducted, the result being that after all the different payments had been made as the lease provided the gross amount of Rs. 16,775 rent was reduced to Rs. 3,804 per annum.

Proceedings were subsequently instituted on behalf of the infant son to obtain partition of the joint estate, and a decree was made on the 9th November 1914,

granting this claim. The actual partition does not appear to have taken place at present. Proceedings were also instituted for the purpose of setting aside the contemporaneous mortgage and the sale, and these ended by a compromise, the effect of which was that all that the infant could reasonably claim as his share of the family estate was released from the mortgage debt, and the sale-deeds were set aside. That compromise did not deal with the lease, which was made the subject of the subsequent proceedings out of which this appeal has arisen.

The learned Additional Judge before whom the matter first came found that the lease was one which the father could properly execute in discharge of his position as manager of the joint family estate. He examined all the rather unusual conditions of the lease with extreme minuteness, and came to the conclusion that upon the whole it was not possible for the infant to assert that the terms were so unreasonable that the lease should be set aside, but in his minute examination of the actual literal contents of the document he appears to have overlooked what is the fundamental question that lies at the root of the whole of these proceedings, that is, whether the lease, as it was drawn with its provisions for application of the rent, was a lease which could be regarded as fair and reasonable and in proper exercise of a manager's powers. As has already been pointed out, the lease was really in effect a collateral security for the mortgage-debt, and the result was that the infant's property was put into pledge to secure the re-payment of the moneys in respect of debts improvidently contracted by his father. Their Lordships think that the whole of this matter is effectively summed up in a sentence of the judgment of the High Court where they say that

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they regard the lease as 'an unfair and inequitable lease in regard to the Plaintiff's rights, and that the offer put forward on behalf of the Appellant that he is prepared to make all necessary alterations in the lease, in order to reduce it to a proper and reasonable form, is one that cannot be considered for the purpose of influencing their judgment, and with that opinion their Lordships agree. It is impossible to do what Counsel on behalf of the Appellant have ingeniously urged, to regard this provision for payment of the interest and any other provision that might be regarded as objectionable in the lease as in the nature of an independent bargain between the lessee and the lessor which can be cut out and separated from the general structure of the lease, and then can be so dealt with that the infant's property is relieved from these offensive provisions. The lease must be regarded as a whole. It must be regarded as it was drawn on the 12th September 1913, and so regarding it their Lordships think it is impossible successfully to contend that this lease is of such a character that would justify the manager of a joint family estate binding the joint family property by means of its terms.

There only remains the consideration of one or two trivial points that have been raised with regard to the claim for possession, and the arrangement for payment of interest on certain sums of money to which reference will be made.

The claim for possession can be dealt with very simply. This estate has not been partitioned, though the decree for partition has been made. The decree appealed from cannot reasonably be intended as a decree to put the Plaintiff into physical possession of that which still remains one undivided half of the whole. It only means that he has been excluded

from his proper share of the property jointly held, and that he is entitled to possession for the purpose of securing his position.

With regard to the other matters one question is as to the sum of Rs 1,100 paid into the Bank by the Appellant consequent upon a tender that he made to the first Respondent. The tender was accompanied by a condition which prevented it being a perfect and complete tender, and the Respondent was under no obligation to accept it. It follows, therefore, that that cannot be regarded as the equivalent of payment, and that sum, if it is still in the control of the Appellant, should be handed over to the Respondent as part of the payment which he has to make. If, in fact, it is in any way in joint control so that it can be affected by an order of the Court, the Court will order that it be released and the money paid over to that Respondent.

With regard to the interest upon it, there is nothing in the circumstances in which it was paid that can relieve the Appellant from his liability to pay interest upon that sum. If it has earned interest that will go *pro tanto* in reducing his liability, but subject to that his liability remains.

The final question with regard to the amount of interest that has been allowed against the Appellant can be disposed of in a few sentences. The rate is 12 per cent. It appears, according to our notions in this country, a high rate of interest, but that has nothing whatever to do with the matter which their Lordships have to consider. It may very well be that, having regard to the local conditions in India, it is a very proper and reasonable rate to impose, and their Lordships see no reason whatever why any alteration should be made as to the amount.

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It follows, therefore, that this appeal must fail, and their Lordships will humbly advise His Majesty that it be dismissed with costs.

Solicitors : Messrs. Barrow, Rogers & Nevill for the Appellant.

Solicitors : Messrs. T. L. Wilson & Co for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 151 OF 1920.

<p>MOOKERJEE, J. CHOTZNER, J. 1922, Heard, 28 and 29, April and 1, 2, 3 and 4, May. Judgment, 22, August.</p>	<p>PROMODE KUMAR RAY and ors., Plaintiffs and Defendants Nos. 7, 8, 14 15 and 19, Appellants, v. KALI MOHAN SAHA PRAMANIK and ors., remaining Defendants, Respondents.</p>
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Benami transaction—*Nature of evidence necessary to establish benami discussed—Civil Procedure Code (Act V of 1908), sec. 66, operation, of retrospective—Civil Procedure Code (Act XIV of 1882), sec. 317.*

Where it is asserted that an assignment in the name of one person is really for the benefit of another, the most important test to be applied is the source from which the consideration came. Where from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming as to the payment of the consideration, the Courts will deal with the case on reasonable probabilities and inferences arising from proved or admitted facts, having regard to the surrounding circumstances, the position of the parties, their relations to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property, not

permitting the real question to be obscured by the form of expression used in the deeds of transfer or by recitals therein of obviously untrue statements.

Where, however, the Plaintiff contended as in the present suit that the purchaser at an execution sale which took place sometime ago was a benamidar for the judgment-debtor and all that he was able to prove was that the judgment-debtor was at the time of the sale in involved circumstances, that certain voluntary transfers by him were fictitious; that the auction-purchaser was distantly related to him and paid a small sum as purchase-money, and there was evidence that the properties sold were heavily encumbered and no evidence that the judgment-debtor continued to be in possession after the execution sale . . .

Held—That although there might be ground for suspicion and although some of the circumstances might engender doubt, no inference could be drawn, based on legal testimony, that the auction-purchaser was a benamidar for the judgment-debtor.

Quære.—Whether the Plaintiff in this suit was debarred from raising the question of benami having regard to sec. 66 of the Civil Procedure Code of 1908.

This was an appeal against the decree of Babu Nani Gopal Mukherjee, Subordinate Judge, 4th Court of Zillah Dacca, dated the 1st of April 1920.

The facts of the case will appear from the judgment.

Babus Rajendra Chandra Gooha, Bhupendra Chandra Guha and Rama Prasad Mookerjee for the Appellants.

Dr. Sarat Chandra Basak, Babus Gopal Chandra Das and Promotha Nath Banerjee for the Respondents.

PROMODE KUMAR RAY v. KALI MOHAN SAHA PRAMANIK.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Plaintiffs in a suit for partition of land upon establishment of title. The subject-matter of the litigation is described in the plaint at 6 gds. 2 k. 2 kr. share in *sikmi* taluk Muhammad Amiruddin including, amongst others, released mouzahs Champaknagar and Kalai Gobindapur known as Budhiamara reformed after diluvion of Alinagar. The case for the Plaintiffs is that the disputed property belonged at one time to a wealthy Mahomedan lady of Dacca, by name Akikannessa Bibi, and that by successive devolutions, the share mentioned has vested in them. The case for the first four Defendants, who alone contested the claim, is that the interest has devolved on them, and that this litigation has been engineered by the fifth Defendant, Lalitmohan Ray, a pleader at Dacca, because he was unsuccessful in his effort to secure the property for his own benefit. The lands in controversy have a long and complicated history; but upon an examination of the evidence and a review of the relevant facts, the Subordinate Judge has come to the conclusion that the Plaintiffs had no vestige of a title and that they had failed to establish their possession within 12 years antecedent to the suit. In this view, the Subordinate Judge has dismissed the suit with costs. On the present appeal, the arguments have been directed towards two fundamental questions, namely, first, whether successive purchases of the interest of Akikannessa by Abdul Majid and Abdul Azim were genuine or fictitious transactions; and, secondly, whether one Asmatannessa had a share in Champaknagar and Kalai Gobindapur, known as Budhiamara Khalasimahar, and if so, how much. A

subordinate point has also been argued with regard to the title to an indigo factory and lands appertaining thereto.

As regards the first point, it is not disputed that one Kalachand Mukherjee obtained a decree for money against Akikannessa in 1891, and in execution brought the disputed properties to sale on the 9th March 1892, when Abdul Majid became the purchaser of three lots, two for Rs. 45 and a third for Rs. 42 making an aggregate of Rs. 87. The sale was confirmed on the 13th May. The Plaintiffs contend that the purchase was made by Akikannessa herself in the name of Abdul Majid. In support of this conclusion reliance is placed upon the surrounding circumstances, and it is urged that as Akikannessa was heavily indebted at the time, she had a motive to place her properties in the name of an ostensible owner. Our attention is drawn to the fact that on the 3rd February 1882, she borrowed Rs. 30,000 on mortgage from Ruplal Das and Raghunath Das, two well-known bankers of Dacca, and that the mortgagees sued on the 9th April 1891 to enforce their security, which resulted on the 30th June 1892 in a decree for over Rs. 88,000: besides this, in 1890 Nawab Asanullah of Dacca obtained a decree against her for more than Rs. 4,000 and when he attempted to realise his dues in execution, claims were preferred by her relations who had taken from her three deeds of gift or release on the 5th March 1891. These claim cases were unsuccessful, and the suits which were thereafter instituted by the disappointed claimants on the 22nd January 1892, were all ultimately dismissed on the 11th January 1913. There can, we think, be little doubt that Akikannessa was pressed by her creditors in 1891 and was in considerable embarrassment at or about the time when Kalachand

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Mukherjee obtained his decree against her. There is also little doubt that she had recourse at the time to fictitious transfers, as is sufficiently indicated by the result of the claim cases mentioned. The Defendants urge, however, that it does not necessarily follow that the purchase by Abdul Majid was fictitious, merely because the judgment-debtor was involved in litigation and made ineffectual efforts to place her estate beyond the reach of her creditors. But we are pressed to take into consideration also other events which happened immediately afterwards. In 1895, one Ayesha Akhtar Khatun, a co-sharer zemindar, obtained a rent-decree against Akikannessa and others. The decree was executed, and the disputed properties were purchased on the 15th December 1896 by one Chandra Kumar Ray, on behalf of the fifth Defendant Lalitmohan Ray, for a sum of Rs 500. This sale was confirmed on the 24th February. At the same time, a similar decree was obtained by the same Plaintiff against Golamullah and others with the result that, at the time which followed, Chandra Kumar Ray became the purchaser as before for Rs. 805 and the sale was confirmed on the 24th February 1897. Before confirmation of the sales, Chandra Kumar Ray and Lalitmohan Ray, however, jointly executed a conveyance in favour of Abdul Azim on the 13th January 1897 for a sum of Rs. 1,605, that is, upon a profit of Rs. 300 on the purchase-money actually paid at the execution sales. Meanwhile, Jabinda Khatun and others, another set of co-sharers, zemindars, had obtained two rent decrees in 1895 against Golamullah and others. The decree-holders took out execution, whereupon Abdul Azim preferred two claims. On the 4th January 1898, the claims were allowed, except in respect of the share of Akikannessa in taluk

Muhammad Amiruddin. On the 24th February 1898, Abdul Azim, whose claim had thus proved abortive in part, took a conveyance from Abdul Majid for a sum of Rs. 199. The substance of the transaction was that Abdul Azim who had failed in his claim, in respect of the share of Akikannessa, acquired the outstanding title from Abdul Majid so that he might be able to rely thereupon in the event of future dispute. The decree-holders, Jabinda Akhtar Khatun and others proceeded with execution of their decree in so far as the claim order allowed, and on the 14th March 1898, Tarini Charan Saha became purchaser for Rs 625 of the share of Akikannessa in taluk Muhammed Amiruddin. On the 24th April 1902, Abdul Azim executed a conveyance in favour of Nurennessa, the daughter-in-law of Akikannessa, in respect of the taluks together with arrears of rent, for a sum of Rs. 6,000. On the 2nd June 1902, Nurennessa granted a *mirash* tenure of the properties to Abdul Azim and his brother Abdul Halim on receipt of Rs. 2,500 as bonus and on a net annual rental of Rs. 600, the lessees undertaking to pay in addition the head rent direct to the zemindars. On the 17th March 1904, Nurennessa conveyed her right to receive rent under the lease of 2nd June 1902, to the fifth Defendant Lalitmohan Ray, for a consideration of Rs. 6,000. Thereafter, on the 3rd December 1909, Tarini Charan Saha and his brother Chandra Nath Saha conveyed their interest to the present Plaintiffs and others for a sum of Rs. 500. On the 27th September 1913, the Plaintiffs instituted this suit on the strength of their purchase. The history outlined above makes it plain that the title of the Plaintiffs is dependent upon the true effect of the purchase by Tarini Charan Saha on the 14th March 1898. That title

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is ineffectual against the contesting Defendants, if a real interest has already vested in Abdul Azim by virtue of his purchase, dated 24th February 1898, from Abdul Majid, who had acquired the interest of Akikannessa under the sale which was held on the 9th March 1892 in execution of the decree obtained by Kalachand Mukherjee and was confirmed on the 13th May 1892. The Plaintiffs are, consequently, driven to assert that the purchase by Abdul Majid on the 9th March 1892, as also the purchases by Abdul Azim on the 13th January 1897 from Lalitmohan Ray and on the 24th February 1898 from Abdul Majid were fictitious transactions, which left the title of Akikannessa wholly unaffected and free to vest in the Defendants through the purchase of Tarini Charan Saha. The Subordinate Judge has held that the purchases by Abdul Majid and Abdul Aziz were all genuine transfers. In our opinion, no good grounds have been established to justify our dissent from this conclusion.

It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Seth Maniklal v. Raja Bijoy Singh* (1), the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord Westbury in *Sreeman Chunder v. Gopaul Chunder* (2) and by Sir Lawrence Jenkins in *Mina Kumari v. Bejoy Singh* (3). But we are not unmindful that in the words of Lord Hobhouse in *Uman Prasad v. Gandharp Singh* (4) and of Lord Shaw

in *Mohammad Mahabub Ali v. Bharat Indu* (5), as *benami* transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities, as Lord Buckmaster observed in *Irshad Ali v. Kariman* (6). He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person, who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things, *Azimut Ali v. Hardwaree Mull* (7), *Faez Baksh v. Fakiruddin* (8), *Suleman Kader v. Mehdi Begum* (9), *Nirmal Chunder v. Mahomed Siddiq* (10) and *Matulal v. Kundan Lal* (11). The most important test to be applied in these cases is, as observed by Mr Ameer Ali in *Nrityamoni v. Lakhan Chandra* (12), the source whence the consideration came. Sir George Fairwell formulated the same test in different language, when he observed in *Bilas Kunwar v. Desraj Ranjit Ram* (13), that where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle that the trust of the legal estate results to the man who pays the pur-

(5) 23 C. W. N. 321 (P. C.) (1918).

(6) 22 C. W. N. 530 (P. C.) (1917).

(7) 13 M. I. A. 395 (1870).

(8) 14 M. I. A. 234 (1871).

(9) L. R. 25 I. A. 15: s. c. I. L. R. 25 Cal. 473; 2 C. W. N. 186 (1897).

(10) L. R. 25 I. A. 225: s. c. I. L. R. 26 Cal. 11 (1898).

(11) 21 C. W. N. 929: s. c. 25 C. L. J. 581 (P. C.) (1917).

(12) I. L. R. 43 Cal. 660: s. c. 20 C. W. N. 522; 24 C. L. J. 1 (P. C.) (1916).

(13) L. R. 42 I. A. 202: s. c. I. L. R. 37 All. 557; 19 C. W. N. 1207; 23 C. L. J. 516 (1915).

(1) 25 C. W. N. 409 (1920).

(2) 11 M. I. A. 29 (43) (1866).

(3) L. R. 44 I. A. 72: s. c. I. L. R. 44 Cal. 682; 21 C. W. N. 585 (1916).

(4) L. R. 14 I. A. 127: s. c. I. L. R. 15 Cal. 20 (1887).

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chase-money applies. To the same effect is the decision of the Judicial Committee in *Parbati v. Baikuntha* (14), which recalls the earlier pronouncements by Lord Campbell in *Dhurumdas v. Syamasundari* (15) and by Knight Bruce L. J., in *Gopee Kristo v. Gunga Prosad* (16). Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when he observed in *Dalip Singh v. Nawal Kunwar* (17) that if the evidence on neither side is wholly convincing as to the fundamental criterion, namely, the source of the purchase money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property, see *Upendra Nath v. Purendra Nath* (18). We must further look to the substance of the transaction as evidenced in the deeds of the parties, not permitting the real question to be obscured by what Knight Bruce, L. J., calls, in *Hunooman Pershad v. Babui Moonraj Kunwaree* (19), the form of expression, the literal sense, nor by what Lord Macnaghten describes in *Lal Achal Ram v. Kazim Husain* (20), as

exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument.

Keeping these well-established principles in view in the consideration of the evidence, the Subordinate Judge has interpreted the surrounding circumstances as unfavourable to the theory that Abdul Majid and Abdul Azim were shadows of Akikannessa and never really acquired her interest in the disputed property. It is not questioned that Akikannessa was heavily involved at the time, but that is consistent with the theory that there was a real sale at the instance of Kalachand Mukherjee, who found it otherwise impossible to recover his dues. Stress has also been laid on the circumstance that Abdul Majid made the purchase for a small sum, but the fact cannot be ignored that the properties sold were heavily encumbered, while no evidence is forthcoming to establish accurately the relation the purchase money paid bore to the real value of the right, title and interest brought to sale. There is also the circumstance that the purchaser and the judgment-debtor were distantly related; but it must be remembered that strangers, unless speculative purchasers, would hardly be anxious to step in when the entire estate of Akikannessa and her co-sharers was involved in what the Subordinate Judge calls a general overwhelming ruin. As regards the source of the purchase money, there is no room for suspicion that the purchaser was not able to provide the sum. Nor can much weight be attached to the fact that Akikannessa did attempt to effect colourable transfers in favour of some of her relations; that does not show that all the transfers, voluntary or compulsory, were of the same character. As was observed by Lord Westbury in *Sreeman Chunder*

(14) 18 C. W. N. 428 (P. O.) (1913).

(15) 3 M. I. A. 229 (1843).

(16) 6 M. I. A. 53 (1854).

(17) L. R. 35 I. A. 104; s. c. I. L. R. 30 All. 252; 12 C. W. N. 609 (1908).

(18) 21 C. W. N. 280 (1915).

(19) 6 M. I. A. 393 (1856).

(20) L. R. 32 I. A. 113; s. c. I. L. R. 27 All. 271; 9 C. W. N. 477 (1905).

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v. *Gopaul Chunder* (2), if we were to take away men's estate upon inferences derived from such circumstances as these, it would be impossible that any property would be safe. The Subordinate Judge has observed that the considerations applicable to the purchase by Abdul Majid at the execution sale apply also more or less to the purchases by Abdul Aziz from Abdul Majid and from the fifth Defendant Lalitmohan Ray. We may add that upon the fundamental test of possession, the Plaintiffs are in inextricable difficulty; for the evidence does not establish that Akikannessa continued in occupation notwithstanding all the transfers mentioned, nor that the Plaintiffs have custody of the title deeds. On a review of the whole evidence, we are not prepared to dissent from the view taken by the Subordinate Judge that although there may be ground for suspicion and although some of the surrounding circumstances may engender doubt, no inference can be drawn from legal testimony that Abdul Majid and Abdul Azim were the *benamidars* of Akikannessa. In this view, it is not necessary to consider whether sec. 317 of the Civil Procedure Code of 1882 which was in operation when Abdul Majid became purchaser at the execution sale on the 9th March 1892 governs the case, or whether the Plaintiffs are debarred from raising the question of *benami* under sec. 66 of the Code of 1908, which is now in force. The decision of this Court in *Pro-matha Nath v. Mohini Mohan* (21) shows that the stringent rule in favour of the certified purchaser, enunciated in the Code of 1908, has not retrospective operation and cannot be utilized by an execution purchaser whose title was perfected when

sec. 317 of the Code of 1882 was in force. This, however, is immaterial, because we have held that the execution purchaser Abdul Majid was the real purchaser, and the subsequent purchases by Abdul Azim also were real transfers. This renders it superfluous for the Plaintiffs to invoke the aid of the principle formulated by the Judicial Committee in *Ram Coomarr Koondoo v McQueen* (22) and *Mohamed Mozaffer Hoosin v Kisor Mohan* (23), which would protect them as *bonâ fide* purchasers for value without notice from ostensible holders, even if Akikannessa were shown to have utilised Abdul Majid and Abdul Azim to carry out a scheme of *benami*.

As regards the second point, the Subordinate Judge has pointed out that the question of the nature and extent of the rights of the parties in Marzaha Champaknagar and Kalai Gobindapur known as Budhiamara Char is involved in considerable obscurity. This is chiefly due to the fact that as the village had been diluviated many years ago and reformed only in part, the parties themselves had no clear knowledge of their rights and dealt with them in a reckless manner. The three documents which throw light on this matter are the partition deed and the *ekrarnama* of the 3rd March 1843, and the *robakari* of Mr H. N. Metcalfe, Collector of Tippierrah, dated the 2nd April 1845. In the partition deed, the villages Kalai Gobindapur, Champaknagar, Budhiamara and Alinagar are treated as distinct villages, and the first three are taken to appertain to more than one distinct mahal. This confusion is reproduced in the *robakari*. But the *thak* papers as also

(2) 11 M. L. A. 28 (47) (1893).

(21) I. L. R. 47 Cal. 1108; A. C. 24 C. W. N. 1011; 31 C. L. J. 463 (1920).

(22) L. R. (Sup. Vol.) I. A. 43; 11 B. L. R. 46 (1872).

(23) L. R. 22 I. A. 129; A. C. I. L. R. 22 Cal. 909 (1895).

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the settlement papers show that there is no separate mouza of the name of Budhiamara; it appears to be only another name of Kalai Gobindapur and Champaknagar, which are in reality the names of two different parts of Alinagar. The partition deed and the *ekrarnama* leave no room for doubt that such of the lands as at the time were either not in possession of the parties or were the subject-matter of litigation were left unpartitioned. The lands of Alinagar were given to Khatunjan, and consequently, the title to the released lands would vest in her. Her title could not be affected by reason of assertions in derogation of her undoubted right made by her co-sharers and others in documents of a later date. The inference follows that the Shikmi taluks are now vested in the fifth Defendant, and the first four Defendants are the *mirashdars*. Consequently, neither the Plaintiffs nor the Defendants, other than those mentioned, have a share in Budhiamara, and the claim in this respect has been rightly dismissed.

Next, as regards the indigo factory there is no doubt that the partition deed of the 3rd March 1843 implies an under-tenure in respect thereof under Khatunjan, and this is supported by the *ekrarnama*. But there is no evidence to show that this under-tenure was ever really in existence, or rent was at any time paid on account of it. We are unable to hold, in these circumstances, that an under-tenure ever came into existence or was in operation at the date of the institution of this suit.

Finally, we have to consider the question of limitation. The Subordinate Judge has pointed out that complete sets of collection papers have not been produced on either side and that what has been placed before the Court does not indicate that either side was in peaceful occupation. He has held, however, that, on the

whole, the balance of evidence as to possession is in favour of the Defendants who are proved to be the rightful owners. In such circumstances, the rule enunciated by the Judicial Committee in *Rampram Pande v Gobardhan Pande* (24) may be applied, namely, that where there is strong evidence of possession on the part of the Respondents, opposed by evidence apparently strong also on the part of the Appellant, in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with the title, and that with the aid of it, there is a stronger probability that the Respondents' case is true than that of the Appellant; see also *Secretary of State v Chellikani* (25), *Krishnen v. Peringati* (26), *Raja Shuaprasad Singh v Hira Singh* (27), *Jai Chand v Girwar Singh* (28), *Innasimuttu v Upakarath* (29) and *Lala Singh v Mir Latif* (30), which points out that in the judgment in *Mirza Shamser v Kunjabhavi* (31), the word "satisfactory" is misprinted as "unsatisfactory" in the passage summarising the rule in *Rampram v. Gobardhan* (24).

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

P K. C.

(24) 20 W. R. 25 (1878).

(25) L. R. 43 I. A. 192. s. c. I. L. R. 39 Mad. 617; 20 C. W. N. 1311 (1916).

(26) 26 C. W. N. 666 (P. C.) (1921).

(27) 6 P. L. J. 478 (1921).

(28) 1 L. R. 41 All. 669 (1919).

(29) L. R. 26 I. A. 21. s. c. I. L. R. 23 Mad. 10 (1899).

(30) 21 C. L. J. 480 (1915).

(31) 12 C. W. N. 273 (280); s. c. 7 C. L. J. 414 (422) (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES

NOS. 79 AND 167 OF 1922.

MOOKERJEE, J. | RAGHUNATH SARMA and
CHOTZNER, J. | ors., Appellants,
v.
1922, | JIBAN CHANDRA SARMA,
7, July | Petitioner, Respondent.

Election of temple trustees—English law, how far applicable in India - Persons not entered in voters' list, if can vote.

Where the validity of the election of Daloi or the head priest of the Madhub temple at Hajo in Kamrup who is elected by the Burdeories whose names are recorded in a list prepared for that purpose was assailed on the ground that persons whose names were not entered in the list of voters were permitted to participate in the election

Held—That there was nothing in the scheme of election which ordained that the right to vote was dependent on the entry of the names of voters in the voters' list, nor did it provide or follow, in the absence of an express direction to that effect, that those not so entered could not vote. There was therefore no infringement of any mandatory rule.

SHYAM CHAND BASAK v CHAIRMAN, DACCA MUNICIPALITY (1) referred to.

Held also—That the English common law of parliamentary elections should not be applied to regulate the election of temple trustees in this country though the principles which underlie that law may be involved if they appear to the Court to be in conformity with the rules of justice, equity and good conscience.

This was an appeal against the decrees of S. E. Stinton, Esq., District Judge of Zillah Assam Valley Districts, dated the 4th of March 1922.

(1) I. L. R. 47 Cal. 524. s. c. 24 C. W. N. 189; 30 C. L. J. 270 (1919).

The facts of the case will appear from the judgment.

Dr Sarat Chandra Basak, Babus Prokash Chandra Majumdar, Mohesh Chandra Banerji and Manmatha Nath Roy II for the Appellants.

Babus Ram Chandra Majumdar and Bryan Kumar Mukherjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :

This appeal is directed against a determination of the question of validity of an election to the headship of the Madhub temple at Hajo in the District of Kamrup. The high priest is named *Daloi* and the last incumbent of the office died on the 21st December 1917. This religious endowment is described in the proceedings as ancient and its management is now regulated by a scheme drawn up by this Court on the 1st May 1911 in modification of a scheme prepared by the District Judge on the 9th December 1908, in a suit instituted under sec. 539 of the Civil Procedure Code of 1882 for the administration of the trust.

This scheme directs that the *Daloi* be elected as before by the *Burdeories* of the temple, to hold the office for life unless removed by the Civil Court in a suit instituted for that purpose. There will also be a Committee of five elected members besides the *Daloi* who will hold office for three years. Three of the members will be elected by the *Burdeories* and two by the *Shebais*; the *Daloi* will be the sixth and will have a casting vote. The scheme further directs that a Commissioner be appointed by the Court to prepare a list of the *Burdeories* living within 5 miles of Hajo, who will be entitled to vote at the election of a *Daloi* and of the members of the Committee. There will also be a list of the *Shebais* entitled to vote

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for the Committee; and the Court will indicate the manner in which such election should be held for future guidance. The Committee will revise the list of voters once a year after the publication of notice and will arrange for the election of their successors and of a *Daloi* when there is a vacancy.

In accordance with this scheme, steps were taken for the election of a *Daloi* and the election was in fact held on the 15th January 1918. The result was that the present Appellant received 203 votes and the Respondent 48 votes. The validity of the election was consequently challenged by the Respondent. The District Judge allowed the objection and cancelled the election. On appeal, this Court reversed the decision of the District Judge and remitted the case for further consideration. The District Judge thereupon upheld the objection that the election had been held in an objectionable manner and again cancelled the election. There was a further appeal to this Court which was dismissed on the 10th February 1921. But this Court directed that a list of voters be framed and that a fresh election be held after the Committee had been reconstituted. The election was held on the 19th and 20th February 1922, and we are now called upon to decide whether the election was valid in law.

The validity of the election is assailed on the ground that persons whose names were not entered in the list of voters were permitted to participate in the election. This objection has been overruled by the District Judge and has been re-iterated here as a matter of principle. On behalf of the Appellant the position has been maintained that the Commissioner who held the election was not competent to permit any person to participate in the election whose name had not been pre-

viously entered in the electoral roll. We are of opinion that there is no force in this contention. There is nothing in the scheme which ordains that the right to vote is dependent on the entry of the name in the voters' list. Although the scheme states that those *Burdeories* whose names are entered in the list are entitled to vote, it does not provide nor does it follow in the absence of an express direction to that effect that those not so entered cannot vote. There is consequently no infringement of a mandatory rule, *Shyam Chand Basak v. Chairman, Dacca Municipality* (1). This view of the effect of this scheme was incidentally adopted by Mr. Justice Woodroffe and Mr. Justice Smither in an earlier stage of these proceedings. But it has been urged before us that the question was not at that stage directly and substantially in issue. This may be conceded. We are of opinion, however, that the view then taken was undoubtedly well-founded on principle.

Under sec. 7 of the Ballot Act, 1872, it is provided that at any election for a county or a borough, a person shall not be entitled to vote unless his name is on the register of voters for the time being in force for such county or borough, and every person whose name is on such register shall be entitled to demand and receive a ballot paper and to vote; provided that nothing in this section shall entitle any person to vote who is prohibited from voting by any statute or by the Common Laws of Parliament, or relieve such person from any penalties to which he may be liable for voting. The effect of this provision was examined in the case of *Stowe v. Jolliffe* (2), where it was ruled that the register is conclusive not

(1) I. L. R. 47 Cal. 524; s. c. 24 C. W. N. 189; 80 C. L. J. 270 (1919).

(2) L. R. 9 C. P. 784 (1874).

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only at, but after, the election, so that the votes of persons whose names are on the register cannot be struck off on a petition unless the persons come within the proviso. Lord Coleridge reviewed the history of the establishment of register of voters and pointed out that it was not till the register was established by the Reform Act that the view was adopted that the entry of the name of a voter on the register was a condition precedent to the exercise of franchise by him. A similar provision will be found in the rules framed on the 21st November 1896 under the Bengal Municipal Act. These rules are so framed as to make no person eligible to vote, unless he has been previously duly registered in accordance with the rules prescribed for the maintenance of register of voters. In the case before us, there is no provision in the scheme to the effect that the right of a person to vote at the election is dependent on the entry of his name in the register. We are consequently of opinion that it cannot be maintained as a matter of principle that the election in this case is invalidated by the fact that persons were permitted to participate in the election, though their names had not been previously placed on the register of voters. In this connection reference may be made to the decision in *Ramau Julu v. Partha Sarathi* (3), where it was pointed out that the Common Law of England relating to parliamentary elections should not be applied to regulate the election of temple trustees in this country, though the principles which underlie that law may be invoked, if they appear to the Court to be in conformity with the rules of justice, equity and good conscience.

In the view we take, the only question which remains for consideration is, whe-

ther the facts found by the District Judge show that the election has been fairly held. As regards the voters who recorded their votes in favour of the Respondent, objection has been taken on the ground that two of them, who were originally infants but had attained majority at the time of the election, were allowed to take part in the election and that two other persons whose father was a voter and recorded as such in the register, but had died before the election, were also allowed to take part in the election. The course adopted by the Commissioner in these circumstances was manifestly correct. It is not disputed that each of these persons possessed the necessary qualifications at the time when the election took place.

As regards the voters who were excluded from the election and who, it is asserted, would have recorded their votes in favour of the Appellant, the District Judge has found that the objection is groundless. These persons did not appear at the proper time and at the proper place to record their votes. They visited the Commissioner at a time when the election was not in progress and at a place other than that fixed for the election. The Commissioner also was not satisfied as to some of them that they are the persons whose names were recorded as voters. We are of opinion that the course adopted by the Commissioner cannot be successfully challenged.

It has finally been urged on behalf of the Appellant that opportunity was not granted to him to establish his objection at the time of the scrutiny of the votes recorded. There is no substance in this contention. There are no rules prescribed as to the mode in which the scrutiny is to be conducted. The only test to be applied is, whether the party who takes

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exception to the voters' record has been prejudiced by the procedure adopted. We are unable to say that there was any genuine attempt made by the Appellant to support his allegation by the production of evidence. There is nothing to show that he asked the Commissioner or the District Judge to take evidence in support of his assertions. In these circumstances we are not satisfied that he has a real grievance in this matter.

The result is that we affirm the decree made by the District Judge and dismiss the appeal with costs, 5 (five) gold mohurs.

F. A. No. 167 of 1922

In view of our judgment in F. A. No. 79 of 1922, the Appellant does not wish to proceed with this appeal, which is consequently dismissed but without costs.

S. C. C.

CIVIL REVISIONAL JURISDICTION.]

RULE No. 213 OF 1922.

RICHARDSON, J.	LAL BEHARI BASAK,
B. B. GHOSE, J.	Plaintiff, Petitioner,
1922,	v.
2, August.	AKHIL CHANDRA
	SANTRA, Defendant,
	Opposite Party.

Bengal Tenancy Act, (VIII of 1885), sec. 153, proviso, revisional powers of the Additional District Judge in rent suits—Civil Courts Act (XII of 1887), sec. 8, Additional District Judge's power to hear an application under the proviso to sec. 153, transferred to him by the District Judge.

Where an application under the proviso to sec. 153 of the Bengal Tenancy Act presented to the District Judge was transferred by him to the Additional District Judge for hearing and was dismissed by the latter:

Held—That the District Judge in transferring the application to the Additional District Judge no doubt acted under

the general powers conferred on him by sec. 8 of the Civil Courts Act, the provisions of which are wide enough to enable an Additional District Judge to hear an application under the proviso to sec. 153 of the Bengal Tenancy Act transferred to him for disposal by the District Judge. The jurisdiction conferred by the proviso on the District Judge is a function of the District Judge which under the Civil Courts Act he may assign to an Additional Judge.

GAUDNA BIBI v. JABANULLA MANDOL
(1) distinguished.

This was a Rule issued by this Court, on the 5th April 1922 against an order of the Additional District Judge of Howrah, dated the 3rd January 1922, dismissing the petition of revision presented by the Petitioner against the decree passed in Rent Suit No. 265 of 1920.

The facts of the case are briefly as follows—The Petitioner brought a rent suit against the Opposite Party in the Munsif's 2nd Court at Howrah, which was, however, eventually dismissed. Thereupon the Petitioner moved the District Judge of Hooghly against the said decree under the proviso to sec. 153 of the Bengal Tenancy Act. The District Judge transferred the application to the Additional District Judge of Howrah for disposal and the latter dismissed it on 3rd January 1922. Thereupon the Petitioner moved the High Court and urged *inter alia* that the District Judge exercised his jurisdiction illegally and with material irregularity in transferring the case to the Additional District Judge and that the latter exercised a jurisdiction not vested in him in hearing and dismissing the application.

LAL BEHARI BASAK v. AKHIL CHANDRA SANTRA. -

Babus Hari Charan Ganguli and Monmohon Dose for the Petitioner.

Babu Hira Lal Chakravorty for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule relates to an order, dated the 3rd January 1922, made by the Additional District Judge of Howrah whereby he dismissed the application of the Petitioner presented to the District Judge of Hooghly under the proviso to sec. 153 of the Bengal Tenancy Act and transferred by the District Judge to him for hearing.

The Rule obtained by the Petitioner calls upon the Opposite Party to show cause why the Additional District Judge's order should not be set aside for the reasons set forth in ground (a) of the petition. Ground (a) of the petition is to the effect "that the learned District Judge exercised his jurisdiction illegally and with material irregularity in transferring the case to the Additional District Judge and the latter exercised jurisdiction not vested in him in proceeding with the trial and dismissing the motion."

In support of the Rule reliance was placed on the case of *Gaudna Bibi v Jabanulla Mandul* (1). We have referred to the record of the case in this Court and we find that there the Additional Judge of Jessore had before him an appeal described in the title as a miscellaneous appeal. The learned Additional Judge dealt with the matter not as an appeal but as an application under sec. 153 of the Bengal Tenancy Act, and it was held by this Court that he had no jurisdiction in those circumstances to deal with the case as an application under sec. 153 of the Bengal Tenancy Act. In the present case the application of the Opposite Party ten-

ant was properly made to the District Judge of Hooghly who appears to have transferred it for disposal to the Additional District Judge of Howrah.

In so doing the District Judge no doubt acted under general powers conferred on him by sec. 8 of the Civil Courts Act, XII of 1887.

Sub-sec (2) of that section provides :—

"Additional Judges . . . shall discharge any of the functions of a District Judge which the District Judge may assign to them, and in the discharge of those functions, they shall exercise the same powers as the District Judge."

We are of opinion that the case cited is distinguishable from the present case on the facts and that the provision in the Civil Courts Act to which we have referred is wide enough to enable an Additional Judge to hear an application under the proviso to sec. 153 of the Bengal Tenancy Act transferred to him for disposal by the District Judge. No doubt the jurisdiction conferred by the proviso is conferred on the District Judge but in our view the hearing of an application under the proviso is a function of a District Judge which under the Civil Courts Act, he may assign to an Additional Judge. If that be so, the order of the learned Additional Judge to which the Rule relates was not made without jurisdiction and this Rule must be discharged with costs (hearing fee one gold mohur).

J N. R. *Rule discharged with costs.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT CAVE. T. P. SRINIVASA CHA-
 LORD SHAW. RIAR, since deceased
 SIR JOHN EDGE. (now represented by
 MR. AMEER ALL. T. P. Rangachariar
 1922, and anr), Appellants,
 Heard, 2, 3, 6, 7 and v.
 9, March. C. N. EVALAPPA
 Judgment, MUDALIAR,
 6, April. Respondent.

Trust property, later on held by trustee as personal property—Property whether legitimately or improperly converted into personal property—Onus—Trustee concocting false accounts to support claim to trust property adversely to trust, liability to removal—(Dharmakartha), position of, distinguished from that of shebait or mohant—Survey and Settlement Register, value as evidence.

Where property is found originally to have been trust property, the onus does not rest on the beneficiaries to prove that they have been illegitimately converted into personal property by the trustee. The onus rests heavily, on the other hand, on the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition.

Survey and Settlement Registers are important but not conclusive evidence of ownership, being official documents made after minute inspection and enquiries on the spot, though they do not commit parties to the statements recorded therein as admissions or affirmations.

The position of a Dharmakartha is not that of a shebait of a religious institution or of the mohant or head of a mutt. These functionaries have a much higher right with larger power of disposal and administration and they have a personal interest of a beneficial character. But a Dharmakartha is literally, and no more than, the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal

support, are never in a higher legal category than that of a mere trustee.

A trustee who set up unfounded assertions of personal title in endowed properties and strenuously supported them by even concocting accounts cannot be continued in the office in the interest of the trust and should be removed by the Court.

This was an appeal from a judgment and decree of the High Court of Madras, dated the 6th March 1917, which varied a decree of the District Judge of Chingleput, dated the 11th December 1914.

The suit was instituted by the Plaintiffs as Tirthan Mirasidars and Ubhaya-kars of the Vishnu temple of Jagannatha Perumal and Trumushi Alwar at Madavilagam, asking for the removal of the Defendant (Respondent) from his position as Dharmakartha of the temple on the ground that he had misappropriated the temple properties, failed to keep accounts, and interfered in the ceremonies.

The Defendant contended that he was hereditary trustee of the temple, that the temple had never owned the major portion of the lands claimed, and he denied the various charges of misfeasance.

The trial Judge found that the Plaintiffs had not established the title of the temple to any of the land in question, but held that the Defendant had produced false accounts and wrongfully interfered in the temple ceremonial and festivities and ordered his removal, and the formation of a scheme for the proper management of the endowment.

From this decree the present Respondent appealed to the High Court of Madras and the Appellant filed cross-objections.

The appeal was heard by Sir J. Wallis, C. J., and Seshagiri Ayyar, J., who

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passed a decree declaring certain of the property claimed by the Respondent to belong to the temple, but held that there were not sufficient grounds for dismissing the Respondent though they ordered him to pay the costs throughout. The Plaintiffs were now the Appellants to His Majesty in Council.

Sir George Lowndes, K. C. and Mr. E. B. Raikes for the Appellants.—The whole of Madavilagam was "*miras*" land, and the temple was sole "*mirasdar*" of the village. Now the *mirasdar* is bound to cultivate hence the appointment of the *Dharmakartha* who has been cultivating on behalf of the temple.

The rights and history of *mirasdars* will be found in the Chingleput Manual, 1879, at pp. 222, 258, 288, 300 and Fifth Report of the Select Committee on the Affairs of the East India Co., Vol. 3, p. 199.

See too Place's Final Report, para. 189.

Having regard to the nature of *mirasi* tenure the onus is on the Defendant to show that these *mirasi* lands became his property, and he has failed to discharge it.

The *Dharmakartha* is to all intents and purposes a trustee. He is distinguishable from a *shebait* in that he has no beneficial interest in the property. The Defendant here apparently thought he was a *shebait* and was entitled to any surplus and accordingly kept no accounts.

A trustee's first duty is to keep accounts.

Lewin on Trusts, 11th Ed., p. 866.

Further, he has contended throughout that the trust property is his own and has fabricated accounts.

He has also admittedly mixed his own property with the trust property which raises a presumption against him.

Lupton v. White (2)

These acts constitute a wilful breach of trust for which the trustee should be removed.

See Tudor's Charitable Trusts (1899), p. 194 and *Pearry Mohan Mukerji v. Monohar Mukerji* (3).

Messrs. DeGruyther, K. C., Kenworthy Brown and Palat for the Respondent—The *Dharmakartha* cannot be said to be a trustee, nor can the English law of trusts be applicable to him. He is merely a manager representing the property.

Vidya Varuthi Thirtha v. Balusami Ayyar (4) and *Bombay, Burmah Trading Corporation, Ltd. v. Smith* (5).

Mayne's Hindu Law, 7th Edn., para. 437.

The *Dharmakartha* is in fact identical with a *shebait*.

A "*miras*" tenant is only a tenant with a permanent right of occupancy as distinguished from a "*paikari*." Admittedly we are hereditary *Dharmakarthas*, that is so, because we are the heirs of the founder. Certain lands were granted by Government for the support of the temple, but not the lands in suit which have always been the private property of the *Dharmakartha's* family. The income of this property has never been applied to the temple so that if there has been a breach of trust it took place over 100 years ago.

The temple was taken over by Government in 1814 and the endowments applied to charitable purposes.

See Madras Regulation, VII of 1817.

Scrupulous care was taken by Govern-

(2) 15 Ves 436 1808.

(3) L. R. 48 I. A. 268 at p. 264; s. c. 26 O. W. N. 182 (1921).

(4) L. R. 48 I. A. 302 (1921).

(5) L. R. 21 I. A. 139 at p. 147 (1894).

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nient on the property being restored, and any claimant must sue within 12 years.

Ambalaxana Pandara Sannidhi v. Mecnakshi Sundareswaral Devasthanam (6).

Yet in the subsequent records the ancestors of the present *Dharmakartha* are shown as owners.

There is in any case no substantial question of law in this case and no appeal lies to the Privy Council.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal against the judgment and decree of the High Court of Judicature at Madras, dated the 6th March 1917, which varied a decree of the District Judge of Chingleput, dated the 11th December 1914.

This suit was instituted by the present Appellant and another, under the Civil Procedure Code, sec. 92. The prayer of the plaint was for an account of the Respondent's management of a temple in the District of Chingleput since his assumption of office, and that he be made accountable for all losses occasioned to this temple by his breaches of trust, for his removal from office, and for the settlement of a scheme for the management of the *Devasthanam* and its properties." Incidentally, the judgment for accounts made in the suit has raised a question of complexity and importance as to the ownership of lands of considerable extent and value. The issue upon that topic is the principal one raised in this appeal. It is whether those lands belonged to the temple or are the private property of the Respondent, who, in point of fact, is its *Dharmakartha* or hereditary trustee.

The grounds for the removal of the Respondent from the position of *Dharmakartha* have been added to by the conduct of the Respondent in the course of the suit, and now include not only misfeasance and breach of trust, but the proved falsification of the temple accounts.

This question of removal from the position of trustee will be afterwards dealt with, but it may here be mentioned that the former question, *viz*, the question of the true ownership of the temple properties, so keenly contested by the Respondent, has not only to be determined on its merits, but may turn out to have a bearing upon the question of his removal from office.

The case is very involved, and their Lordships have to acknowledge the care which has been manifested with regard to it in the Courts below, and in particular the elaborate investigations of the history of this property made by the District Judge.

As it is desirable that the Board should endeavour to exclude from this judgment all such details as might obscure the question of principle dealt with, it may be well to consider the respective positions of parties in the clear language adopted by the District Judge. His narrative of the Plaintiff's case is this:—

"2. The Plaintiffs allege that they are the *tirtham mirasidars* and *ubhayakars* of the said temple, that the Defendant is its trustee, that its management since 1842, when the Government handed over the same, has been in the family of the Defendant, that the endowments to the temple consist of *meras* from Government, income from lands and contribution from *ubhayakars*, that the administration of the temple by the Defendant has been unsatisfactory and that he is guilty of various acts of misfeasance, malfeasance, nonfeasance, breach of trust and neglect of duty. The instances

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of misconduct are set forth in para. 9 of the plaint, the main item being with reference to the lands wet and dry and manyams described in A (1) to A (8) schedules of the plaint which it is alleged to belong to the temple, and the Defendant is charged with misappropriation of the income from them without bringing the same into the temple accounts, and it is alleged that these accounts are not regularly and correctly kept."

His narrative of the Defendant's case is as follows:—

"3 The Defendant contends that he is the hereditary trustee of the temple and that his ancestors were the trustees even before the Government assumed management thereof, and denies that he is guilty of any act of misfeasance, etc., alleged in the plaint. He further states that the plaint temple never owned or enjoyed any of plaint A1 or A2 schedule lands, that item 1 of A3 schedule is enjoyed by the temple, and that, in item 2 of A3 schedule and in the first seven items of A5 schedule, the melwaram right alone belongs to the temple, that lands in A1, A2, A7, A8 were always exclusively owned and enjoyed by the Defendant and his ancestors as their absolute property. The Defendant further states that all the incomes arising from the lands belonging to the temple have been regularly entered in the temple accounts and duly accounted for, that the said income is not sufficient for the upkeep of the temple, and that the Defendant has been meeting the deficit from his private funds, and that the accounts filed in Court were regularly maintained by the temple karnams."

These statements show broadly and correctly the attitude of the parties to this litigation.

The temple in question is an endowment or institution for the worship of the God Vishnu. It is dedicated to a Saint or Incarnation called Tirumushi Alwar. The temple lands are at Madavilagam and other villages in the District of Chingleput, in the vicinity of the City of Mad-

ras. As the Plaintiff in Head 3 of the plaint avers:—

"There is a Public Vishnu Temple at Madavilagam, a hamlet of Tirumushi, in Poonamalle Division, Saidapet Taluk, dedicated to Sri Jagannatha Perumal and Tirumushi Alwar."

That, in point of fact, a temple did exist there from ancient times, and that it was in possession of certain endowments in the shape of lands, seems to be undoubted.

The Board has had a reference to various historical authorities upon the subject of the Chingleput District, and upon the *mirasi* tenure therein. These records are voluminous. It is too much to expect that anything definite can be obtained prior to the devastation of the District by Hyder Ali in the latter half of the eighteenth century. The most valuable document is the Fifth Report of the Select Committee on the Affairs of the East India Company of the year 1812. Says the Report:—

"The Jaghire (Chingleput) appears to have been obtained in the years 1760 and 1763, from the Nabob of Arcot, in return for the services rendered him and his father, by the Company. . . . The Jaghire was twice invaded by Hyder Ali; in 1768, and in the war of 1780, when he entered it with fire and sword. On the termination of the latter war, in 1784, hardly any other signs were left in many parts of the country of its having been inhabited by human beings, than the bones of the bodies that had been massacred, or the naked walls of the houses, choultries, and temples, which had been burnt. To the havoc of war, succeeded the affliction of famine; and the emigrations arising from these successive calamities, nearly depopulated the district."

"The system of management in the Jaghire, while it was rented by the Nabob, was of the same oppressive and unjust character, which marked the administration of affairs in his territory, the Carnatic."

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A period of no little confusion ensued, even after the Company Government assumed the Jagheer in the years previous to 1780, the confusion being much relieved in 1794 when the country was placed under the management of Mr. Lionel Place, who continued as administrator until 1798, and whose Final Report respecting the Jagheer is dated the 6th June 1799. Mr. Place's views with regard to *mirasi* are stated to have undergone a material change, and in the language of the Report:—

“He had become convinced that the *mirasidar* had an undoubted hereditary property in the soil; that he derived this right originally from the Sovereign to whom he acknowledged obedience, and the rendering of a stated proportion of the produce, as the tenure by which he held it; that he sold, mortgaged, gave away, and left his lands to his posterity.”

It would not elucidate the points at issue in this suit to enter further into the development, historically, of the adjustments of the rights regarding the land and its tenure and cultivation. This following excerpt, however, may be made from Mr. Place's Final Report.—

“702 The following definition, therefore, of *meerassce*, or property in land, seems to be deducible from the discussions that have passed on it

“703. That it is a right to the use and substance of the soil, vested in the present proprietor, his heirs and successors, so long as he does or can cultivate it, and pays the dues of Government and is obedient to its authority; and that when he does not, or cannot, cultivate his lands, when he withholds the dues of Government, or is disobedient to its authority, such part as he neglects, or in the latter case the whole, escheats to Government, who may confer it on whom it pleases.”

These excerpts have been given because the fact has been acknowledged that the village, afterwards referred to,

with the lands in suit in the present case, are held under the *mirasi* tenure. Nor, secondly, is it disputed that Vishnu as a juristic entity, and, as such, owner of the temple dedicated to and appearing under the following names: Sri Jagannatha Perumal and Tirumushu Alwar, can according to law and must if it accord with fact, be reckoned as a *mirasidar* holding a village *mirasi*. The point in the case is: Was the property in suit held under *mirasi* tenure by this *mirasidar* in the interests of the institution and worshippers of Vishnu attached to it, or was it held by the Respondent personally?

The Respondent founds, and strongly founds, upon the state of the records of this property as for the year 1825. He maintains that there is sufficient indication from this record that the property in suit had wholly belonged, not to the temple as part of its endowments, but to Evalappa, his grandfather, as his own personal property.

The date of the origin of this temple is not apparently now ascertainable, but the first broad and fundamental fact appearing from the record founded upon is that in 1825 *de facto* such a temple did exist; secondly, that the institution was at that date managed by a *Dharmakartha*; and thirdly, that it was the owner of some lands. What were those lands; and, in particular, did they include those in suit in the present case? On that point the singularity of the position is that it appears to be, and that very rightly, assumed in the judgment of the Courts below, that originally the temple did own the lands, but that the state of affairs crystallized in the paimash of 1825 left it at least doubtful whether some change had not been effected under which a personal acquisition by the *Dharmakartha* had taken place.

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And it is the fact, with regard to the large majority of the items composing the village lands, that the plots and portions are set out in detail in the name of Evalappa Mudalia, without describing him as trustee, and without giving any indication contrary to that of personal ownership. It is this circumstance upon which the Respondent in the appeal strongly relies.

It may be said of the 1825 paimash or record, taken as a whole, that it does involve certain self-contradictions which contribute to leaving the point at issue in considerable doubt.

It will serve no useful purpose to load this opinion with details, although all these details have been carefully considered. It may suffice to say as follows. The Paimash Jariff Taram chitta for Mandavilagam village, dated the 31st August 1825, forms the Ex. A, and its headings and general preliminary statements must be attended to. It states the "persons who were present at the Jariff," mentioning by name the Government Officer. Then follows this entry: "Alwar temple village *miras*." This appears to describe in general terms the ownership by the temple of all the village *miras*. Then there appears this entry: "Appasami Mudali and Arunachala Mudali, *gumasthas* of Evalappa Mudali, *Dharmakartha* of the aforesaid temple—total, two persons." Up to this point it seems plain enough that the lands are owned by the temple, and that Evalappa is its *Dharmakartha*. When the specific entries begin there occur the following "remarks": "village *Miras*—Sri Tirumushi Alwar," and a little further down, "No. 1 *Miras*. Tirumushi Alwar Devastanom *Dharmakartha* Nattu Evalappa Mudali." Then still another: "Alwar mantapam tope, No. 1 *Miras* Tirumushi

Alwar Devastanom." Up to this point the doubt as to the lands being temple lands—it being admitted that they are part of the village *miras*—has not arisen. When these items came to be entered, the column of remarks shows "village *miras*," and by far the most important of the entries are those referring to the *miras* itself, viz., "No. 1 *Miras*," and one of the most important pieces of the property is a tope or grove, which is entered as *punya*, and in the remarks is stated to be Alwar mantapam tope. So far all is clear.

The confusion arises, however, from another document, Ex A1, called "Register of lands as per paimash or mamul account." It is to be observed that in it again occurs "No. 1 Village *Miras* Tirumushi Alwar," and in No 83, "No. 1 *Miras* Tirumushi Alwar Devastanom," there being added the words "*Dharmakartha* Nattu Evalappa Mudali."

While this is so, the remarkable thing is that all the other entries, with perhaps one or two exceptions, are stated to be "No. 1 *Patta* Evalappa Mudali," with no indication that those particular items are temple lands or that Evalappa holds them as *Dharmakartha*. This fact, and practically this fact alone, forms the foundation of the Respondent's claim that he is personal owner of these numerous items. The inconsistency of this with the other entries above referred to is unexplained, and in particular it is unexplained how property originally temple property ever came into his private ownership. No express grant is produced; no legal authority for a conversion so singular is suggested.

In these circumstances their Lordships are not prepared to say that if the records had stopped here they would have agreed

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with the judgments of the Courts below and would have attributed the entries opposite Evalappa's own name as entries certiorating private property. It is unlikely; but for the reasons to be hereafter stated it is not necessary to decide the question.

Let it be assumed, however, that the point of ownership stands doubtful upon the 1825 records. To such a situation it is conceivable that the observation of the learned Chief Justice would apply. He says:—

"It is of course impossible at this distance of time to say exactly how it was that these properties passed from the temple into the hands of the trustee's family, and the case may undoubtedly appear to be one of suspicion. But we cannot say, at this distance of time and in view of this long enjoyment, that the title of the temple has been sufficiently established in the present suit as to the great bulk of those properties, that is to say, in respect of those properties which, in the paimash, are not entered as temple properties. Where we find in the paimash properties entered as temple properties, that is sufficient to throw the onus on to the trustee of showing how these properties ceased to belong to the temple."

Their Lordships must dissent entirely from the view that where the discoverable origins of property show it to be trust property the onus of establishing that it must have illegitimately come into the trustee's own right rests upon the beneficiaries. Upon the contrary, the onus is, and is heavily, upon the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition. Even upon the records of 1825 their Lordships would have inclined to this view.

But the records did not end here. In their Lordships' opinion it is necessary in a case of this kind to view the records, transactions and proceedings as a whole.

And in their view the greatest weight must be attached to the elaborate proceedings of 1876, and in particular to the Survey and Settlement Register of the village of Madavilagam. That Register contains 169 items, including among other particulars an identification, so far as possible, of each item with the old number or name of fields, and in particular the extent and assessment of each plot of land in the whole list. The Register is signed by Major, C. J. Stuart, Acting Deputy-Director of Revenue Settlement, and is dated from the Revenue Settlement Office. It cannot be too clearly premised, however, that the Board would not hold any such record to be conclusive evidence of ownership; but, upon the other hand, their Lordships cannot be blind to the importance of such a document which appears, *de facto*, to have settled the bounds of the possessions of these plots for a period of thirty-five years—that is to say, from 1876 to 1910. This is especially important in any case where the personal as against the trust claim is supported also, and alone, by a reference to an earlier record of a similar character, marred as that record happens to be by the contradictions to which reference has been made.

It is, however, unnecessary, it may again be said, to enter into details. But the facts as to the 1876 records are outstanding and make the position much clearer. Evalappa had been succeeded by Varadappa, and numerous cases, including those in which in 1825 the entries of the owner had only been the name of Evalappa Mudaliar, with nothing added thereto, now appear with the point as to the character of the ownership cleared up.

The Survey is headed "Descriptive Memoir of Madavilagam of the Saidapet Taluq." Extracts from it form Ex. B of

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the present proceedings.' Their Lordships have, however, seen a print of the Descriptive Memoir itself, bearing to be signed by Major Stuart, "Acting Deputy-Director of Revenue Settlement." The following entries are important :—

"*Mirasi Tenure.* As the Government have recognized the *Mirasidar's* claim to a percentage fee (*swatantham*) on the taram assessment, the following arrangements are made for its future collection and payment."

This entry speaks for itself. The tenure was *mirasi* tenure, and there was one *mirasidar*. Then occurs the following :—

"The fee is fixed at 2 annas in the Rupee of assessment of both dry and wet lands for which the lands are divided into (I) Pangu, (II) Durkast, and (III) Waste."

The word "Pangu" refers to the original cultivated land—that is to say, land cultivated by persons or a person, or institution, belonging to the village. "Durst" refers to lands granted by the Government for cultivation not by villagers, but by outsiders. "Waste" refers to jungle or uncultivated land.

The main point to be kept in view is the form of the entries of the lands, the issue as to which is whether they are temple lands, or are private property or pangu lands. The importance, accordingly, of special reference to pangu lands is clear. That entry is as follows :—

"*Pangu Lands* This is an Ekabogam village and the lands have hitherto been held by 1 *Pattadar*. The fee registered against these lands is at present a mere matter of account and need not be collected, as the *Mirasidar* himself holds the lands. But if these lands hereafter become waste by relinquishment and are taken up again by a stranger, they will be chargeable with the fee, plus the taram assessment, and the fee thus collected will be payable to the *Mirasidar*."

The village is spoken of as an ekabogam

village. "Ekabogam" according to Wilson is :—

"The possession or tenure of village land by one person or family without any co-sharer. The appellation is continued in some instances where other parties have been admitted to hold portions under the original tenure as long as that remains unaltered."

It is stated that the lands have been hitherto held by one *pattadar*, and that the *mirasidar* himself holds the lands. The extreme importance of this entry arises from the events which had taken place in and about the early sixties of last century.

It seems fairly plain that by the middle of the nineteenth century various demands were being made to obtain a statement of the rights of *mirasidars* in this part of India. In the volume named "Chingleput, late Madras District," compiled under the orders of the Madras Government by Mr. Charles Stewart Crole, the position is thus described :—

"In 1834 it began to induct outsiders into the permanent possession of lands, and issued *pattas* to such persons. In 1859 it compelled the *Mirasidars* to declare once for all the extent of their individual holdings, and proceeded to issue *pattas* accordingly, which it at first styled *mirasi pattas*."

"In the same and following years it warned *Mirassidars* that they would have to pay the assessment on all lands in their holdings, whether they cultivated or not, and limited by new rules, which have since increased in stringency, the occasions on which, and then only as a matter of grace, remissions would be given."

"In 1863 the Government directed the abolition of the words 'Mirassi putta' and 'Payikari putta,' which had previously appeared as a heading on those documents in order to distinguish *mirassi* from ordinary tenure, and it ordered the 'name of the *Pattadar*' merely to be inserted, thus distinctly proclaiming that it would no longer recognize any difference in tenure."

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This historical circumstance gave great weight to the Settlement and Survey, about to be referred to, made in the year 1876. It is in particular noticeable that a special column of *pattadars*, with a demand for their names, appears in the Return, and that this coincides with the acknowledgment of the *mirasi* tenure. The application of this to the situation of the village, whose ownership is in suit, will be immediately seen. It would rather appear that no public document of anything like equivalent value to that of the Report of 1876, with regard to the details of any properties which were at once *mirasi* and *patta*, had ever been previously issued.

It is accordingly of special importance to know who was the *mirasidar* holding a *patta*, and therefore *pattadar* of those particular lands in suit. Appended to each entry of grants of land in the village is a column headed "*Pattadar's Name and No.*" It cannot be seriously disputed that the *patta* was No. 1 *Patta*.

Who, then, was the holder of these lands, occupying the position at once of *mirasidar* and *pattadar* No. 1? Item by item the entries under "*Pattadar's Name and No.*" are "*Nattu Varadappa Mudaliar, Trustee of Tirumushi Alwar Pagoda.*" The entries are repeated and repeated in the same sense. And, in short, there is here an official affirmation that these lands are temple lands; that they are held in No. 1 *Patta*; and that the trustee of the temple is Varadappa.

It would accordingly appear to be clear that this official document, which it cannot be doubted was prepared after minute inspection and enquiries on the spot, sets at rest any doubt as between private and temple ownership, and clearly affirms the latter. Varadappa was not the private owner; he was the *Dharma-*

kartha or trustee. It, however, must be admitted that although this was the official view, the record does not commit Varadappa himself to such an affirmation or admission.

Most fortunately, however, there are elements of probation existing applicable to the regime of Varadappa, which greatly help to clear this difficulty away. These instances may be given:—

(1) On the 8th February 1888, Varadappa brought a suit against the Government in regard to certain lands and trees, which he alleged he was debarred from cultivating. He desired a declaration to establish his right "to the said property as absolute owner thereof." It is, however, an entire mistake to reckon this an assertion of private ownership, because Varadappa describes himself as Plaintiff and as *Dharmakartha* of the temple at Madavilagam village, and the first three statements of his plaint are as follows:—

"1 The village No. 137, 112, Madavilagam and all its *miras* appertain to, and form portion of the endowments of the temple of Tirumushi Alwar situated in the said village, Poonamallee Division, Saidapet Taluk, Chingleput District."

"2 The Plaintiff above named is the hereditary *Dharmakartha*, of the said Devasthanom."

"3. Plaintiff's ancestors have, from time out of mind, been enjoying the lands under Nos. described below by building choultry, cultivating the soil and raising a tope, &c. paying revenue to the Government for the said lands."

As *mirasidar* and as trustee of the temple his grievance against the Government was that he was not entitled to extend the rights which he asserted over certain further lands and trees, and accordingly the suit was substantially for the purpose of enabling that extension to be made, presumably for temple purposes, and accompanied with the assertion that

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—quoad the temple—the village of Madavilagam “and all its *miras*” were the endowments of the temple of which Varadappa was the *Dharmakartha*.

(2) A statement signed by “Nattu Varadappa Mudaliar, *Dharmakartha*,” and made before the Deputy Tahsildar, Poonamallee Division, is also produced. This statement refers to the Paimash of 1876, and is to the effect that the entire village is the *ekabogam* village of the temple, *viz*, of Tirumushji Alwar, that he, Varadappa, is the *Dharmakartha* of the temple, and he goes on to state “Whenever anyone wants to build a house on vacant lands other than the land on which houses have been in existence from time immemorial in the village *nattam* of this village, it is usual for me to grant lands to such persons, and to get deeds executed therefor.”

(3) This was quite true, and various deeds of that character are referred to in the proceedings—that is to say, they are called rental agreement deeds, and are addressed to Varadappa, as on the 27th March, 1876, and signed “Nattu Varadappa Mudaliar, *Dharmakartha* of Tirumushji Alwar Devasthanom,” or, as in that of the 7th March 1904, after Varadappa’s death, to Evalappa the second, his son, thus named “S Nattu Evalappa Mudaliar Avergal, son of S Nattu Varadappa Mudaliar, Shrotriendar, Kondaikattu Vellala, Vaishnavite, Mirasdar of the village of Madavilagam as well as *Dharmakartha* of Tirumushji Alwar Devasthanom.”

It is of importance to observe that Varadappa is named, and names himself the *Dharmakartha*. This is in truth the legal equipollent to trustee. The position of *Dharmakartha* is not that of a *shebait* of a religious institution, or of the *mahunt*, or head of a *mutt*. These functionaries have a much higher right with larger

power of disposal and administration, and they have a personal interest of a beneficial character.

In the very learned judgments delivered in *Vidyapurna Tirtha Swami v Vidyamdhuri Tirtha Swami* (1), the distinction between those functionaries is explained. But a *Dharmakartha* is literally and no more than the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee.

The details need not further be entered upon as to these deeds, which appear to be numerous, and to assert clearly the fiduciary position in which Varadappa and even his successor, the present Respondent, stand. They are by no means confined to a period subsequent to Major Stuart’s Report in 1876; one, for instance, is dated the 22nd January 1870, executed to Varadappa as “*Dharmakartha* of Tirumushji Devasthanom,” and describes Madavilagam as “the *miras* village of the said Alwar.” In fact, there are documents extending over a period of about forty years, all framed on that footing, a footing which negatives private but affirms temple ownership. Their Lordships do not doubt that that was a public fact in 1876, when the report was made, and the subsequent transactions in the life of Varadappa, and even of his successor, the present Respondent, confirm that view. This was plainly the state of affairs when, on Varadappa’s death, the Respondent succeeded him as hereditary *Dharmakartha*.

A separate argument involving some detail was submitted with regard to the topes, or groves, belonging to the temple, on which their Lordships will only say that after full investigation they are con-

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vinced the topes in suit have been sufficiently traced to temple ownership.

The doubts, accordingly, which would have warranted the line of judgment indicated from the opinion of the High Court, above cited, have now disappeared. In the opinion of the Board the properties in suit are established to be temple properties. The statements and records made in the year 1910 do not substantially bring any fresh light on the situation. It must, of course, be plain that it would require circumstances unique to warrant the transfer or transformation of those endowment lands into the private property of the trustee. There is, in fact, nothing of the sort. In the present suit the Respondent's right and title as personal owner have been successfully challenged, and the lands in question must, all of them, be restored as endowments of the temple.

In case it should be thought to have been omitted, their Lordships merely further observe on this head that during the period extending from 1825 there were clearly established several items of the property in dispute which could be identified as still remaining as temple lands. To these items there were added, in the course of discussion, several further items which were traced from register to register, and clearly and separately identified as temple lands by name, and freed from the doubt as to the personal ownership of the former *mirasidar*, Evalappa. They, too, have been claimed by the Respondent as his own, and this is a notable circumstance. These facts might have proved obstacles to the learned Judges of the High Court in forming their conclusion and assisted in removing any doubt which they felt; but the view which has been taken by their Lordships of the larger issue, namely, of the effect of the

1876 register on the transactions to which Varadappa was a party, affects the whole of the lands in suit, and makes it unnecessary to deal with the individual items referred to.

It will now be seen how serious is the position of the Respondent as a claimant for the continuance of the trusteeship of this temple and its endowments. The doubts in the minds of the Courts below, on the subject of his being allowed to continue in office, are sufficiently plain. But when it is now decided that the whole of this litigation has substantially been occupied by an unfounded assertion, supported by the concoction of accounts—an assertion by the trustee of private ownership in himself and a powerful resistance to the recovery of these properties for the trust which he administers—it does not appear to their Lordships to be open to them, on any sound principles either of administration or of law, to permit the continuance of the Respondent in the office of *Dharmakantha*.

The conduct of the Respondent, even in the course of the present suit, has been sufficiently grave to be thus noted by the Judges below. Says the District Court Judge—

“My finding is that the Exs K series were got up for the purpose of this suit, and that they have been proved to contain false entries in many instances.”

In the High Court the pronouncement was quite as strong. The learned Chief Justice observes.—

“The District Judge has found that the Defendant failed to keep proper accounts and that the accounts which he has brought into Court in this case were written up for the purposes of this case. We have ourselves examined the accounts, and we regret to say that there are very serious reasons for believing that that has been the case and that the accounts have been largely written up for the purposes of this case.”

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Their Lordships have considerable doubt as to whether any litigant found to have been guilty of seriously reprehensible conduct of this description could ever have been retained in the office of *Dharmakartha*. The worshippers of the temple, the true beneficiaries in the endowments, are entitled, at least in regard to the trusteeship thereto, as also is a Court of Law before whom such delinquencies are established, to insist upon the first step towards trustworthiness in administration being taken by the removal of the trustee. Most unhappily the guarantee for that trustworthiness has been destroyed. Although the Board very willingly admits that much allowance must be made for the inaccuracy of karnams, and of other officials who may have been anxious to fortify the trustee's personal rights by methods which were unwarranted, the Respondent must, however, stand answerable for such conduct.

Their Lordships do not doubt that if the High Court had been of the opinion now delivered with regard to the merits of the suit, the trustee would have been removed from office. The Board desires that in the remit, which their Lordships will humbly recommend to His Majesty to make, the High Court shall select as trustee a person or persons of such sufficient standing in the District as will enable the transfer from the Respondent of the property to be effectively made, and the administration thereof purely for the purpose of the endowment effectively secured.

The scheme drawn up in the District Court, and referred to in the proceedings of the High Court, would appear to be not unsuitable for the case, but these two fundamental alterations must be taken into account. In the first place the list of endowments must, of course, be en-

larged to suit the affirmation as to the extent of the temple property made in the plaint and here affirmed, and secondly a new and independent trustee will be nominated to administer the scheme.

Their Lordships will humbly advise His Majesty to remit the case accordingly to the High Court, with a finding that the properties in suit belong to the endowments of the temple; that the Respondent as *Dharmakartha* and trustee thereof be removed from office; that a scheme be framed for trust administration under a new trustee, and that the judgment of the High Court of the 6th March 1917, except as regards costs, be recalled, and that the Respondent do pay the costs of this appeal.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs T L Wilson & Co* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 1354 TO 1373 AND 1513 OF 1920.

MOOKERJEE, J.	MAHOMED JANU MIA
CHOTZNER, J.	and ors., Defendants,
1922,	Appellants,
Heard, 22 and	v.
23, June.	MAJUBALI CHOUDHURI
Judgment,	and ors., Plaintiffs,
25, July.	Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 105, settlement of fair and equitable rent in respect of tenures held at a fixed rate of rent—Construction of documents, upon consideration of all the terms of the instruments—Question of onus of proof when the entire evidence is before the Court, how far material—"Junkume," if imports fixity of rate of rent in perpetuity.

Certain lands under the direct management of the revenue authorities were in 1836 settled with some tenure-holders who had been in occupation, in many in-

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stances, from before the date of the Permanent Settlement of 1793. In the documents, by which the settlements were made, specified amounts were mentioned as jamakamel, in some cases from the commencement, and in some cases, after a period of two years. The landlords made the present applications under secs. 105 and 105A of the Bengal Tenancy Act for settlement of fair and equitable rent in respect of the lands held by their tenants.

Held—That the construction of the grants must depend upon the interpretation of all the terms of each instrument, and except in a case of ambiguity, extrinsic evidence would not be admissible. It had nothing to do with the questions whether the tenures were in existence in 1793, whether they had been held at a uniform rate of rent since then, or whether by application of sec. 50 of the Bengal Tenancy Act, they might be presumed to have been so in existence and held at a uniform rate of rent during the period mentioned.

N. E. RAILWAY v. HASTINGS, (1). HEBBERT v. PURCHAS (2), DHUNPUT v. GOOMAN (7), SUTTOSURRUN v. MOHESH (8) and several other cases referred to.

Each case must be considered on its own facts, and in order to ascertain the effect of the grant resort must be had to the terms of the grant itself and to the whole circumstances so far as they can be ascertained

UPADRASHTA v. DIVI (4) and CHIDAMBARA v. VEERAMA (5) referred to.

(1) [1900] A C 260.

(2) L R 3 P O 605 (1871)

(4) L. R. 46 I. A. 123: s. c. 24 C. W. N. 129 (1919)

(5) P O. 15th May 1922: Reported 27 C. W. N 245.

(7) 11 M. T. A. 433 (1867)

(8) 12 M. I. A. 263 (1868).

The word jamakamel means "the full amount of rent or the highest rent leviable." The word being preceded by the word "sahana" (annual) and followed by the word "harshal" (all years to come), the three terms taken together unmistakably pointed to the conclusion that the rent mentioned was the highest rent ever leviable, which indicated fixity of rent. The landlord, therefore, had precluded himself by his grant from claiming rent at an enhanced rate

No debate on the question of burden of proof arises when the entire evidence on both sides is once before the Court.

SETURATNAM v. VENKATACHALA (6) referred to.

These were appeals preferred on the 7th May 1920 from a decision of Babu Amrita Lal Mukerjee, Special Judge, Noakhali, dated the 5th January 1920, reversing that of Babu A. K. Sen, Assistant Settlement Officer, Noakhali, dated the 16th September 1918

The facts of the case are as follows:—Certain tenures were originally comprised in a revenue-paying estate which was permanently settled in 1793. The proprietors having defaulted, the estate was sold for arrears of revenue in 1834, when Government became the purchaser. The lands were kept under the direct management of the revenue authorities from 1834 to 1861, when a permanently settled estate was created in favour of the predecessors of the present Plaintiffs-Respondents. In 1836, while the lands were under the direct management of the revenue authorities, settlements were made with tenure-holders who had been in occupation, in many instances, from before the date of the Permanent Settlement of 1793. In some instances, the

(6) L. R. 47 I. A. 76: s. c. 25 C. W. N. 485 (1919).

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grant included culturable fallow lands, and in other cases, all the culturable lands were under cultivation. The cultivated lands were assessed at the full rate from the commencement and the culturable fallow was not assessed with rent during the first two years, the full rent for which lands therefore became payable after the expiry of two years. The vernacular word used in the documents for full rent were "*jamakamel*" meaning "the full amount of rent or the highest rent leviable." This word was preceded by the word "*saliana*" (annual) and followed by the word "*harshal*" (every year). In the record-of-rights as finally published these tenures were recorded as held at fixed rates of rent. The landlords therefore applied under secs 105 and 105A of the Bengal Tenancy Act for settlement of fair and equitable rent in respect of the lands held by their tenants. The Assistant Settlement Officer held that the tenures were held at fixed rates of rent and accordingly the rents were not liable to enhancement. On appeal the Special Judge reversed this decision and assessed fair and equitable rents, inasmuch as the tenures were, in his opinion, not held at rates of rent fixed in perpetuity. Hence the present appeals to the High Court by the tenants.

Babus Asiranyan Chatterjee and Satyendra Nath Mitra for the Defendants-Appellants.

**Babu D. L. Kastgir* for the Plaintiffs-Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—These twenty-one appeals arise out of as many applications made by landlords under secs. 105 and 105A of the Bengal Tenancy Act, for settlement of fair and equitable rent in

respect of the lands held by their tenants. In the record-of-rights as finally published, entries had been made to the effect that each tenure was held at a fixed rate of rent. The tenants accordingly contended that the rents were not liable to enhancement. The Assistant Settlement Officer gave effect to this contention, subject to the reservation that excess lands were liable to be assessed with additional rent. Upon appeal the Special Judge has reversed this decision, and has assessed fair and equitable rent, inasmuch as the tenures were, in his opinion, not held at rates of rent fixed in perpetuity. In this Court, the decision of the Special Judge has been assailed on a four-fold ground, namely, first, that upon a true construction of the grant in each case, it should have been held that the tenure was held at a rate of rent fixed in perpetuity; secondly, that the tenants were entitled to the benefit of the presumption formulated in sec. 50 of the Bengal Tenancy Act; thirdly, that the tenures were protected from enhancement, as they had been continuously in existence and had been held at a uniform rate of rent from a date anterior to the Permanent Settlement of 1793; and, fourthly, that if the rent was liable to enhancement, the provisions of sec. 7 of the Bengal Tenancy Act must be strictly followed. It is plain that if the first of these grounds be substantiated, the others do not require examination.

There is no controversy that the lands of the disputed tenures were originally comprised in a revenue-paying estate which was permanently settled in 1793. The proprietors defaulted, with the result, that the estate was sold for arrears of revenue on the 29th March 1834, when the Government became the purchaser. The lands were kept under the direct

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management of the revenue authorities from 1834 to 1861, when a permanently settled estate was created in favour of the predecessors of the present Plaintiffs. In 1836, while the lands were under the direct management of the revenue authorities, settlements were made with tenure-holders who had been in occupation, in many instances, from before the date of the Permanent Settlement of 1793. The question thus arises, whether the rents so settled in 1836 are liable to enhancement or must be deemed to have been fixed in perpetuity by the grants then made. In the construction of these grants, we are not concerned with the points, whether the tenures were in fact in existence in 1793, whether they had been held at a uniform rate of rent since then, or whether by application of sec. 50 of the Bengal Tenancy Act they may be presumed to have been so in existence and held at a uniform rate of rent during the period mentioned, nor are we called upon to consider, in connection with the question of construction, whether the tenures continued in fact and in law, notwithstanding the sale for arrears of revenue. The construction of the grants must depend upon the interpretation of all the terms of each instrument, and, except in a case of ambiguity, extrinsic evidence would not be admissible; see *N. E. Railway v. Hastings* (1), *Hebbert v. Purchas* (2) and *Secretary of State v. Narendranath Mitter* (3). As pointed out by the Judicial Committee in *Upadrashta v. Dimi* (4) and *Chudambara v. Veerama* (5), each case must be considered on its own facts; in order to ascer-

tain the effect of the grant resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained. Nor does the question of burden of proof arise; for as observed in *Setu Ratnam v. Venkata Chala* (6), when the entire evidence on both sides is once before the Court, the debate as to onus is purely academical; the controversy has passed the stage at which discussion as to the burden of proof is pertinent, the relevant facts are before the Court and all that remains for decision is, what inference should be drawn from them.

The grant in each case was made by a document divisible into two parts; the first shows the details of assessment, the second sets out the terms of the settlement. In some instances, the grant included lands described as *laik patit*, that is, culturable fallow, in other cases, all the culturable lands were under cultivation and there was no culturable fallow. The cultivated lands were, in all cases, assessed at the full rate from the commencement, the culturable fallow was not assessed with rent during the first two years. Consequently, in the first class of cases, the full rent did not become payable till after the expiry of two years; in the second class of cases the full amount became leviable from the commencement. We set out here a specimen of a grant of each type.

Signed by mark
Koresb.
Pana.
Daulat.
Alabuksh,

(1) [1900] A. C. 260.

(2) L. R. 3 P. C. 605 (1871).

(3) 32 C. L. J. 402 (1920).

(4) L. R. 46 I. A. 123: s. c. 24 C. W. N. 129 (1919).

(5) P. C. 15th May 1922: Reported 27 C. W. N. 245.

(6) L. R. 47 I. A. 76: s. c. 25 C. W. N. 485 (1919).

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To

Nara Narayan Roy,
Deputy Collector,
District Bhulua.

Dowl bundbust talukdari in respect of
Taluk Hashim Kashim Mullik, the owners
whereof are Alabuksh, Koresh, Pana and
Daulat, lying within the Government *khass*

Mahal Chakla Chamarkhola Pargana
Gopalpur Mirzanagar, settlement whereof
was recently granted at the time of Srijut
Babu Nara Narayan Roy, Deputy Collec-
tor, District Bhulua from the year 1243
B S and confirmed by the Commissioner.
Fins Dated the 31st August 1836 cor-
responding to the 17th Bhadra 1243 B S

Details	Quantity of Land				Rate per Kani			Amount of jama in Com- pany's coin		
	K. Gds.	Kr.	Kt.		Rs	As	P.	Rs	As	P.
The <i>bundbust</i> is from the year 1243 B S										
Total quantity of land as measured by the Amins with a rod of 16 cubits of 18 inches to a cubit, 12 such rods in length and 10 such rods in breadth making a Kani and 16 Kanis a Drone	9	1	3	2						
Deduct Gai Laek Patit	0	3	3	1						
Tank and Ditches, etc	0	10	1	0						
	0	14	0	1						
	8	7	3	1						
Remission allowed as held in abeyance on account of Laek Patit	0	4	0	1						
Hasil	8	3	3	0						
Deduct at the rate of 3 Kanis 4 Gandas per Drone according to the <i>talukdari</i> prac- tice	1	12	3	0						
	6	11	0	0	3	3	3	20	15	8
Add Laek-abadi which was held in abey- ance	0	4	0	1						
Deduct at the usual rate of 3 Kanis 4 Gan- das per Drone	0	0	3	1						
	0	3	1	0						
Remission allowed as bearing no rent from 1243 B. S. to 1244 B. S.										
Full amount (of rent) for 1245 B. S. and each year following					3	3	3	0	8	4
	6	14	1	0	0	0	0	21	8	0

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Jama from the year 1243 B. S. up to year 1244 B. S. *Jama* per annum from the year 1245 B. S.

Per year.

Rs. 21 8 0

Jama brought forward Rs. 20-15-8.

Details of kistibundi.

	Rs.	As.	P.	Rs.	As.
Kist Baisakh	0	12	0	0	12
Kist Joistha	0	12	0	0	12 0
Kist Assarh	1	8	0	1	8 0
Kist Sravan	3	0	0	3	0 0
Kist Bhadra	3	0	0	3	0 0
Kist Assin	3	0	0	3	0 0
Kist Kartik	2	0	0	2	0 0
Kist Aghrayan . . .	3	0	0	3	0 0
Kist Poush	3	8	0	3	8 0
Kist Magh	0	7	8	1	0 0
	20	15	8	21	8 0

Remaining in possession at a total *jama* of Rs 20-15-8 pies in Company's coin per year from 1243 B. S to 1244 B. S , at the full amount of *jama* of Rs 21-8-0 in Company's coin per year from 1245 B. S , and for each year (following), we shall pay the aforesaid amounts of *malguzari*, year after year, and month after month, as per the *kistibundi* We shall abide by the laws that are now in force and may be brought into operation in future We shall not allow any bad character to reside in the aforesaid *taluk* nor allow any one to manufacture illicit salt, and shall not do anything contrary to law and regulations; if we do, we shall be held responsible for the same. All profits and loss accruing through drought, inundation, death and desertion, and providential visitations, etc., shall be ours and shall have no concern with Government. *Finis*. Dated as above.

Having received a counter-part of this *Dowl* to my satisfaction, I grant this receipt—Dated the 12th December 1836.

Sd.—Apsaruddi, on behalf of Talukdars.
 “ B
 (Sd)—By mark
 Sadaraddi.
 Tomijaddi.
 Moniraddi.

To

Nara Narayan Roy,
 Deputy Collector,
 District Bhulua.

Dowl bundabust talukdari in respect of Taluk Fatey Manu within Government *khas* Mehal Chakley Chamrakhola, Pargana Gopalpur, Mirzanagar, the owners whereof are Sadaraddi, Tomijaddi and Moniraddi by virtue of recent settlement granted at the time of Babu Nara Narayan Roy, Deputy Collector, District Bhulua, and confirmed by the Commissioner from the year 1243 B. S. *Finis*. Dated 31st August 1836 corresponding to 17th Bhadra 1243 B. S.

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Description.	Total quantity of land.				Rate per Kani.			Amount of rent in Com- pany's coin.		
	K.	Gds	Kr.	Kt.	Rs.	As.	P.	Rs.	As	P.
The settlement is from the year 1243 B. S.										
Total quantity of land as measured by the Amins with a rod of 16 cubits of 18 inches to a cubit, 12 such rods in length and 10 such rods in breadth making a Kani and 16 Kanis a Drone	2	11	1	1						
Deduct Gar Laek Patit	0	0	3	1						
	<hr/>									
Tank and ditches, etc.	0	14	2	0						
	<hr/>									
	0	15	1	1						
	<hr/>									
	1	16	0	0						
Remission allowed as held in abeyance on account of Laek Patit	0	0	0	0						
	<hr/>									
Hasil	1	16	0	0						
Deduct at the rate of 3 Kanis 4 Gandas per Drone according to the <i>talukdari</i> practice	0	7	0	2	3	3	3	4	9	11
	<hr/>									
	1	8	3	1						
Full rate of rent from the year 1243 B. S. and for each year (following).										

Details of Kists.

	Rs.	As	P.
Kist Assarh	1	0	0
Kist Bhadra	1	4	0
Kist Kartik	1	8	0
Kist Poush	0	13	11
	<hr/>		
	4	9	11

A *talukdari* settlement is made with us at the full amount of annual *jama* of Rs 4 annas 9 and pies 11 from the year 1243 B. S. and for each year (following). Being in possession according to the practice of the *talukdars*, we shall pay the aforesaid amounts of *malguzari*, year after year, month after month, as per the *kist-bundi*. If we default any *kist*, we shall

pay interest according to law. We shall abide by the laws and regulations now in force and also those that may come into operation in future. We shall not allow any bad character to live within the *taluk* aforesaid nor allow any one to manufacture illicit salt, nor shall we do anything contrary to laws and regulations. If we do so, we shall be answerable for the

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same All profits and losses accruing from it, inundation, death and desertion, and providential visitation, etc., shall be ours, and these shall have no concern with Government. Finis. Dated as above.

Having received to my satisfaction a counter-part of this *Dowl*, I grant this receipt. Finis. Dated 29th December 1836

(Sd.)—By Mark,
Tomjuddi."

It will be observed that in both A and B, deduction was allowed for *Gar Laek patit*, that is, unculturable fallow, there was also a deduction of 3 *Kanis* 4 *Gandas* per Drone, that is, 20 per cent according to *talukdari* practice. In "A" deduction was further allowed for *Laek patit*, that is, culturable fallow; but in "B" there was no such deduction, because all the culturable lands were *hasil*, that is, cultivated. The expression in A which has been rendered as "full amount of rent for 1245 B. S. and each year following" is in the vernacular, "*San 1245 Sal 0 harsal purdastur*." The term "*purdastur*" means "full customary rate," the word "*harsal*" means "all years to come." The two words taken together clearly show that the full rate was intended to be in operation so long as the tenure might subsist. Later on in the document, we find the rent for 1243 and 1244 described as *saliana jama*, that is, annual rent or rent per year. This is followed by the rent for 1245, which is described as *jamakamel*, meaning "the full amount of rent or the highest rent leviable." The expression "*jamakamel*" is preceded by the word *saliana* and is followed by *harsal*. The three terms taken together unmistakably point to the conclusion that the rent payable in 1245 was the highest rent ever leviable. When we turn to "B," we come across similar expressions which

indicate fixity of rent. On a consideration, then, of the terms of the grants, we come to the conclusion that the disputed tenures are held at fixed rates of rent, but the total amount payable in respect of each tenure varies with the area, as the settlement was made on the basis of area determined by measurement according to a carefully specified standard.

We may add that our attention has been invited to judicial decisions which are helpful only in so far as they formulate canons for the interpretation of documents of this description. Amongst these, special mention may be made of the decisions of the Judicial Committee in *Dhanpdt v. Gooman* (7), *Satyasaran v. Mahes* (8), *Soorasoonderree v. Golam Ali* (9) and *Port Canning and Land Improvement Company, Ltd. v. Katyani Debi* (10), which were applied by this Court in *Huro Prasad v. Chundee Churn* (11) and *Robert Watson & Co. v. Radhanath Singh* (12). Much stress was, however, laid on behalf of the Respondents on the decisions in *Bhurut Chunder v. Gour Monee* (13) and *Kasecmuddee v. Nadde Ali* (14), where Loch and Hobhouse, JJ, declined to follow the decision of Bayley and Phcar, JJ, in *Golam Ali v. Gopal Lal Thakoor* (15), which was subsequently affirmed by the Judicial Committee in *Soorasoonderree v. Golam Ali* (9). The decision of the Judicial Committee in *Bamasoonderry v. Radhika* (16), does not advance the case for the Respon-

(7) 11 M. I. A. 433 (1867).

(8) 12 M. I. A. 263 (1868).

(9) 19 W. R. 141; 15 B. L. R. 125 (1873).

(10) 24 O. W. N. 269; s. c. 32 O. L. J. 1 (1919).

(11) 1 I. L. R. 9 Cal. 505 (1888).

(12) 1 O. L. J. 572 (1905).

(13) 11 W. R. 31 (1869).

(14) 11 W. R. 164; 2 B. L. R. 265 (1869).

(15) 9 W. R. 65 (1863).

(16) 13 M. I. A. 248 (1869).

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dents. No doubt a suit to enhance rent proceeds on the presumption that a zamindar holding under the Permanent Settlement has the right, from time to time, to raise the rents of all the rent-paying lands within his zamindari, according to the pargana or current rates, unless either he is precluded from the exercise of that right by a contract binding on him or the lands in question can be brought within one of the exemptions recognised by Reg. VIII of 1793. Consequently, in each of these cases, the nature of the tenure and the conditions under which it is held is the primary question, to be determined with reference to the documents and the circumstances disclosed therein. Here we have the grants themselves, and they show, in our opinion, that the rate of rent was fixed in perpetuity. It is unnecessary in these circumstances to rely upon the doctrine that fixity of rent may be presumed from uniformity of rent for a long series of years; *Gulab v. Kumar Kalanand* (17), *Nityananda v. Nanda Kumar* (18) and *Ramdayal v. Midnapur Zamindari Company* (19). The question is, as put in *Upendra Lal v. Jogesh Chandra* (20), which was applied in *Makbul Ali v. Jogesh Chandra* (21), whether the landlord has precluded himself by his grant from claiming rent at an enhanced rate. The answer, on the documents in these cases, must be in favour of the tenants.

It was finally suggested that there was indication in the evidence that the rate of rent had varied from time to time and that on the principle recognised in *Bamapada v. Midnapore Zemindari Co.* (22),

- (17) 12 C. L. J. 107 (1910).
- (18) 13 C. L. J. 415 (1910).
- (19) 15 C. W. N. 263 (1910).
- (20) 22 C. W. N. 275 (1917).
- (21) 30 C. L. J. 140 (1919).
- (22) 16 C. L. J. 322 (1912).

the tenures should be deemed to have been held at enhanceable rents. There is, however, no foundation for this contention. The total amount of rent in each case must, as we have seen, be dependent on the area. But even if we assume that the total rent has varied, it has not been proved that the rate of rent has varied. We conclude accordingly that the Assistant Settlement Officer correctly held that the tenures were held at fixed rates of rent. In this view, no other question requires examination.

The result is that these appeals are allowed, the decrees made by the Special Judge set aside and those made by the Assistant Settlement Officer restored with costs both here and in the lower Appellate Court. We assess the hearing-fee in this Court at one gold mohur in each case.

J. N. R. Appeals decreed with costs.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1930 OF 1918.

CHATTERJEA, J.

PANTON, J.

1920,

Heard, 1 and

2, June.

Judgment,

24, August.

NARENDRA LAL KHAN,
Plaintiff, Appellant,

v.

BHOLA NATH BHUYA
and ors., Defendants,
Respondents.

Evidence Act (I of 1872), sec. 92—Admissibility of evidence of conduct to prove contract not intended to be acted upon—Impossibility of performance.

The Plaintiff brought a suit for the recovery of damages on account of the Defendant's failure to deliver certain papers under the terms of a patni kabuliyat. The defence was that during 35 years since the execution of the kabuliyat the patnidar never submitted any paper nor did the zemindar demand the same and that the stipulation was never intended to be acted upon.

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Semble:—*That evidence of the conduct of the parties was admissible to prove that the stipulation was never intended to be acted upon, i.e., from the very beginning.*

PREONATH SHAHA v. MADHU SUDAN BHUIYA (1), KHANKAR ABDUR RAHMAN v. ALI HAFZ (3), MAHOMED ALI HOSSEIN v. NAZAR ALI (4), KAILASH CHANDRA v. DARBARIA (7) and MANINDRA CHANDRA v. DURGA SUNDARI (8) referred to.

BALKESHEN DAS v. LEGGE (2) distinguished.

Held, upon a construction of the *kabulyat*—*That the stipulation was impossible of performance.*

This was an appeal preferred on the 14th November 1918 against a decree, dated the 22nd July 1918, of the District Judge of Zillah Midnapur (J A Ross, Esq.), affirming a decree, dated the 19th September 1916, of the Subordinate Judge of that District (Syama Charan Chackerbutty, Esq.)

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy and Khirad Narain Bhuyan for the Appellant

Babus Bepin Behari Ghose and Santosh Kumar Pal for the Respondents

The JUDGMENT OF THE COURT was as follows —

This appeal arises out of a suit for recovery of Rs. 1,290 from the Defendants as damages on account of the Defendants' failure to deliver certain papers under the terms of a *patni kabulyat*.

(1) 1. L. R. 25 Cal. 603. s. c. 2 O. W. N. 562 (F. B.) (1898).

(2) L. R. 27 I. A. 58. s. c. J. L. R. 22 All 149; 4 O. W. N. 153 (1899).

(3) I. L. R. 28 Cal. 256 (1900).

(4) I. L. R. 28 Cal. 289; s. c. 5 O. W. N. 326 (1901)

(7) 20 O. W. N. 847 (1915).

(8) 20 O. W. N. 680 (1915).

The *patni kabulyat* is dated the 23rd February 1880 and was executed by the grand-father of the Defendants. There is a stipulation in the *kabulyat* which runs as follows:—"I shall deliver one set (or one copy) of the *chita*, *khatrian jamabandi*, and *shcha*, *thoka* and *jama wasil baki* and other *lawazima* papers of the *patni mahals*, signed by the persons preparing the same and bearing my signature, into your *shershta* after the expiry of two consecutive years at the end of every third year, and obtain receipt for the same, on failure to do so you will take from me Rs 215, the cost of preparing the papers at the end of every 3 years, and if I do not pay the same amicably, you will realize the same by having recourse to law and get the said papers prepared by making *mofussil* survey and *tuniar* by appointing *Amin* at the end of every third year. To this neither I nor my heirs will be able to make any objection."

The suit was instituted on the 21st September 1915. It is found that during the course of 35 years since the execution of the *kabulyat* the *patnidar* never submitted any paper as aforesaid, nor did the *zemindar* ever demand the same. The Court of first instance held that the stipulation was stringent and unreasonable and was never meant to be acted upon, and that in any case the Plaintiff was entitled only to compensation not exceeding Rs. 215, but there was no evidence to show the amount of loss actually sustained by the Plaintiff. In the result the suit was dismissed. On appeal the learned District Judge was of opinion that the terms of the *kabulyat* cannot reasonably bear the interpretation sought to be put upon it by the Plaintiff, that ever since the execution of the *kabulyat* the papers had never been demanded or submitted, and that the stipulation was never meant

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to be enforced. The appeal was accordingly dismissed. The Plaintiff has appealed to this Court.

It is contended that the evidence of conduct relied upon by the Courts below is not admissible in evidence having regard to the provisions of sec. 92 of the Evidence Act. The authorities upon the point are not uniform. A Full Bench of this Court in the case of *Preonath Shaha v. Madhu Sudan Bhuiya* (1) held that oral evidence of the acts and conduct of parties such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-out sale is admissible to prove that the deed was intended to operate only as a mortgage. A question was, however, raised in some later cases whether the Full Bench decision had not been affected by the decision of the Judicial Committee in the case of *Balkeshen Das v. Legge* (2). But the evidence which was held to be inadmissible by the Judicial Committee in the case was certain oral evidence of intention which had been admitted in the Court below and the ground upon which their decision is based is that such evidence is excluded by the provisions of sec. 92 of the Evidence Act. The evidence there consisted only of oral statements of the parties, and there was no other evidence of the acts and conduct of the parties adduced in that case which was considered by the Privy Council. It is upon these grounds that the decision in *Balkeshen's case* (2) was distinguished by Banerji and Brett, JJ., in *Khankar Abdur Rahman v. Ali Hafiz* (3) and the learned Judges held that *Bal-*

keshen's case (2) did not in any way affect the rule laid down by the Full Bench in *Preonath Shaha v. Madhu Sudan Bhuiya* (1). The same view was taken by Maclean, C. J., Banerji and Brett, JJ., in *Mahomed Ali Hossein v. Nazar Ali* (4).

In the case of *Radharaman Chowdry v. Bhowani Prosad* (5), Rampini and Gupta, JJ., were of opinion that oral evidence of the subsequent acts and conduct of the parties is not admissible to show that the rent is less than what was stated in a registered *kabuliyat*. A similar view was taken by Rampini, J., in the case of *Beni Madhub Gorani v. Lalmoti Das* (6), but his decision was set aside on appeal by Maclean, C. J., and Macpherson, J., and the learned Judges held that certain rent receipts showing payment of a smaller rent than that provided in a registered lease were admissible to show either that the parties never intended the terms of the *kabuliyat* to be strictly carried out, or that as between the parties there had been a waiver of the strict terms of the lease. The case was followed in the case of *Kailash Chandra v. Darbaria* (7) and *Manindra Chandra v. Durga Sundari* (8), one of the members of the present Bench being a party to both the decisions. It may be open to doubt, however, whether there can be a waiver of the essential terms of a registered lease except by a registered instrument having regard to the decision of the Full Bench in the case of *Lalit Mohan Ghosh v.*

(1) I. L. R. 25 Cal. 603; s. c. 2 C. W. N. 562 (F. B.) (1898).

(2) L. R. 27 I. A. 58; s. c. I. L. R. 22 All. 149; 4 C. W. N. 153 (1899).

(3) I. L. R. 28 Cal. 266 (1900).

(1) I. L. R. 25 Cal. 603; s. c. 2 C. W. N. 562 (F. B.) (1898).

(2) L. R. 27 I. A. 58; s. c. I. L. R. 22 All. 149; 4 C. W. N. 153 (1899).

(4) I. L. R. 28 Cal. 289; s. c. 5 C. W. N. 326 (1901).

(5) 6 C. W. N. 60 (1901).

(6) 6 C. W. N. 242 (1898).

(7) 20 C. W. N. 347 (1915).

(8) 20 C. W. N. 680 (1915).

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Gopali Chuck Coal Company (9), where, however, the variation was sought to be effected by documents. But in the cases mentioned above, the Court held, upon the evidence of the subsequent acts and conduct of the parties, that certain terms of the contract were never intended to be acted upon. On the other hand, in the case of *Lakhatulla v Bishwambhar* (10), Jenkins, C. J. and Doss, J., held that an agreement is none the less oral because it is to be inferred from the conduct of the parties.

The question was raised before the Judicial Committee in the case of *Maung Kyin v. Ma Shwe La* (11), but was not decided. Their Lordships observed:— "The evidence which the Appellants thus proposed to tender was described in general terms, and their Lordships have not the advantage of dealing with it in the form of questions specifically put and argued. So far, however, as it is still pressed, it, no doubt, consisted only of evidence relating to the acts and conduct of the parties as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them. Its object was to show that whatever the terms of the documents may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions, they had always treated the business between them as one of loan secured by mortgage.

This may give rise to important and difficult questions under sec. 92 of the Indian Evidence Act, which provides that

when the terms of any contract required by law to be reduced to the form of a document (and sales or mortgages of land are, by secs. 54 and 58 of the Transfer of Property Act, 1882, included among such contracts), "no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."

We have not referred to the decisions of the other High Courts, some of which have taken a view contrary to that taken by the Full Bench of this Court in *Preonath's* case (1) of the effect of the decision in *Balkeshen's* case (2). The question therefore is not free from difficulty nor settled. But the weight of authority so far as this Court is concerned is in favour of the admissibility of evidence of the acts and conduct of parties, and as stated above in some cases, this Court has held upon the subsequent acts and conduct of the parties that certain terms of a contract were never intended to be acted upon, i.e., from the very beginning.

It is unnecessary, however, to discuss the matter further having regard to the view we take of the construction of the *kabuliyat*. The covenant relied upon provides that one set (or one copy) of "*chita, khatian, jamabandi, seha, thoka, jama wasil baki* and other *lawazima* papers" are to be submitted at the end of every third year bearing the signature of the persons preparing the same. The tenure created by the *kabuliyat* was a *patni* tenure. Ordinarily no such papers

(9) I. L. R. 39 Cal. 284: s. c. 16 C. W. N. 55 (F. B.) (1911).

(10) 12 C. L. J. 648 (1910).

(11) I. L. R. 39 Cal. 892: s. c. 15 C. W. N. 958 (F. B.) (1911).

(1) I. L. R. 25 Cal. 603: s. c. 2 C. W. N. 562 (F. B.) (1898).

(2) L. R. 27 I. A. 58: s. c. I. L. R. 22 All. 149: 4 C. W. N. 153 (1899).

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are delivered by the *patnidar* to the *zemin-dar*. There is, however, nothing in the law to prevent the parties from entering into such a contract. But *chita*, *khatian* and *jamabandi* can be prepared only after measurement of lands. Such papers are not prepared every third year and under sec 90 of the Bengal Tenancy Act, the landlord can (subject to any contract) *cause* a measurement of the lands of tenants only once in 10 years except in certain cases which do not apply to the present. The *patnidar* therefore cannot have such measurement made and therefore cannot have *chita*, *khatian* and *jama-bandi* prepared every third year. It was not possible therefore for the *patnidar* to comply with such a stipulation. The zemindar could not also for the same reason get a measurement of the lands by appointing an Amin every third year, even if he could realize Rs 215 every third year from the *patnidar*. It is probably for those reasons that such papers were never demanded nor submitted. It is true *seha*, *thoka* and *jama wasil baki* papers are prepared every year, but the sum of Rs. 215 agreed upon to be paid in the event of the breach of the contract includes the cost of preparation of the *chita*, *khatian* and *jamabandi*, as well as for preparation of *seha*, *thoka* and *jama wasil baki* papers. As stated above, the papers were never demanded nor submitted at any time during the 35 years that the *patni* is in existence, and the Plaintiff after having acted in a particular way for 35 years has instituted a suit for recovery of Rs. 1,290 as damages for failure to submit such papers for six years, claiming Rs. 215 for each year. We are of opinion that the Courts below are right in dismissing the suit. In this view it is unnecessary to consider the other contentions raised before us.

The appeal is accordingly dismissed with costs.

S. C. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1264 OF 1919.

CHATTERJEE, J. } BEHARI LAL NANDI and
PEARSON, J. } ors., Plaintiffs,

1922, Appellants,

Heard, 1 and r.

6, February. NRITYANANDA GHOSE

Judgment, (Morik alias Ghose), and

6, February. ors., Respondents.

Limitation Act (IX of 1908), Art. 142, limitation for a suit for possession of uncultivated land over which both parties alleged exercise of definite acts of ownership—Resort to presumption in such cases, if warrantable

Where, according to both parties, definite acts of ownership were exercised over the land which though not cultivated was not incapable of possession, the Court must decide the case upon the evidence adduced by the parties without resorting to any presumption based on title.

SURESH SOHNUR ALI v J. HUTTMAN (1), JONES v. CHAPMAN (2) and RAM BANDHU v KUSU BHATTU (3) referred to and discussed.

This was an appeal preferred on the 25th of June 1919 against the decree of Babu Hem Chandra Bose, Officiating Subordinate Judge, 2nd Court of Zillah Hooghly, dated the 19th of March 1919, reversing the decree of Babu Satya Charan Mukherjee, Munsif of Amta, dated the 15th of May 1916

The material facts of the case are briefly as follows:—The Plaintiffs were the owners of 16 cottahs of land of which they were in possession through tenants

(1) 1 O. W. N. 277 (1898).

(2) 2 Exch. Rep. 808 (1849).

(3) 5 O. L. R. 481, 483 (1879).

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and subsequently by letting it out to grain-dealers, boat-makers or boat-repairers, etc. The present suit was brought by the Plaintiffs for declaration of title to, and recovery of possession of, one bigha of land which had been formed by accretion to the aforesaid 12 cottahs of land, but which the Plaintiffs alleged to be reformation *in situ*. The first Court observed that the nature of the disputed land was such that for some time both the Plaintiffs and Defendant No. 1 used the land, but neither party was in exclusive possession as none of the temporary tenants who actually used the land had any interest to question the right of entry of another person upon a different portion of the disputed land. The Plaintiffs alleged that before 1310 B. S. the land was actually in the cultivation of their tenants. The lower Appellate Court held that from 1306 B. S. the Defendant No. 1 was in possession on his own behalf and had dispossessed the Plaintiffs. The present suit was brought more than 16 years after 1306 B. S. The first Court decreed the suit, and the lower Appellate Court dismissed the suit. Hence the present second appeal was preferred to the High Court by the Plaintiffs.

Babus Mohendra Nath Roy and Manmatha Nath Roy for the Appellants.

Dr. D. N. Mitter and Babu Asiranjjan Chatterjee for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for declaration of title to, and recovery of possession of, one bigha of land.

The disputed one bigha has been found to be an accretion to another 12 cottahs of land. The 12 cottahs of land was found by the Court of first instance to belong to the Plaintiffs. The lower Appellate

Court, however, was of opinion that the Plaintiffs could not succeed because they had not set up a case of accretion, but had set up a case of reformation *in situ* and he gave also other reasons for deciding the question of title against the Plaintiffs.

It is unnecessary, however, to discuss the question of title as we think that the finding upon the question of limitation disposes of the case. It has been found by the learned Subordinate Judge that the Plaintiffs' suit is barred by limitation as they had failed to prove possession within 12 years of the suit.

It is contended before us on the assumption that the Plaintiffs are the rightful owners (as it must be assumed for the purpose of considering the question of limitation without deciding the question of title) that in order to constitute dispossession of the rightful owner by a trespasser, it is not sufficient to show the trespasser's possession, but it is also necessary to show the cessation of the owner's possession. Our attention is drawn to a finding of the Court of first instance, namely, that "the nature of the disputed land is such, that it is not improbable that for some time both the Plaintiffs and the Defendant No. 1 used the land, for neither party was in actual personal possession and none of the grain-dealers or boat-makers or boat-repairers who actually used the land was in occupation of the whole of the land, and as they had but transitory interest in the land in their occupation, they would not ordinarily question the right of entry of another person upon a different portion of the disputed land. The mere fact that the Defendant No. 1 through his tenants did some acts of possession on the disputed land would not necessarily amount to the Plaintiffs' dispossession."

It is true, as pointed out by Banerji,

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J., in the case of *Sheikh Sohnur Ali v. Hazarika v. J. Huttman* (1), that there is no dispossession unless there is termination of the possession of the rightful owner followed by the actual possession of another.

In the case of *Jones v. Chapman* (2), Maule, J., observed:—

“If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser.”

Upon the facts as found by the Court of first instance, both parties were in possession through temporary tenants, each exercising acts of possession over different portions of the land for temporary periods. The learned Subordinate Judge, however, on appeal, has not accepted that case for the Plaintiff. He has considered the evidence adduced by the Plaintiff and disbelieved it. He finds “There can therefore be no doubt that from 1306 at least the Defendant No. 1 has been in possession on his own behalf.” The suit was instituted 16 years after 1306. Further on, the learned Judge finds that the Plaintiffs were dispossessed by Defendant No. 1.

It is contended, however, that even if the Plaintiff's witnesses were disbelieved, the learned Judge ought to have considered whether the evidence of the Defendants as to possession was such as to constitute ouster of the Plaintiffs having regard to the character of the land and the nature of possession said to have been exercised, and if not, whether there was not any presumption in favour of the rightful owner.

But the case of the Plaintiffs themselves was that before 1310, the land was actually in the cultivation of their tenants, that in 1310 there was a surrender and that subsequently the Plaintiffs were in possession by letting out the land to grain-dealers and for the purpose of boat-repairs and other acts. The Plaintiffs' case, therefore, was not that the land was incapable of enjoyment though the land was not cultivated. The Defendant's case was that he was in continuous possession of the entire land (as part of his *jama*) through tenants. If therefore according to both parties, definite acts of ownership were exercised over the land, the Court must decide the case upon the evidence adduced by the parties without resorting to any presumption.

In the case of *Ram Bandhu v. Kusu Bhattu* (3), Garth, C. J., observed: “As long as reliable evidence of acts of ownership is forthcoming, there is no difference between the proof of possession in the case of jungle or uncultivated lands, and that in the case of cultivated lands and such proof is oftentimes forthcoming.” “But it does sometimes happen that neither party to a suit has exercised any acts of ownership at all over the land in question which are capable of proof; and then in the doubt by such absence of proof, or of reliable proof, the Court is obliged to resort to evidence of title, and to presume that the party who has the title has also the possession. But in the present case there would seem to be evidence of at least some acts of ownership; and if so, it would be right for the Court to decide the case upon that evidence, so far as the question of possession is concerned, without resorting to the proof of title.”

It may be pointed out that the words “reliable evidence” or “reliable proof”

(1) 1 C. W. N. 277 (1896).

(2) 2 Easch. Rep. 803 (1842).

(3) 5 C. L. R. 481, 482 (1879).

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in the decision quoted above appear to have been used in the sense of definite and unequivocal acts of ownership which can be acted upon, because the learned Judges observed: "But in the present case there would seem to be evidence of at least some acts of ownership." The matter was before this Court in second appeal, and this Court directed the lower Court to decide the case upon the evidence of possession. This Court in second appeal could not possibly express any opinion whether the evidence as "reliable" in the sense that the evidence could be believed.

In the present case the land was not *jungly* land, and although uncultivated subsequent to 1310, it was the case of both parties that the land was let out to grain-dealers and for the purpose of boat-repairs and other acts, and as stated above the finding of the Court of first instance that both parties exercised possession by letting out small and different portions of the land to different tenants for temporary periods has not been accepted by the Court of Appeal below.

We think, having regard to the definite findings that the Plaintiffs were dispossessed by the Defendants, and that the Defendants have been in possession (by which, we think was meant exclusive possession), for a period of 16 years before the suit, the suit must be held to be barred by limitation.

The appeal accordingly fails and is dismissed with cost.

J. N. R.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES AND BERAR.]

LORD BUCKMASTER.	SHANKAR GANESH
LORD ATKINSON.	DABIR, Petitioner,
LORD SUMNER.	v.
LORD CARSON	THE SECRETARY
SIR JOHN EDGE.	OF STATE FOR
1922,	INDIA IN COUN-
23, May.	CIL, Respondent.

Legal Practitioners Act (XVIII of 1879), sec. 13 (f)—"Any other reasonable cause," if extends to other than professional misconduct—Pleader, urging people not to pay unpopular tax, and bound over to keep the peace under sec. 107, Criminal Procedure Code (Act V of 1898)—Court, if has jurisdiction to deal with pleader under sec. 13 (f) of the Legal Practitioners Act—Discretion of Court—Privy Council—Special leave, application against order made within jurisdiction but in exercise of Court's discretion, if lies

Sec. 13, sub-sec. (f) of the Legal Practitioners Act is not confined to acts done in a professional capacity.

*When a pleader, in the course of an agitation against a local tax, did not confine himself to protests, however vehement, against the tax or against its injustice but urged an organised resistance to payment and attempted to establish a system which would have impeded and might have defeated its recovery with grave danger to public peace, and was bound over to keep the peace and later on dealt with by the High Court under the Legal Practitioners Act with the result that his *sanaq* of practice was cancelled "until such time as he satisfied the Court by his conduct that he was fit for re-admission":*

Held (without expressing either approval or disapproval of the order)—That the circumstances were sufficient to found jurisdiction under sub-sec. (f) to sec. 13 of the Act, and as it was entirely a matter

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for the discretion of the Court that made the order, no leave to appeal against it should be granted by the Judicial Committee.

This was an application for special leave to appeal to His Majesty in Council from an order made by the Court of the Judicial Commissioner of the Central Provinces and Berar, dated the 12th October 1921.

The petition in support of the application set out the following facts :—

The Plaintiff was a pleader at Basim in Berar who was interested in the abolition of the *Mahar Baluta* revenue system and delivered speeches in the District from one of which the following is an extract :—

“The system of *Baluta* is unjust and illegal. People cannot afford to pay it as it is to be paid in kind. Instead of doing this the Government should pay it from the Jagha Cess.”

“If after reducing the number of *Mahars* the expenses could not be met from Jagha Cess the Cess should be enhanced or a separate one be levied. But in no case should it be given in kind.

“Government say that the people pay *Mahar's Baluta* willingly, but this is not true. It is paid through fear of Government. Then if you really wish that the injustice of *Baluta* should be stopped and that *Baluta* should not be paid let the Government recover it by attachment; do not pay it of your own will”

On the 6th April 1921 the Petitioner was served with a notice by the Divisional Magistrate of Basim under the provisions of sec. 107 of the Code of Criminal Procedure, 1898, to shew cause why he should not be ordered to execute a bond for Rs. 500 with two sureties for Rs. 500 each for keeping the peace for one year.

On the 3rd May 1921 the Sub-Divisional Magistrate delivered judgment and ordered the Petitioner to execute a bond in terms of the said notice.

This order was affirmed by the District Magistrate and an application by the Petitioner for a revision thereof was refused on the 15th September 1921 by the Court of the Judicial Commissioner.

Two days later the Petitioner was summoned before a Bench of the latter Court and directed to shew cause why he should not be dealt with under sec. 13 of the Legal Practitioners Act.

The Petitioner filed a written statement and pleaded before the said Bench which gave judgment on the 12th October 1921. In the course of their judgment the learned Judicial Commissioners said :—

“It is clear that the pleader preached against the payment of *Baluta* and told cultivators not to pay that tax but to allow their property to be attached and sold for it. *Baluta* is a tax legally recoverable by distress: he has been, by delivering lectures in public and distributing placards headed the inquiry of *Baluta*, instigating one class of persons not to pay money legally due to another class, procedure reasonably calculated to lead to a breach of the public tranquillity, and the pleader's action seems to us incompatible with his obvious duties and responsibilities as an official of this Court. He has not expressed regret for what he has done but attempts to justify it. We learn that he has already suspended practice in the Courts. Suspension from practice in these circumstances would not be any punishment. We therefore cancel his *sanad* until such time as he satisfies us by his future conduct that he is fit for re-admission.”

From this order the present application -

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was made on, amongst others, the following grounds :—

(a) That the ground on which the said Court has disbarred the Petitioner does not fall within the provisions of the Legal Practitioners Act, 1879.

(b) That the facts proved against the Petitioner did not warrant the application of the provisions of sec. 107 of the Criminal Procedure Code, 1898

(c) That the mere fact that the Petitioner was compelled to execute a bond under the provisions of sec. 107 of the Criminal Procedure Code, 1898, is no reason, much less a sufficient reason, for disbarring the Petitioner

(d) That the appeal raised a substantial question of law of great public importance to legal practitioners in India.

Mr. B. Dubé for the Petitioner.—The Petitioner practised as pleader at Basim in the District of Akola, Berar, which was represented in the Legislative Council of the Central Provinces by one *Mr. J. B. Sane* of Berar. There had been a great agitation about a certain tax called the *Mahar Baluta* tax. The Government of India had appointed a Committee to consider the *Mahar Baluta* question in 1908. That Committee considered the question and recommended that the *Mahar Baluta* tax should not be abolished, but that it should be re-organised and recommendations were made. This Member of the Legislative Council thereupon introduced in the Legislative Council this Resolution: “(a) This Council, while disagreeing with the majority report of the *Mahar Baluta* Committee, recommends to the Government that the present *Mahar Baluta* system in Berar, which forms part of the land revenue system, should be abolished: (b) This Council, however, agrees with the view expressed by the Committee that the service of the Mahars and

Jaghas is essential for the performance of Government duties in the villages, and that the idea of a watan, which is cherished by the Mahar community should be respected in the maintenance of the Mahar service in future: (c) This Council, whilst expressing its general approval of the principles laid down by the Committee for reducing the present number of Jaghas and Mahars which is excessive, recommends that it is absolutely necessary to re-organise the service of Jaghas and Mahars immediately, and to fix its remuneration on the lines and subject to the scale, suggested by the Committee, after making a village-to-village enquiry with the help of the *panchayate* mentioned in the Report: and (d) This Council further recommends that the expenditure over the service of Mahars and Jaghas be met in future from the proceeds of the Jagha Cess, the deficit, if any, being met from the public revenues.” Then in the course of his speech in support of the resolution, *Mr. J. B. Sane* said as follows. “In ancient times the population of Indian villages consisted mainly of the members of one family and as they could not do all the work necessary for agricultural purposes themselves, they brought in 12 Balutdars in the villages. These Balutdars ministered to the needs of the cultivators and were paid by annual contributions in grain. Mahar was one of the Balutdars and some private work and some communal work was entrusted to him. He was controlled by the representatives of the village community. The payment in kind that was made to these Mahars and other artisans was called Baluta. I object to the present *Mahar Baluta* system, first on the ground that it is unjust to the agriculturists of Berar. The second act of injustice is double taxation. In 1866 Jaglia service

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was introduced for the village service. Jaglia Cess, one anna cess, was imposed for the maintenance of the service. Thus the Mahar huqs were practically converted into Jaglia Cess. The Resident says: 'Hitherto he (i.e., the agriculturist) has paid for the village Dher and in requiring him to pay for the *choukidar* we only change the name of the official and the mode of payment. A new interpretation of the policy came in saying that the Jaglia Cess was not the commutation of the Mahar huqs, but the Jaglias were appointed in addition to Mahars. Against the clear orders of the Government of India and against the non-intervention policy of the Resident, Sir Alfred Lyall acted upon this interpretation and the people were held liable to pay both Jaglia Cess and *Mahar Baluta*. This policy was afterwards ratified by the Government of India. Thus the people of Berar have now to pay both the Jaglia Cess and the *Mahar Baluta* for the same service. It is double taxation. Thudly, up to 1876 the *Mahar Baluta* was not recognised by the British Government and enforceable under the law from the agriculturists. The Resident had clearly declared that 'they are neither recognised nor forbidden, and that no notice of the huqs need be taken either way.' But now, the non-payment of *Baluta* entitles the Mahar to have it recovered by a 'Japti' or attachment under the coercive processes of the Revenue Court. Now, I request you to compare the present position of the parties with that with which we started. Mahar is no longer the servant of the villagers but he is the servant of Government and his *Baluta* is, under the Revenue Law, exacted from the unwilling cultivators by coercive processes notwithstanding the fact that he oppresses them in matters of *begar* and *sarbarat*.

Practically the cultivators have to feed their oppressors for no service done to them. The second objection to the present *Baluta* system is that it is paid in kind. We are living in times far advanced in economic ideas. All objections that can be raised against barter are applicable to this payment in kind of the *Mahar Baluta*. No Government dues are recovered in kind in our days. Moreover, the *patels* and influential persons can avoid the payment in kind which is realised by Mahar and not by Government. Disputes occur very often regarding the quality of grain that is given by the villagers for the *Baluta*. Now, Sir, I have kept before you my resolution in a nutshell; before summing up, I shall deal with one or two important objections which have been levelled against my attitude. The first objection is that *Mahar Baluta* is a long standing custom; people have acquiesced in the wrong so long, and they have now no right to complain against it. I say that all wrongs cannot be cured by prescription'".

[LORD SUMNER—This is a most interesting debate, but what is the point?]

The point is this, that the recommendation made by this Member was passed by a majority of the House, 28 to 2, and it has subsequently been recognised by the Government that that is a resolution of the Legislative Council for the abolition of the *Mahar Baluta*. I will go on to para. 8: "That your Petitioner took great interest at the moment for the abolition of the *Mahar Baluta* system, and he delivered speeches in his constituency and other places in support of it. The following extract from one of his speeches delivered after the above-mentioned debate in the Legislative Council is illustrative: 'The system of *Baluta* is unjust and illegal. People cannot afford to pay it as

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it is to be paid in kind. Instead of doing this the Government should pay it (the *Mahar's* remuneration) from the Jaglia Cess. If, after reducing the number of *Mahars* the expenses could not be met from Jaglia Cess, the cess should be enhanced or a separate one be levied. But in no case should it be given in kind. Government says that the people pay *Mahar's Baluta* willingly, but this is not true. It is paid through fear of Government. Then, if you really wish that the injustice of *Baluta* should be stopped and that *Baluta* should not be paid, let the Government recover it by attachment, do not pay it of your own will. This was an appeal to the agriculturalists in Berar in his own constituency. That was disliked by the executive authorities and a notice was served upon him under sec. 107 of the Code.

[LORD SUMNER.—Is this a criminal proceeding?]

Yes, it is under sec. 107 of the Code of Criminal Procedure. It will be convenient if I refer your Lordships to the section of the Code itself.

[LORD SUMNER.—Was this gentleman sentenced to something?]

He was not sentenced, he was bound over.

[LORD SUMNER.—It was the determination of a criminal matter.]

Yes.

[LORD SUMNER.—Is that what he is appealing against?]

No; he has been struck off the roll. After this order was made by the Criminal Court, the Court of the Judicial Commissioner called upon him to show cause why he should not be struck off.

[LORD SUMNER.—He was disbarred.]

Yes. He contended that the Code of Criminal Procedure has no application to

a case of this kind, and that the order that was made was absolutely illegal, and a gross abuse of the process of the Court.

[LORD CARSON.—What order was illegal, the order holding him to bail?]

Yes.

[LORD BUCKMASTER.—In the end what happened was this, that somebody having authority suspended him from practice until certain things were done, because they found that his conduct was not becoming to a member of the profession to which he belonged.]

Yes.

[LORD BUCKMASTER.—How can we interfere with that?]

After I have stated the facts, I will show your Lordships that there is nothing which reflects the slightest moral delinquency on the part of the Petitioner or suggests that he has been guilty of any offence.

[LORD CARSON.—He was held to bail because he made speeches which were said might lead to a breach of tranquillity and he entered into the necessary bond. Then he was summoned before the disciplinary authority to show cause why he should not be dealt with under the Legal Practitioners Act, and they suspended him.]

[SIR JOHN EDGE.—He was delivering inflammatory speeches recommending people not to pay at all.]

He was contending that that particular tax was a tax which ought to be abolished.

[LORD SUMNER.—That might have been very material before the Magistrates who bound him over, but as long as that order which is a sentence, though a very mild one, stands, for the purpose of considering whether he has committed an act which no longer fits him to be a member of the Bar, you have to assume that that order was a good order, otherwise you would

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be appealing here against a criminal order, and if this is an order of a criminal nature made against a member of the Bar or a pleader, is it not within the disciplinary powers of the Court in their discretion to say whether he shall be suspended from practice or not?

I submit the binding over under sec. 107 of the Code is not a punishment. If your Lordships will refer to the Code of Criminal Procedure, Part IV, it deals with the prevention of offences; it is of a precautionary nature.

[LORD CARSON.—It is the same in this country; it is preventive.]

[LORD ATKINSON.—You may bind a man over to be of good behaviour because he has been guilty of conduct that may lead to disorder.]

It would be a very strong proposition to lay down in England that because a member of the Bar or a citizen expresses strong views with regard to the justice or injustice of a particular tax that he should be bound over.

[LORD ATKINSON.—That order is not under appeal.]

It is indirectly, in so far as I am contending that the order made under sec. 107 has absolutely no application to a case of this kind.

[LORD ATKINSON.—In this country under the Statute of Edward III a man of ill-fame can be bound over.]

Will your Lordships look at sec. 107 of the Code of Criminal Procedure?

[LORD ATKINSON.—It may be that is entirely different.]

It is entirely different. Sec. 107 says: "Whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity." I submit that this

section applies to a person who is about to commit a wrongful act.

[LORD BUCKMASTER.—Not necessarily. The words are "is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity."]

For the sake of argument supposing a man were disturbing the public tranquillity by, for instance, preaching in favour of the temperance movement in front of a liquor shop, it could not be held that because that man delivered a speech and was bound over it would be any discredit to him.

[LORD BUCKMASTER.—That may well be. It may be that what you say is quite right, that what this man was doing was conducting a perfectly lawful agitation, but none the less it was an agitation which in the view of the local authorities was one that might cause a disturbance and breach of public tranquillity, and he was therefore bound over. Having been bound over in those circumstances why was it outside the jurisdiction of the body that looks after the affairs of these pleaders to say. You are a pleader and though you may be well within your rights in disturbing the public tranquillity we do not think as a member of your profession you ought to have done it?]

I submit there is no authority for laying down the proposition that if a man is bound over in the circumstances in which the Petitioner was bound over it is any ground for disbarring him.

[LORD BUCKMASTER.—They have merely suspended him from practice until he satisfies them that he is not going to do it again. If he said to-morrow, I still say I am quite right in what I did, but none the less you point out that my action might cause a disturbance of public tranquillity and that is the last thing I want to do, I do not propose to do it

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any more, they might put an end to his suspension.]

Even if it is a temporary suspension, I submit this order was not warranted by the Act.

[SIR JOHN EDGE.—What right have these pleaders to appear in Court, is it not a license granted to them?]

In the first place they have the right by qualification.

[SIR JOHN EDGE.—Their right to appear is under license, is it not?]

They pass an examination and then they apply to the Court stating that they are fit and proper persons to be admitted, in very much the same way as a barrister who goes out to India applies and is admitted.

[SIR JOHN EDGE.—This man was not a member of the Bar. It is a license to plead and appear, is it not?]

I submit under the Legal Practitioners Act there is no difference between an advocate, a pleader and a vakil.

[LORD CARSON.—The Judicial Commissioners, however, control the practitioners. Are not they really the best Judges of what is necessary?]

No, I submit not, with respect.

[LORD CARSON.—It is very hard for us to know what standard of discipline they may have laid down there.]

If I may say so with respect, because a man makes a strong speech it would amount to be a travesty of justice to say he should be disbarred. It is no answer to say that one Court has done it.

[LORD CARSON.—They know the local conditions.]

The conditions in India are very much parallel to the conditions prevailing in this country or Ireland.

[LORD SUMNER.—You are asking us to deal with an order made by the Court in the exercise of their disciplinary powers

under a statute. Supposing that a vakil who was brought up before them had undoubtedly committed some offence that you would not think could be defended, surely you could not say it was not a matter in the discretion of the Court in question whether he had so conducted himself as to be no longer fit to be an officer of the Court? It would be a question of the gravity of what he had done.]

It is not a question of degree. I contend that under the statute they have no power.

[LORD BUCKMASTER.—I understand what you mean. This is what I understand you to say, that the power to suspend is under sec. 12 of the Legal Practitioners Act.]

Secs 12 and 13

[LORD BUCKMASTER.—That is where a man has been convicted of a criminal offence implying a defect of character which unfits him to be a pleader. You say when he was convicted merely because he had done something that might have caused a breach of public tranquillity, then, even though he had been convicted of a criminal offence, that did not imply a defect of character. That is the real point in the case. I do not see that they say anything about that.]

[Mr. Kenworthy Brown.—The High Court exercised their jurisdiction under sec. 13.]

[LORD BUCKMASTER.—They may suspend or dismiss.]

For professional misconduct. That does not mean at the sweet will of the executive authorities. The lower Court has not found the Petitioner guilty of any moral delinquency or any defect of character apart from the order which has been made.

[LORD CARSON.—Do you put it that they had no jurisdiction, that they have

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done something outside their jurisdiction?]

They were not competent.

[LORD CARSON.—That is a different proposition.]

It is not a question of degree. If it is conceded for the sake of argument that the Magistrate had jurisdiction under sec 107 for that purpose, it is quite sufficient to contend that the conduct complained of is not such which would have justified in any view the order that is made in this case.

[LORD ATKINSON.—At all events did he not advocate the non-payment of a legal tax?]

Yes.

[LORD ATKINSON.—Do you say that is not immoral and may not lead to a disturbance?]

It is not such as to show a defect of character.

[LORD SUMNER.—A defect of character not to be a member of Parliament, but a defect of character to be a pleader.]

If a member of the Bar without being a member of Parliament advocates that the employers' proportion of the Insurance Tax should not be paid, what is there in that to justify disbarring a legal practitioner in this country? The Act in question is the Act No. 18 of 1879 as amended by the Act No. 11 of 1896. I will read the whole of sec 13 as amended. (Reads same).

[LORD ATKINSON.—The whole question is whether there was reasonable cause.]

Yes, my Lord, if it is contended by the other side that it falls under the words "or for any other reasonable cause," I submit there is no shadow of ground for suggesting that there is a reasonable ground for suspending a barrister because he happens to express an opinion

upon a political question which is disliked by the executive.

[LORD CARSON.—Was this order made because of that section in the Criminal Procedure Code or something else?]

Because he was bound over.

[LORD SUMNER.—It is "any other reasonable cause" that involves a question of degree first of all as to what he did, and secondly, how bad it was.]

The question of degree would be material if you found there was moral delinquency.

[LORD SUMNER.—If you first found there was reasonable cause.]

If you do not first find moral delinquency, there can be no reasonable cause. If you do find it, then the question of degree might be material.

Refers to *Re Wallace* (1). There the attorney and barrister was a party in the proceeding. The Judges gave judgment against him, and he said all sorts of things against the Judges, sent them letters and so on. At p 288 the Chief Justice says, this: "He then makes a general charge against the Judges in language too insulting to be repeated, and winds up with a criticism, in the same style, on some of the pettier matters which I had decided in Chambers." Disciplinary action was taken against the barrister and he was struck off.

[LORD BUCKMASTER.—In what Court?]
That was in Nova Scotia.

[LORD BUCKMASTER.—Under what authority?]

There seems to have been no statute there. I suppose it was the general disciplinary jurisdiction. The result was this Board held he would have been guilty of contempt of Court in his individual capacity, but the defect was not such that it can be said that he should not remain

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a member of the Bar in his *professional* status and capacity.

[LORD BUCKMASTER.—Supposing a man here grossly insulted one of the Judges, his Inn of Court would have full power to remove him from the Bar.]

[LORD ATKINSON—More than that, a criminal information would lie against him at once.]

Then Lord Westbury says: "The Appellant in this case is an advocate, and also an attorney, admitted to practise in the Supreme Court of Nova Scotia. It appears that he was also a suitor in that Court. In two or three cases in which he was such suitor he seems to have supposed that he had reason to complain of the conduct of the Judges of the Court, and he accordingly wrote a letter, addressed to the Chief Justice, reflecting on the Judges, and on the administration of justice generally in the Court, which undoubtedly was a letter of a most reprehensive kind. This letter was a contempt of Court, which it was hardly possible for the Court to omit taking cognizance of. It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character, or anything done by him professionally."

[LORD BUCKMASTER.—Supposing here a man insulted a Court in a case in which he was a private suitor and the Court sentenced him there and then to imprisonment for contempt of Court, do you say that would not be a perfectly good reason why they should suspend the man from practice, supposing there was a statute which said you could suspend him for a reasonable cause?]

In this case he refused to make any apology.

[LORD BUCKMASTER.—Supposing that even a private litigant as in *Wallace's* case (1) grossly insulted the Court and was thereupon sent to prison for contempt of Court, and furthermore would not purge his contempt by apologising, which corresponds to the attitude your client has taken up, do you say there would be no jurisdiction to suspend such a person from practice upon the ground that he was not a fit person to exercise the duties of an advocate?]

I submit there would be no jurisdiction.

[LORD BUCKMASTER—Your proposition is, no jurisdiction.]

Lord Westbury delivering the judgment of the Board says: "It was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally, and which act, *per se*, did not render him improper to remain as a practitioner of the Court."

[LORD CARSON—You must go the length of saying that they had no jurisdiction under the practice in this case to do it. If it was a question of degree we could not interfere with it.]

I take a much wider standpoint and say in a case of this sort it would be monstrous if a professional man is going to be suspended from practice because he holds political opinions which the Magistrates do not like.

[LORD ATKINSON—I do not understand the distinction here when they say he did not do this thing in his capacity of a solicitor. If he committed a murder he might not do it in his capacity as a solicitor, but it would be a good reason for suspending him.]

Unless your Lordship is satisfied he has

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done something dishonourable I submit the order is unjust.

[LORD CARSON.—I thought when you read out the facts first that he was suspended for saying they were not to pay this tax. You say the whole judgment went on the binding over.]

Yes, simply binding over and nothing else.

[LORD ATKINSON.—What do they say?]

The material quotation is at para. 16

[LORD SUMNER.—They might reasonably take the view that they have, might they not? It depends upon the tax and the people and upon the advocate. They might have thought if the lectures were sufficiently energetic, they might be calculated to lead to a breach of public tranquillity.]

Yes, but would it be a reasonable cause?

[LORD SUMNER.—They might take the view that a speech is likely to lead to such an amount of disorder in the country or the town that it is in the interests of good Government that it should not be allowed.]

He says, I am entitled to contend that the tax is unjust and I have the right of speaking out . . .

[LORD SUMNER.—Supposing a pleader of the Court were to get up an agitation which could properly be described as a revolutionary and an anarchistic agitation, could one possibly say then that that was not a reasonable cause for which, if the facts were believed by the Tribunal, they might suspend him from practice? Although you may say it is revolutionary propaganda not in connection with statements of claim or defence or mortgages, but in connection with political rights, could you deny that that would be a reasonable cause?]

It is difficult for me to express an opi-

nion as to what "revolutionary" might mean. It might mean the substitution of a new order of society which is not considered revolutionary.

[LORD BUCKMASTER.—Your contention I think must be this that if the man's action is an action which is not of such a criminal character as to cause any moral reflection, then whatever he does outside his duties as a pleader cannot constitute reasonable cause under sec. 13.]

That is so.

[LORD BUCKMASTER.—That is your contention?]

Yes.

[LORD BUCKMASTER.—If you are right in that, then of course the whole thing falls, but if you are wrong in that and if such conduct as a matter of fact gave rise to the jurisdiction under sec 13, it then becomes a question of degree. The whole question is whether it is within it or without it.]

Yes, my Lord. Applying the general principles of discipline there is no ground for suggesting that the standpoint is different in India from what it is in England or in Ireland apart from the question of degree.

[LORD ATKINSON.—Supposing for instance, the attorney committed murder but he did not happen to do it as an attorney, could not he be removed and would not he be removed under such circumstances because it was a reasonable cause?]

Finding a man guilty of murder according to the accepted notions of Society at the present time is the greatest moral delinquency which one knows.

[LORD ATKINSON.—There are no words that cover murder except the words "reasonable cause"]

That is so, my Lord.

[LORD CARSON.—All the matters that are set out are disciplinary matters in re-

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lation to breaches of the standard of honour. Therefore you must contend that except for the breaches of the rules of the profession he cannot be removed.]

I do not think it is necessary to go as far as that.

[LORD CARSON.—You say that binding a man over to keep the peace is no slur on him.]

I submit it is not a slur. It is not a conviction for any offence.

[LORD CARSON.—That would depend upon the exact thing for which he was bound over.]

[SIR JOHN EDGE.—I suppose on the authority of that case you referred to in *Re Wallace* (1), you would argue that the murder was not committed in his professional capacity.]

No. Will your Lordships refer to the case again at p. 295 where the learned Judge says in terms "To offences of that kind there has been attached by law and by long practice a definite kind of punishment, *viz*, fine and imprisonment. It must not, however, be supposed that a Court of Justice has not the power to remove the officers of the Court if unfit to be entrusted with a professional status and character. If an advocate, for example, were found guilty of crime, there is no doubt that the Court would suspend him."

[LORD ATKINSON.—That must be, because under this provision it is a reasonable cause.]

[LORD CARSON.—That is a general jurisdiction.]

Yes, and I submit the general jurisdiction in this case is in no way different.

There was another case decided in India in *In the matter of Koylash Nath Chowdhury* (2). There the learned Judges laid down that although the pleader had

been convicted, in their opinion there was no moral turpitude to be imputed to the Petitioner in respect of the act for which he was punished.

[LORD CARSON.—What had he done?]

It was under Act No. 20 of 1865

[LORD BUCKMASTER.—Supposing they said that does not come in under sec 12 but still we think we should show some sense of our disapproval of his conduct.]

This shows that the learned Judges attached importance to the question whether they could say there was moral turpitude involved or not.

[LORD SUMNER.—I think your proposition comes to this, that you must read "reasonable cause" in the statute in view of the authorities as meaning reasonable cause of a kind involving either moral turpitude or professional misconduct. That is your first point. The first thing you have to do is to justify putting into the statute, by virtue of this decision or other grounds, words which are not there; but the second difficulty that strikes me is this—you say there is no moral turpitude here. There are some crimes which involve moral turpitude in themselves, sexual offences, for instance. There are some which do not, such as letting a dog out without a muzzle on. The way in which the criminal offence is committed may make all the difference whether it involves moral turpitude or not, but it may be done in such circumstances through heat or ignorance or enthusiasm as to deprive it of its moral turpitude. It may be that this man intended to do as much mischief as possible. All those questions are questions of degree and they must depend upon the view taken of the facts by the Tribunal, and, surely the Tribunal, when, as far as I understand your client's own public statements, he declared that he was investigating one class of persons not

(1) L. R. 1 P. C. 283 (1866).

(2) 16 W. R. (Cr.) 41 (1871).

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to pay the tax, that being a deliberate and persistent course of conduct on his part, had material before them to give them jurisdiction, though the discretion with which they exercised that jurisdiction might in a proper case be questionable.]

I submit not The circumstances under which a man acts might constitute the degree of moral turpitude

[LORD SUMNER.—This man is a pleader and an officer of the Court He assists in the administration of the law. That being so he invites and incites a very large number of people not to assist in the administration of the law but to defy it. Is that proper conduct for a man who is one of the officers of the Court?]

I submit there is no question of defiance

[LORD SUMNER.—Surely there is a question of defiance. He instigates these people not to pay. That is defying the law]

But if a number of people honestly believe that the law is unjust . . .

[LORD SUMNER.—You say that this man is at liberty to conduct any agitation which he pleases lawfully and constitutionally to get a law changed That is his obvious right, but if this man as a pleader says: The way to get this thing done is to break the law; not to get the law altered but to break it and refuse to obey it, then whatever is the discretion which would be exercised by A, B or C it surely gives them the right to exercise it.]

If it were necessary to contend for the broader proposition that a member of the legal profession is entitled to say this is an unjust law and it should not be observed,

[LORD BUCKMASTER.—That may be a perfectly simple thing for a man to do who is under no obligation to the Court, but when the man is an officer of the Court

he is engaged in the administration of the law.]

A member of the legal profession whether in this country or elsewhere is an officer of the Court inasmuch as he is functionally supposed to be a member of the Court I do not resile from that. If a barrister had said to a person here: Do not pay taxes, could it be held that he was unfit professionally?

[LORD SUMNER.—The point is: Would not that give jurisdiction to the authority to consider whether or not this was an offence of such a character as to unfit him?]

I submit there would be no jurisdiction.

[LORD SUMNER.—Why not?]

I submit the Court would have no jurisdiction to suspend because a man expresses his opinion in that way

[LORD SUMNER.—He instigates people to break the law. That is not an expression of opinion You may say that the law is as bad as you like, but instead of trying to change it you defy the law What is the difference between defying this law and any other?]

Will your Lordships read para. 9? The question in controversy was that he urged the agriculturalists not to pay this tax of their own free will and accord.

[LORD ATKINSON.—He said: Do not pay]

And the Government realises by distress warrant

[LORD ATKINSON.—He instigated people to defy an existing law. That is a criminal offence.]

[LORD BUCKMASTER.—You must not assume that this Board expresses any opinion whatever as to whether or not they would have exercised the discretion vested in these Magistrates in the way in which it was exercised; the only question they

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have to consider is whether there was material here which enabled the discretion to arise. That is the only thing.]

He says here, "then, if you really wish that the injustice of Baluta should be stopped and that Baluta should not be paid, let the Government recover it by attachment; do not pay it of your own will."

[LORD BUCKMASTER. It may be a trivial thing, supposing he had added to that: "barricade your doors and resist the Government coming in," would you say there was no jurisdiction?]

Yes, my Lord.

[LORD BUCKMASTER.—You are confusing the right to agitate politically and to do things you are thoroughly entitled to do as a private citizen and the duty as an officer of the Court to assist as far as you possibly can the administration of justice.]

He is advocating leaving the law to take its own course.

[LORD BUCKMASTER.—What I was putting to you went further than that. If you admit he was going to such an extent that the jurisdiction arises, it then becomes clear that the jurisdiction attaches because he has attempted to impede the administration of the law.]

Here there is nothing more than proposing to the agriculturalists not to pay voluntarily.

[LORD SUMNER.—You are proposing to them not to pay voluntarily, knowing full well that there are so many of them and what they have to pay is so important to the Government that if they do not pay, the Government has power to compel by legal process and the Government is penalised on account of their refusing.]

That is a possible view.

[LORD SUMNER.—If that were the character of the agitation even although there was no instigation to barricade their houses or pour hot water on the policeman

or do anything which the suffragettes did, surely it would be a question of degree whether defiance of that kind was not tainted with moral turpitude unless your proposition, as I rather think it is, is intended to be that so long as a man acts with political motives and in the course of a political agitation though he may offend against the criminal law he does not do so with any sense of moral turpitude.]

Supposing a certain man believes that he ought not to pay a certain tax.

[LORD SUMNER.—You do not divorce political from ethical motives. Do you?]

The question of whether it would be considered revolutionary or unethical would depend on the opinion of the bulk of the people.

[LORD ATKINSON.—To instigate a conspiracy against the Government not to pay is a crime. A conspiracy among a number of debtors not to pay their debts is a crime.]

If all of the unemployed were to bind themselves together and to say the masters must pay the insurance tax and not the employed?

[LORD BUCKMASTER.—You have not faced the point. The point here is not whether this Board would have thought that the offence was one which warranted suspension, they express no opinion whatever upon that because that is absolutely for the Court over there. The question is whether a man who is an officer of the Court and who goes beyond political agitation and adds to it a direct incitement to break the law has not been guilty of something which is a reasonable cause why his conduct should be considered. That is the whole thing.]

Yes. I submit it is not, because in the first place, as your Lordship pointed out, in the case of this barrister and attorney from Nova Scotia he must have known

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because it is elementary that Judges could not be treated with contempt; he was certainly found wanting in the moral sense which ought to characterise every member of the profession. I submit that this case here simply amounts to this that the executive authority of the country takes the view that in the interests of peace and good order he shall be bound over.

[LORD BUCKMASTER.—It is a criminal offence in that case.]

I submit it is too much to say that a professional man should be disbarred because he has been convicted of a criminal offence. It is only those offences which amount to defects of character

[LORD CARSON.—We are only saying it is a matter for the Court to consider.]

Your Lordship is familiar with strong speeches on political and religious questions.

[LORD CARSON.—I have made many myself but that does not show that the Court has not a discretion if a man is brought before them]

Surely that would be laying down for the first time rules of discipline which at the sweet will of the Government of the day would prevent legal practitioners from carrying on their profession.

[LORD CARSON.—It is not the Government of the day; it would be the Courts. I am not going to impute improper conduct to the Magistrates]

Neither am I.

[LORD BUCKMASTER.—That is a pure question of law: it is a question whether there is a case here sufficient to justify your client in arguing before this Board that the circumstances of this case could not give rise to reasonable cause.]

I ask your Lordships to recommend to His Majesty that this is a case which should be heard on the merits and as the subject is of importance to legal practi-

tioners, should your Lordships take the view that the petition ought to be refused, I would ask that your Lordships should give your reasons so that there may be no misunderstanding at all as to the grounds upon which the petition is refused.

Mr Kenworthy Brown for the Secretary of State.—My Lords, the first thing I want to remind your Lordships of is this. The matter having been before three Courts they all having held that it was an act in which an order under the section should be made, I submit that is a matter which the Court can justly attach a great deal of importance to. Starting from the point that the order under sec 107 was properly made, the position of affairs was this, that the Petitioner, whose right to take legitimate political action I do not want in the least to throw doubt upon, took steps with the object which my learned friend has stated, and the means by which he proposes to take those steps are such as would be likely to lead to a breach of the peace. That being so I think I am on firm ground and I submit to your Lordships that it is undoubtedly a case in which the High Court had a discretion. It is not a question whether the circumstances were such that the High Court had no discretion.

*[LORD BUCKMASTER.—That is the whole point. Mr. Dubé says no discretion exists.]

Yes, my Lord, but the reason why he says that is a reason which leaves me somewhat in doubt, because the final phrase of that new section of the Legal Practitioners Act is expressed in very wide terms; the words are "any reasonable cause."

[LORD CARSON.—The only actual matter set out apart from this is the clause at the end which refers to professional matters.]

Yes, my Lord, that is so, but it has been

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held in India by a very important Tribunal that you cannot construe the generality of that final clause by the previous clauses which are dealing with matters of professional misconduct.

[LORD ATKINSON.—Supposing a man gets 12 months' penal servitude, he could be removed under the words "reasonable cause."]

I submit that is not the construction that the section naturally bears and in the second place every Court has jurisdiction over its officers.

[LORD ATKINSON.—The argument is that they had no jurisdiction, it is not a question of the exercise of jurisdiction, but they had not jurisdiction.]

[LORD SUMNER.—I think you have this ground for saying that (f) "any other reasonable cause" is not *ejusdem generis* with the matters mentioned from (a) to (e) for this reason, it is omitting the word "reasonable" or else it is imputing to (a) and (e) that they are all things that are not reasonable and if they meant to say for any other cause *ejusdem generis* with the others the word "reasonable" was not wanted. On the other hand, as it is there, effect has to be given to it.]

I follow that. Then the question is this. Do your Lordships desire that I should refer to authorities in India in which it has been held that this last clause is not to be controlled by the generic character of the previous clauses. There is a case that came before a very large bench of a Calcutta Court in *LeMesurier v. Wajid Hossein* (3).

[LORD SUMNER.—That has been authority there ever since.]

Yes, my Lord.

[LORD SUMNER.—For 20 years.]

Yes, my Lord.

[LORD BUCKMASTER.—All the Judges were in support of that except Mr Justice (those You say that has been followed without question ever since.)

It has never been questioned.

[LORD SUMNER.—Is there any further decision on the point?]

I do not think so. I cannot say; I have made an exhaustive search.

[LORD SUMNER.—Mr. Dubé did not say that there was any decision in support of his view.]

Mr Dubé.—I purposely refrained from contending that cl (f) is confined absolutely to the other clauses from (a) to (e) and I contended therefore that there must be some moral delinquency

[LORD BUCKMASTER.—Your first argument appears to be a strong one, supported by the case in *Re. Wallace* (1), that it must be something of a professional nature. Unless that authority is wrong, that is not the case.]

As to the question of the authority the case of *In the matter of Jogendra Narain Bose* (4) to which reference has been made, the view taken was that cl (e) was confined only to professional misconduct.

[LORD BUCKMASTER.—It was because of that that this case assumed the importance that it did. Directly that is not confined to professional misconduct, then it becomes a matter on each occasion for the Court to consider that.]

Not necessarily, because if there is an act which does not involve any moral turpitude at all, it does not come within that clause. I am asking your Lordships for special leave to consider that broad proposition that in the case of a legal practitioner if it does not involve moral delinquency it cannot come under sec. 13. I do not contend for the proposition that a

(3) 1. L. R. 29 Cal. 890 s. c. 6 C. W. N. 556 (F. B.) (1902).

(1) L. R. 11 P. C. 283 (1886).
(4) 5 C. W. N. 48 (1900).

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pleader of the Court can be suspended only on grounds of professional misconduct

[LORD SUMNER — You have been quite lucid. You say professional misconduct or a criminal offence involving moral turpitude. Then your proposition is that being the foundation of the jurisdiction, where is the moral turpitude here?]

Yes.

[LORD SUMNER — Those are the two points.]

Yes.

[LORD SUMNER — You say there is no evidence of moral turpitude.]

None at all. The man is regarded by a vast number of his fellow countrymen as holding the view which was right and proper, though the executive Government may possibly take a different view, but I submit it does not certainly involve moral turpitude.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER — As a concession to the urgent request of Counsel, their Lordships will briefly state the reasons why they are not able to advise that leave to appeal should be granted to the Petitioner, but this indulgence must not be taken as recognising any departure from established practice, nor affording any precedent for the future. In expressing the opinion which they hold that this petition ought to be refused, their Lordships expressly desire to make plain that their opinion carries with it no approval of or reflection upon the order against which leave to appeal is sought. That order was entirely one for the discretion of the Court that made it, and the only matter that it has been necessary to consider is whether a *prima facie* case has been made out to establish that there was no foundation

upon which that discretion could properly repose. It appears that the Petitioner was, on the 3rd May 1921 bound over by the Sub-Divisional Magistrate at Basim to keep the peace for a period of one year, and that order was confirmed by the District Magistrate and by the Court of the Judicial Commissioner. The offence which he had committed was connected with an agitation against payment of the *Mahar Baluta*, and it appears that in the course of such agitation he did not confine himself to protests, however vehement, against the tax, or against its injustice, but that he urged an organised resistance to payment, and attempted to establish a system which would have impeded and might have defeated its recovery with grave danger to the public peace. These considerations led to the conviction to which reference has been made, and caused his conduct as a pleader to be brought before the Court in their jurisdiction under the Legal Practitioners Act of 1879. Their Lordships are of opinion that the circumstances to which they have referred were sufficient to found jurisdiction under sec 13, sub-sec. (f) of that Act, which is not confined to acts done in a professional capacity, and for these reasons they think that no leave to appeal ought to be granted in this case, and they will humbly advise His Majesty accordingly.

Solicitor. *Mr. Edward Dalgado* for the Applicant.

Solicitor. *The Solicitor to the India Office* for the Opposite Party.

G. D. M.

Leave refused

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1603 of 1919.

THE INDIA PROVIDENT

Co., LD., Defendants,

Appellants,

v.

GOVINDA CHANDRA DAS

and anr., Plaintiffs,

Respondents.

CHATTERJEE, J

PEARSON, J.

1921,

6, July

Civil Procedure Code (Act V of 1908), sec. 20 (c) — Cause of action — Jurisdiction — Fraud — Suppression of summons — Suppression of real fact, misleading of Court by — Decree obtained in one District and executed in another — Suit to declare the decree fraudulent and for injunction restraining execution, if maintainable in the latter District — Ex parte decree in Calcutta Small Cause Court — Suit in Sylhet.

Where an ex parte decree obtained in the Calcutta Small Cause Court was transferred for execution to a Court at Sylhet within the jurisdiction of which the judgment-debtor resided, and thereupon the judgment-debtor brought a suit in the Court at Sylhet to have the said ex parte decree declared as fraudulent and for an injunction restraining the decree-holder from executing the decree :

Held—That the Court at Sylhet had jurisdiction to entertain the suit, and that Court was competent to issue an injunction, and in order to grant that relief it had the power to go into the question whether the ex parte decree was obtained by fraud.

KEDAR NATH MUKERJEE v. PRASSANNA KUMAR CHATTERJEE (3) referred to.

Held also—That upon the facts found the ex parte decree was a fraudulent one, and it was not a question of obtaining a decree by perjured evidence

This was an appeal against the decree of Babu Upendra Chandra Mukherjee, Subordinate Judge, 1st Court of Zillah

Sylhet, dated the 4th of June 1919, affirming the decree of Babu Jnanendra Mohan Das, Munsif, 2nd Court at Sylhet, dated the 24th September 1918

The facts material to this report are these :—

The suit leading to this appeal was brought under the following circumstances : The Defendant Company who are the Appellants in the present appeal obtained an ex parte decree against the Plaintiffs-Respondents in the Calcutta, Small Cause Court for Rs. 1,217, on the 1st March 1916. The Defendant Company got the decree transferred to the Court at Sylhet in the jurisdiction of which the present Plaintiffs resided, and applied in that Court for execution of the decree. Plaintiffs thereupon brought a suit out of which the present appeal has arisen in the Court at Sylhet for a declaration that the ex parte decree obtained by the Defendant Company against the Plaintiffs in the Calcutta Small Cause Court was obtained by fraud, was void and not fit to be executed, and prayed for the issue of a permanent injunction restraining the Defendant Company from executing the decree. The case of the Plaintiffs was that the Defendant Company without getting any summons served on the Plaintiffs surreptitiously secured a collusive and fraudulent ex parte decree in a false suit brought against them in the Calcutta Small Cause Court, that no summons was served by post upon the Plaintiffs as was alleged by the Defendant Company, that there was no adjustment of accounts although the suit was brought on the allegation that the accounts had been adjusted, and that Plaintiff No 1 was surety only for Rs 1,000, and that nothing was due to the Defendant Company by Plaintiff No. 2, and pro forma Defendant No. 2 who acted as agent of the Defendant Company,

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and that the surety bond was not forfeited. The defence of the Defendant Company, *inter alia*, was that the Sylhet Court had no jurisdiction to try this suit, that Plaintiff No. 2 and *pro formâ* Defendant No. 2 and Plaintiff No. 2 realised money from the Defendant Company's constituents and afterwards sent an adjusted account which shewed that Rs. 1,127 was actually due by Plaintiffs and *pro formâ* Defendant No. 2, and that the decree obtained by the Defendant Company was not fraudulent, that the summons was sent by the Small Cause Court, Calcutta, under registered covers, and the Plaintiffs and *pro formâ* Defendant No. 2 deliberately did not accept the summons and the registered covers were therefore returned to the Court of Small Causes as "refused," and that the allegations that the registered letters did not reach the Plaintiffs and the *pro formâ* Defendant No. 2 and the Defendant Company suppressed the same were false.

The learned Munsif at Sylhet who tried the suit gave a decree to the Plaintiffs. The following portion of his judgment is material: "Although the decree in question was passed by the Calcutta Small Cause Court it was executed here within the jurisdiction of this Court and the present suit is triable by this Court."

From all the above circumstances I am of opinion that the allegation in the plaint of the Small Cause Court suit in which the *ex parte* decree in question was passed that there was an adjustment of account was not true and that if the facts were truly placed before the Court there could not be a decree without taking an account, that this suppression amounted to fraud and had the effect of misleading the Court. Again the security bond shews that Plaintiff No. 1 stood surety for Rs. 1,000 and if the bond was produced

in Court there could not be a decree for the entire claim of that suit against Plaintiff No. 1 of this suit. The next question is whether there was suppression of summons as alleged. Although there is no direct evidence of suppression, there is no evidence either that the present Plaintiffs received summons of that suit or that any registered cover containing summons of that suit was ever tendered to them.

From the above it is quite clear that the Defendant Company presented a fraudulent case before the Calcutta Small Cause Court with the result that the said Court was misled and that the fact of the previous suit was not known to the present Plaintiffs who had no opportunity of defending it. I find accordingly that the decree in question was fraudulently obtained and as such it is liable to be set aside.

The decree in question in this suit is declared to be void and inoperative and a perpetual injunction is granted restraining the Defendant Company from executing that decree."

On appeal by the Defendant Company the learned Subordinate Judge at Sylhet upheld the decision of the Munsif and dismissed the appeal.

The following portion of his judgment will be found material:—

"As to the question of jurisdiction I should observe at the outset that a case like the present falls within the purview of sec. 20 of the Civil Procedure Code. The residence of the *pro formâ* Defendant No. 2, a co-debtor of the Plaintiffs, cannot help the Court in determining the jurisdiction under that section. Admittedly the Defendant Company was not a resident within the jurisdiction of the Court of first instance. Cls. (a) and (b) of sec. 20 therefore do not apply. Let me see if cl. (c) of that section applies. . . The Defendants in that suit were described as

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residents within the jurisdiction of the Sylhet Courts and in looking into the plaint as well as the decree sought to be set aside, it appears that they were served with summons under registered covers at the instance of the Defendant Company. The Plaintiffs in the present suit deny the service of summons by registered covers. So it is clear that a portion of the alleged fraud was said to have been perpetrated within the jurisdiction of the trial Court. It is not therefore correct to say that a portion of the alleged fraud was entirely perpetrated in Calcutta. Then I should also add that execution proceedings are part of the same suit. Admittedly the decree in question was sought to be executed within the jurisdiction of the trial Court; and so it can be fairly said that the alleged fraud was continued to be perpetrated within the jurisdiction of the trial Court. In my opinion, therefore, the Court below had jurisdiction to try the suit under cl. (c) to sec. 20 of the Civil Procedure Code.

"I next proceed to consider the merits of the case. The allegation that the accounts had been adjusted was false. The Court trying the Small Cause Court suit in the Calcutta Small Cause Court was certainly misled by the aforesaid false story. Then despite the terms of the agreement the Defendant Company did not hesitate to make the claim against Defendant No. 1 over and above the liability he had agreed to bear. This fact, it is clear, was kept concealed from the notice of the Court which tried the Small Cause Court suit in question. All these are very broad facts and they tend to add to the conviction that the summonses were designedly suppressed. Reading sec. 16 of the Evidence Act and sec. 114 of that Act and bearing in mind that the 'registered covers' were returned as 'refused,'

I think it was the duty of the Defendant Company to shew that really the registered covers were tendered to the Defendants in the Small Cause Court suit. The Defendants in that suit—i.e., the Plaintiffs in this suit emphatically denied to have ever got such covers or that such covers were tendered to them. There is nothing to gainsay their denials—I should therefore declare that the alleged non-service was amply substantiated. . . . Taking into consideration all the above facts I cannot but declare that the claim of the Defendant Company before the Calcutta Small Cause Court was not only false but fraudulent. In my opinion the learned Munsif very justly decreed the suit. The appeal thus fails and is dismissed with costs."

Against this decision of the Subordinate Judge the Defendant Company preferred this second appeal.

Dr. Dwarkanath Mitler (with him *Babu Heramba Chandra Guha*) for the Appellants—I submit the Sylhet Court had no jurisdiction to try the suit. The decree was obtained in Calcutta and the fraud, if any, was practised in Calcutta. The cause of action did not arise at Sylhet. Refers to *Umrao Singh v Hardeo* (1) and *Dan Dayal v Munna Lal* (2).

The cases of *Kedar Nath v Prassanna Kumar* (3), *Bank Behary Lal v Pokhe Ram* (4), *Jawahir v Neki Ram* (5) and *Khushali Ram v Gokul Chand* (6) are distinguishable. In those cases either the properties within the jurisdiction of the Court were attached or sold, or the judgment-debtor was arrested in execution,

(1) I. L. R. 29 All. 418 (1907).

(2) I. L. R. 36 All. 584 (1914).

(3) 5 O. W. N. 559 (1901).

(4) I. L. R. 25 All. 43 (1902).

(5) I. L. R. 37 All. 189 (1914).

(6) I. L. R. 39 All. 607 (1917).

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which gave rise to the cause of action. In this case no such proceedings in execution were taken.

Secondly, I submit that the lower Courts erred in law in holding that the decree was obtained by fraud. The Courts below were wrong in presuming that the summons was suppressed. The finding is based on no evidence. The summons was sent by registered post and the presumption is that it must have reached the addressee. Refers to *Harihar Banerji v Ramsashi Roy* (7).

The Courts below were wrong in going into the merits of the claim of the Defendant Company. A decree cannot be set aside on the ground that the suit on which the decree was obtained was a false suit and was decided on perjured evidence. Refers to the cases in *Kedar Nath v. Hemanta Kumari* (8), *Nanda Kumar v. Ram Jiban* (9), *Mosuful Huq v Surendra Nath Ray* (10), *Lakhmi Charan v. Nur Ali* (11), *Nistarni v. Nanda Lal* (12) and *Pran Nath v. Mohesh Chandra* (13).

Babu Paresh Lal Shome for the Respondents.—My submission is that the Sylhet Court had jurisdiction to try the suit. The decree complained of was transferred to the Sylhet Court for execution and the decree-holder applied for execution in that Court. In the suit brought at Sylhet there was a prayer for injunction, and as such that Court was competent to grant an injunction restraining

the execution and in doing that it had power to determine the question whether the *ex parte* decree was obtained by fraud. I rely on the case of *Kedar Nath v. Prassanna Kumar* (3). The case of *Banke Behary Lal v. Fokhe Ram* (4) is in my favour. There is nothing to shew in that case that any property was attached in execution. The cases of *Umrao Singh v. Hardeo* (1), *Dan Dayal v. Munna Lal* (2), cited on the side of the Appellants are not applicable. In *Umrao Singh v. Hardeo* (1) there was no prayer for injunction, and in *Dan Dayal v. Munna Lal* (2) execution was not taken out. I submit that part at least of the fraud was committed within jurisdiction of the Sylhet Court, viz, the suppression of summons, and as such part of the cause of action arose within the jurisdiction of that Court. Refers to *Jawahir v. Neki Ram* (5).

On the question of fraud the concurrent findings of the Courts below are that the registered covers were returned from the Post Office as "refused" and that the Defendant Company failed to prove that the registered covers were tendered to the Plaintiffs. So the presumption referred to in the case of *Harihar Banerji v Ramsashi Roy* (7) does not arise. I submit that the Courts below were right in holding that the decree was obtained by fraud. It was not a question of a decree obtained by perjured evidence, so the cases cited by the Appellant have no application. In the present case it has been found that the decree was obtained by practising fraud on the Court by suppressing material facts and the Plaintiffs were prevented from

(7) L. R. 45 I. A. 222; s. c. I. L. R. 46 Cal. 458; 23 C. W. N. 77 (1918).

(8) 18 C. W. N. 47 (1913).

(9) I. L. R. 41 Cal. 990; s. c. 18 C. W. N. 681 (1914).

(10) 18 C. W. N. 1002 (1912).

(11) I. L. R. 38 Cal. 936; s. c. 15 C. W. N. 1010 (1911).

(12) I. L. R. 26 Cal. 891; s. c. 8 C. W. N. 670 (1899).

(13) I. L. R. 24 Cal. 546 (1897).

(1) I. L. R. 29 All. 418 (1907).

(2) I. L. R. 36 All. 564 (1914).

(3) 5 C. W. N. 559 at p. 561 (1901).

(4) I. L. R. 26 All. 48 (1902).

(5) I. L. R. 37 All. 189 (1914).

(6) L. R. 45 I. A. 222; s. c. I. L. R. 46 Cal. 458; 23 C. W. N. 77 (1918).

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placing their case before the Court which was misled into making a decree. Refers to *Manindra Nath Mittra v. Hari Mondal* (14).

The JUDGMENT OF THE COURT was as follows :—

The Defendants who are the Appellants before us obtained a decree in the Small Cause Court, Calcutta, for Rs 1,200 odd on the 1st March 1916. The suit was decreed *ex parte*. After obtaining the decree, the Defendants got it transferred to the Court of the Subordinate Judge of Sylhet within whose jurisdiction the present Plaintiffs resided and applied for execution of the decree against the Plaintiffs. The Plaintiffs thereupon instituted a suit in the Court of the Subordinate Judge of Sylhet for a declaration that the *ex parte* decree obtained by the Defendant in the Calcutta Small Cause Court was obtained by fraud, was void and not fit to be executed. They also applied for the issue of an injunction against the Defendant No. 1 restraining him from executing the said decree.

The Plaintiffs alleged that as a matter of fact no summons was served upon them in the suit brought in the Small Cause Court, that there was no adjustment of accounts although the suit was brought on the allegation that the accounts had been adjusted and that it was not brought to the notice of the Court that the Plaintiffs were sureties only for a limited sum. The case for the Plaintiffs was that the summons had been fraudulently suppressed, that the decree was obtained by practising fraud upon the Court, and that in these circumstances, the decree was not binding upon them.

The Defendants raised the objection that the Sylhet Court had no jurisdiction

to try the suit as the cause of action did not arise in Sylhet, but in Calcutta where the decree complained of was obtained.

The Courts below overruled the objection. They found that the decree was fraudulently obtained and gave a decree to the Plaintiff.

Two contentions have been raised on behalf of the Defendants-Appellants. The first is that the Sylhet Court had no jurisdiction to try the suit.

The learned Pleader for the Respondents has contended that a part of the cause of action arose in the jurisdiction of the Sylhet Court inasmuch as the suppression of process by reason whereof the *ex parte* decree was obtained in Calcutta took place within the jurisdiction of Sylhet and that therefore it might be said that a part of the cause of action arose within the jurisdiction of the Sylhet Court.

We do not think, however, that the cause of action arose in Sylhet by reason of suppression of processes in that Court, when the decree which gave rise to the cause of action was obtained in Calcutta. However that may be, we think that the Sylhet Court had jurisdiction to try the suit. As stated above, the Plaintiffs asked for a declaration that the decree was void and not fit to be executed, and also prayed for a permanent injunction restraining the Defendant from executing the decree.

The question whether a suit can be instituted in one District for setting aside a decree passed by a Court in another District has been the subject of many decisions and the decisions cannot be said to be uniform. The general principle which may be said to have been established by the cases, however, is that save under special circumstances, a suit to set aside a decree obtained by fraud in which no other relief whatever is claimed, cannot be maintained in any District outside the Dis-

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strict in which the fraud was committed and the fraudulent decree was obtained [see the case of *Umrao Singh v. Hardeo* (1)] and in the case of *Dan Dayal v. Munna Lal* (2) it was held that the addition of a prayer for injunction would not give such Court jurisdiction. A contrary view was taken in the case of *Kedar Nath v. Prassanna Kumar* (3). Where, however, the decree is obtained in one District and executed in another, it has been held in some cases that the Court in which execution is taken out is competent to try such a suit [see the cases of *Banke Behary Lal v. Pokhe Ram* (4) *Jowahir v. Neki Ram* (5) and *Khushali Ram v. Gokul Chand* (6)]. In these cases the property of the judgment-debtor was attached or he was arrested within the jurisdiction of the Court where the suit was instituted.

In this case it is true that no property of the Plaintiffs had been attached within the jurisdiction of the Sylhet Court, but the Defendant applied for execution of the decree and it was against the threatened execution that the suit was brought and an injunction was asked for. The Sylhet Court was entitled to issue an injunction and in order to grant that relief, it had the power to go into the question whether the *ex parte* decree was obtained by fraud in which case it would be inoperative. [See the case of *Kedar Nath Mukerjee v. Prassanna Kumar Chatterjee* (8)].

In these circumstances we are of opinion that the Sylhet Court had jurisdiction to entertain this suit.

The next question is whether the Court

below was right in holding that the decree was obtained by fraud. A number of cases have been cited before us, but we think, having regard to the findings arrived at by the Court of appeal below, it must be held that the decree was obtained by fraud. The Judge has found that the summonses were designedly suppressed and that the real facts were suppressed from Court. Now if the present Plaintiffs who were the Defendants in the Small Cause Court suit were prevented by the contrivance of the Plaintiffs in that suit from placing their case before the Court and the Court was misled into making a decree in favour of the Plaintiffs in that suit, we think that the decree was a fraudulent one and that it is not a question of obtaining a decree by perjury.

We are accordingly of opinion that the decree of the lower Appellate Court is right and that this appeal should be dismissed with costs.

H. C. S.

Appeal dismissed.

(1) I. L. R. 29 All. 418 (1907).

(2) I. L. R. 36 All. 564 (1914).

(3) 6 O. W. N. 559 (1901).

(4) I. L. R. 25 All. 48 (1902).

(5) I. L. R. 27 All. 199 (1914).

(6) I. L. R. 32 All. 607 (1917).

PRIVY COUNCIL

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.	MEDAI DALAVOI
LORD ATKINSON.	THIRUMALAIY-
LORD SUMNER.	APPA MUDALIAR,
LORD CARSON.	Appellant,
SIR JOHN EDGE.	v.
1922,	NAINAR TEVAN
Heard, 16, May.	and ors., Res-
Judgment, 31, May.	pondents.

Hindu law—Widow in possession of husband's estate as limited owner—Sale to pay off mortgage debt due by husband—Purchaser is bound to see to application of purchase money—Speculative purchase not necessarily sham—Widow is bound to sell property in bits—Valuation, proper mode of

A widow of a separated Mitakshara Hindu sold property belonging to her husband's estate in her possession as limited owner for Rs. 5,300 in order to pay off Rs. 4,588-2-2 due on two mortgages executed by her husband. The balance of Rs. 711-13-10 was appropriated by the widow to reimburse herself for expenses previously incurred at the marriage of a daughter of the husband's brother.

Held—That the sale was not invalid because a portion of the purchase money (Rs. 711-13-10) was spent on a purpose which did not constitute a legal necessity, as the purchasers were not bound to see how the widow applied the purchase money.

That the fact that the purchaser was able to realise a much larger sum by selling the property bit by bit to cultivating raiyats did not establish that the sale by the widow was necessarily improvident, as it was not reasonable to suggest that the widow should have gone about endeavouring to find persons who would purchase the property in small quantities.

That though the purchase by the widow's vendees was speculative, the sale was a genuine and not a sham sale.

The price at a private sale of a consi-

derable extent of land purchased in lump would depend not so much on the valuation of its component parts, calculated on a regular scale, as on the need of the vendor for money and the competition for lands in that locality at the time of the sale.

This was an appeal from a decree, dated the 9th December 1914, of the High Court at Madras which reversed a decree, dated the 22nd April 1912, of the Subordinate Judge of Tinnevely.

The facts are fully set out in the judgment of the Board.

The suit out of which this appeal arose was instituted by a Hindu reversioner for a declaration that a sale deed executed by the 1st Defendant, a Hindu widow, was not binding on him beyond her life-time. The main contest between the parties was as to whether the sale was for legal necessity.

The Subordinate Judge made a decree granting the declaration asked for but that decree was reversed by the High Court.

Messrs. L. DeGruyther, K. C. and J. M. Parikh for the Appellant.—There was no legal necessity for discharging the marriage expenses and the sale could certainly not be made for this purpose. The purchasers have failed to discharge the onus that is on them of proving necessity.

Sham Sunder Lal v Achhan Kunwar (1) and *Nazir Begam v. Raghunath Singh* (2).

The price was inadequate. Sale by first widow was to a man of straw and is no criterion of the value. The High Court wrongly accept that sale and reject the Government valuation.

(1) L. R. 25 I. A. 182, 190; s. c. I. L. R. 21 All. 71; 2 C. W. N. 729 (1893).

(2) L. R. 46 I. A. 145; s. c. I. L. R. 41 All. 571; 23 C. W. N. 700 (1919).

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When dealing with a *pardanashin* lady the burden of proof is on the purchaser to show that the price was adequate.

Mahomed Shamsool v. Shewukuram (3).

Mayne's Hindu Law, paras. 634 and 640.

Mr. A. M. Dunne, K. C. (with him Mr. Kenuorthy Brown) for the Respondents—What the widow sold was the equity of redemption.

[LORD BUCKMASTER.—Assuming necessity the question arises, was the sale made to satisfy the necessity.]

Once necessity is presumed its continuance is presumed until shown to be otherwise.

See Mayne's Hindu Law, para. 240.

The purchaser has got to prove that certain representations were made to him not that the facts actually were as represented.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Plaintiff in the suit against a decree, dated the 4th December 1914, of the High Court at Madras, which reversed a decree, dated the 22nd April 1912, of the Subordinate Judge of Tinnevely and dismissed the suit. The parties to the suit are Hindus, and the suit is for a declaration to protect the interests of the Plaintiff as a reversioner in certain unmoveable property which was sold for Rs. 5,300 on the 22nd November 1897, by the Defendant No. 1 to the Defendants Nos. 3 and 4.

The Defendants Nos. 1 and 2 are the widows of one Medai Dalavoi Shanmuga Kumaraswami Mudaliar (hereafter referred to as Shanmuga), who died childless in 1892. Shanmuga was a separated Hindu, and at the time of his death was

possessed of a considerable estate, which was more or less encumbered. That estate included a one-third share in the village Aiyankulam. That village will be hereafter referred to as the Mouza. On the death of Shanmuga the Defendant Nos. 1 and 2 succeeded to his estate as Hindu widows. After the Defendant Nos. 1 and 2 had succeeded to the estate they divided the estate or part of it between them, and thereafter each of them enjoyed separately those parts of the estate which had fallen to her on the division. Part of the estate which was so divided was the one-third share in the Mouza, and thereupon each of the Defendants Nos. 1 and 2, as between themselves, was entitled to and enjoyed separately her moiety of that one-third share. That one-third share was subject to a mortgage which Shanmuga and a brother of his had granted on the 25th May 1879, on that mortgage the mortgagees had obtained a decree for sale on the 30th March 1897, if the amount due with interest thereon should not be paid on the 15th August 1897. There was also due, on the 22nd November 1897, the sum of Rs. 1,605-5-0, the first Defendant's agreed share of liabilities under a mortgage of the 6th November 1888, which Shanmuga had granted. The total amount due by the first Defendant under those two mortgages on the 22nd November 1897, was Rs. 4,588-2-2, and in order to provide for the discharge of those debts the Defendant No. 1 sold, on the 22nd November 1897 to the Defendants Nos. 3 and 4 her moiety of the one-third share in the Mouza for Rs. 5,300. The balance of Rs. 711-13-10 of the Rs. 5,300, it is alleged, on behalf of the Defendant No. 1, she appropriated to reimburse herself for expenses which had been incurred in connection with the marriage, three years

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before the sale, of a daughter of Shanmuga's brother. That is the sale which the Plaintiff alleges was invalid as against him as a reversioner.

The Plaintiff is a son of a separated uncle of Shanmuga, and he admittedly is the nearest surviving agnate of Shanmuga. The Plaintiff brought this suit on the 13th December 1909, to obtain a declaration that the sale of the 22nd November 1897, is void as against him as a reversioner. In his plaint he stated that his cause of action arose on the 22nd November 1897, he was of full age in 1897, but no explanation is given of the cause of the delay in bringing the suit. He is a co-sharer in the Mouza, and it appears to their Lordships that it would have been idle for the Plaintiff to have suggested, if he had given evidence in the suit, that he did not know of the sale at the time of the sale or very soon afterwards. The sale was effected by a registered deed. The other 94 Defendants are persons whose titles to parts of the lands in question depend on the validity of the sale of the 22nd November 1897.

In the plaint it is alleged.—

"VIII. The small debt owed by the said estate could have been discharged by Defendants Nos 1 and 2 from the surplus income of the said estate and from the outstandings due to it. But without doing so, Defendants Nos 1 and 2 have, with the evil intention of causing damage to the reversioner's right and fraudulently and against law and justice, been making separate alienations, by way of sale, mortgage, etc, of the properties forming their respective shares, having secretly received larger sums than those mentioned in the particulars of payment set forth in the several deeds, and have been causing damage to the Plaintiff's right

"IX. In like manner, the first Defendant, on 22nd November 1897, intentionally sold to Defendants Nos. 3 and 4 her half-share of

the entire properties mentioned in the schedule hereof and situate within the jurisdiction of this Court, for the low price of Rs 5,300, of which a sum of Rs 4,588-2-2 was directed in the deed to be paid towards the debt incurred by the original owner and Rs 711-13-10 was received in cash, and she executed the sale deed and had it registered. The said properties are worth more than Rs 15,000. Further, the sale, made as it was by the first Defendant without the permission of the second Defendant, cannot be valid after the life-time of the first Defendant. According to Hindu law she is not entitled to make such a sale."

The case which the Plaintiff endeavoured to make out at the trial was that the price for which the Defendant No. 1 had in fact sold her half of the one-third share was Rs. 7,300, and that Rs. 2,000 of that price was secretly paid to her by the Defendants Nos. 3 and 4 as an inducement to her to sell her one-half of the one-third share to them.

The witnesses who were called on behalf of the Plaintiff in support of that case of fraud were not believed by the Subordinate Judge or by the High Court. Their evidence has not been relied upon in support of this appeal, and it may be taken that the charge of fraud had no foundation.

The Subordinate Judge who tried the suit, found as fact that Rs. 4,588-2-2 was employed in discharging debts of Shanmuga, and that to that extent there was a legal necessity for selling the moiety of the one-third share in the Mouza. With that, so far as it goes, the High Court and their Lordships agree. As to the sum of Rs. 711-13-10, the Subordinate Judge was not satisfied that the Defendant No. 1 was legally bound to pay the expenses of the marriage or that there was any necessity for raising money to the extent of Rs. 711-13-10 by selling the property. He overlooked the fact that the Rs. 711-13-10 merely represented the balance of the sale

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price of Rs. 5,300 and that it was not to raise that Rs. 711-13-10 that the property was sold. The High Court Judges were of opinion that it might be accepted that the Rs. 711-13-10 had been required for the marriage of Shanmuga's brother's daughter. From this conclusion their Lordships are not prepared to differ, and the sale would not have been invalid no matter what may have been the purpose to which the Defendant No. 1 applied that Rs. 711-13-10. The purchasers, Defendants Nos. 3 and 4, were not bound to see that the Defendant No. 1 applied it to any particular purpose.

The Subordinate Judge came to the conclusion that the Defendant No. 1's moiety of the one-third share was, at the time of the sale, worth Rs. 12,100, and consequently that the Defendant No. 1 had sold it for less than half its value. He came to that conclusion partly from the fact that the Defendants Nos. 3 and 4 had resold the lands which represented the moiety of that one-third share for some Rs. 11,500. The Defendant No. 3 had been in the employment of Shanmuga and afterwards in the employment of the Defendant No. 1, at and before the date of the sale, and neither of the Defendants Nos. 3 and 4 had apparently any capital; they obviously purchased the moiety of the one-third share as a speculation, and they sold it bit by bit to the cultivating *ryots*, among whom it is reasonable to conclude that there was great competition to acquire lands suitable for cultivation. The Defendant No. 3, from his having been in the employment of Shanmuga and afterwards in that of the Defendant No. 1, must have known all the *ryots* who would be competing for the purchase in small quantities of land suitable for cultivation. It is not reasonable to suggest that the Defendant No. 1 should have gone about

endeavouring to find persons who would purchase her moiety of the one-third share in small quantities; it was urgently necessary to satisfy the decree for sale which had been made. Although the Defendants Nos. 3 and 4 bought the moiety of the one-third share as a speculation, the sale was a genuine and not a sham sale.

The conclusion of the Subordinate Judge that Rs. 12,100 was the value of the moiety of the one-third share was no doubt, as the High Court pointed out, largely based on a valuation which was made in 1892 by a Revenue Inspector of the one-third share which had belonged to Shanmuga in his life-time. That valuation was made by the Revenue Inspector for the purpose of ascertaining the stamp duty payable on a deed which related to that one-third share. The valuation was not a valuation of a moiety of the one-third share, it was a valuation of the whole one-third share, which the Revenue Inspector valued at Rs. 24,200. As to that valuation the Subordinate Judge in his judgment said —

“I think that the valuation made by the Revenue Inspector in 1892 under Ex F [‘Copy of statement showing the estimated value of lands’] should be accepted as correct. According to this valuation the first Defendant's moiety was worth Rs. 12,100. This price would have been paid by a *bona fide* purchaser if the vendor—that is, the first Defendant—could confer on him an absolute title. A prudent man will not, perhaps, go in for a transaction of this kind, and a widow desiring to part with her husband's lands partly for paying her husband's debts and partly for her private purposes will not certainly get the best price for it.”

The “private purposes” to which the Subordinate Judge referred had reference to the balance of Rs. 711-13-10 of the sale price of Rs. 5,300. The Revenue Inspector in making that valuation was assisted

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by two local men, the village *munsif* and an assistant *karman*. The Revenue Inspector valued each field, wet and dry, and each tree separately, with a total result of Rs. 24,200. That Revenue Inspector was not called as a witness, and there is nothing to explain on what principle he valued, but the two local men who assisted him say that the valuation is correct. It appears, however, from their evidence that no one on behalf of the Defendant No. 1 was present when the valuation was being made, and that neither of the local men nor the Revenue Inspector asked the owners for any accounts showing income and expenditure for the purpose of valuing the lands. One of those local men, giving his evidence on the 12th April 1912, twenty years after the valuation was made, said in re-examination — "The land has become dear and there are many tenants competing. The Revenue Inspector verbally asked the *ryots* about the price of lands." The "price of lands." What price? The price which competing cultivating *ryots* would give for small portions of land adjoining or near to their holdings, or the price which the buyer of an area representing the one-third share of the Mouza would give? How would an ordinary *ryot* know anything about the price which a man would be likely to give for an area of land representing the one-third share of the Mouza?

Their Lordships agree with the learned Judges of the High Court that it would be easy to attach an exaggerated importance to that valuation as a piece of evidence in the case. As those learned Judges observe in their judgment, the price "at a private sale of a considerable extent of land purchased in lump would depend not so much on the valuation of its component parts, calculated on a regular scale, as on the need of the vendor for money and the

competition for lands in that locality at the time of the sale." It would be interesting to know what the Revenue Inspector would have said had he been a witness in this suit and been cross-examined as to his knowledge, if any, of the prices paid for similar areas of similar lands in that district.

At the time of the sale the Defendant No. 1 was living with her father at Idakal. At the hearing of this appeal their Lordships were informed that the father of the Defendant No. 1 was a village *munsif*. Whether he was a village *munsif* or not, there is nothing to suggest that he was not a respectable man who would give impartial advice to his daughter, and it is proved that he arranged the sale. It is fair to assume that he arranged the sale for the best price which was in his opinion obtainable. As the Judges of the High Court point out, "No obvious motive is apparent for the first Defendant to wish to benefit the third and fourth Defendants, who are not related in any way to her." They also observe: "The fact that the vendor in this case was a widow would tend rather to low values (prices) being obtained owing to the risk of litigation which intending purchasers might apprehend." They also refer to some other transactions relating to lands, from which it might be inferred that the price obtained by the Defendant No. 1 for the sale of the 22nd November 1897, was under the circumstances a reasonable price; and they say. "The increased values (prices) obtained in recent years on the shares of both the widows appear to be commensurate with the natural rise in prices that has obtained generally in recent years in this Presidency." In conclusion, the learned Judges of the High Court stated: "We are of opinion that the Plaintiff failed to prove that the price realised under

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Ex. A (the sale deed of the 22nd November 1897) was an improper price or that it indicated that the Defendants Nos. 3 and 4 were not bona fide purchasers."

The High Court by its decree dismissed the suit, and from that decree this appeal has been brought

At the hearing of this appeal it was, on behalf of the Plaintiff (Appellant), contended that Shanmuga was a wealthy man when he died and the Defendant No. 1 could have been under no necessity to sell the moiety of the one-third share, and that she, as his widow, should have paid the Rs. 4,588-2-2, out of the personal property which he left at his death and not by a sale of the immoveable property. As to that contention, the short answer is that there is no reliable evidence that at his death Shanmuga was a wealthy man or left personal property out of which his debts could have been paid; there are some vague statements of witnesses that he had been a wealthy man. He died on the 15th January 1892, and he had been borrowing money on a mortgage on the 25th May 1879, and further money on a hypothecation bond on the 6th November 1888, and he died leaving those debts unpaid, and it was to satisfy the debts secured by those mortgages that the Defendant No. 1 sold her moiety of the one-third share in the Mouza. In their Lordships' opinion there was necessity in law and in fact for the sale of the moiety of the one-third share. They are much impressed with the fact that it was on the advice of her father that the Defendant No. 1 accepted Rs. 5,300 as the price of her moiety of the one-third share, and with the fact that she had no apparent motive for benefiting, to her own loss, the Defendants Nos. 3 and 4 by selling to them her moiety of the one-third share at an under-value. It may be observed that the Plaintiff, who must

have known all about the sale in 1897, did not bring his suit to challenge the validity of that sale until the 13th December 1909. The Plaintiff's contention relating to the Rs. 711-13-10 was again put forward in this appeal; their Lordships need not repeat what they have already said on that subject

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs

Solicitor. *Mr. John Josselyn* for the Appellant.

Solicitor. *Mr. Douglas Grant* for the Respondent

G D M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

No. 165 of 1920

GREAVES, J.
1923,
9, January.

Re : DINARAM SOMANI
and ors., Insolvents,
BHIM BAHADUR SING
CHETRI and anr,
Applicants.

Presidency Towns Insolvency Act (III of 1909), secs. 36, 90 (1)—Examination of witnesses under sec. 36—Jurisdiction of High Court to summon witnesses residing outside Calcutta and more than 200 miles away—Civil Procedure Code (Act V of 1908), Or. 16, r. 19.

Under sec. 36 of the Presidency Towns Insolvency Act, the Registrar in Insolvency ordered two persons to attend before him for their examination. On their application to set aside that order on the ground that the order should not have been made as they resided more than 200 miles from Calcutta:

Held—That the High Court has power under sec. 36 to summon before it persons who reside at a greater distance than 200 miles. Proper travelling and other expenses should, however, be paid and so far as possible the convenience of persons required to attend should be considered.

Re : DINARAM SOMANI.

This was an application to set aside an order, dated the 18th August 1922, by the Registrar in Insolvency, under sec. 36 of the Insolvency Act, for the examination of the above-named applicants made on the application of Sadiram Chandanmall, a creditor of Insolvency.

In certain Insolvency proceedings the Registrar in Insolvency ordered the applicants to attend before him to be examined regarding the insolvents, their dealings and properties and to produce some books of account and a mortgage executed by the insolvents in their favour. The applicants applied to the Court for exemption from attendance on two grounds: that the order should not have been made as the applicants reside more than 200 miles from Calcutta and that they were not paid travelling and boarding charges.

Mr. S N Banerjee, Counsel appeared for the Applicants.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an application by two persons to set aside an order for their examination under sec 36 of the Presidency Towns Insolvency Act made on the 18th August 1922. By the said order, which was made at the instance of a creditor who had proved his debt and in the presence of the Official Assignee, the applicants were ordered to attend before the Registrar in Insolvency on the 14th September 1922 to be examined regarding the insolvents, their dealings and properties and they were required to produce their books of account for the year 1920 and a mortgage executed by the insolvents in their favour on the 4th December 1920. The applicants in fact attended before the Registrar in pursuance of the order on the 14th September 1922, when the matter was adjourned until the 30th

November. The applicants thereupon returned to Darjeeling where they reside, and came down again to Calcutta on the 20th November, one of them was attacked by fever on the 23rd November and they both returned to Darjeeling on the 26th of that month. The application is based on two grounds, (1) that the order should not have been made as the applicants reside more than 200 miles from Calcutta, (2) on the ground that they were not paid travelling and boarding charges. The second ground has not been pressed. So far as the first ground is concerned the applicants rely on sec 90 (1) of the Insolvency Act and on Or. 16, r. 19 of the Code of Civil Procedure.

Sec 90 (1) provides that in proceedings under the Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its Ordinary Original Civil Jurisdiction with the proviso that nothing in the sub-section is in any way to limit the jurisdiction conferred on the Court under the Act. Or. 16, r 19 exempts a witness from personal attendance unless he resides within the local limits of the Court's Original Jurisdiction or within 200 miles with the limitation therein provided.

Sec. 36 (1) of the Insolvency Act provides that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order for adjudication has been made, summon before it the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property.

A perusal of the sub-section makes it clear that the person to be summoned

Re : DINARAM SOMANI.

does not, at any rate in all cases, fall within the category of an ordinary witness to whom the provisions of Or. 16 relate. It deals rather with the discovery and recovery of property than with the ordinary testimony which a witness can give, and the proviso to sec. 90 (1) of the Insolvency Act makes it clear that it was not intended to fetter the Court in the exercise of its jurisdiction under sec. 36 by any limitation imposed by the Code of Civil Procedure.

I think the contention of the applicants is not well founded and that the Court has power under sec. 36 to summon before it persons who reside at a greater distance than 200 miles. I need hardly add that proper travelling and other expenses should be tendered and that so far as possible the convenience of persons required to attend should be considered.

As the application fails the applicants must pay the costs.

Messrs. Manuel Agarwalla & Co.,
Solicitors for the Applicants.

Mr. S. K. Dutt, Solicitor (of *Messrs. K. K. Dutt & Co.*) for the Creditor.

J. N. R. *Application rejected.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 1655 AND 1747 OF 1920.

MOOKERJEE, J.	RAJA SATIPRASAD
CHOTZNER, J.	GARGA and anr.,
1922,	Plaintiffs, Appellants,
Heard, 12 and	v.
13, June.	KALIPADA DAS and
Judgment,	anr., Defendants,
7, August.	Respondents.

Rent suit—Joint Mitakshara family—Suit for rent by managing member, without making infant co-parcener party, if maintainable—Party—Bengal Tenancy Act (VIII of 1885), sec. 188, not applicable to rent suit—Civil Procedure Code (Act V of 1908), Or. 1, rr. 1 and 8.

Where the Plaintiffs, who were two brothers governed by the Mitakshara School of Hindu law, instituted a rent suit without joining their infant sons as parties thereto:

Held—That the Plaintiffs as managing members were competent to maintain the suit for the entire rent.

A suit for rent instituted by the managing members of a joint Mitakshara family will not necessarily fail, merely because the infant co-parceners have not been placed on the record as joint Plaintiffs or pro forma Defendants.

Sec. 188 of the Bengal Tenancy Act has no application to the institution of a suit for rent, but the matter is to be determined with reference to the general principles of legal procedure.

The principles underlying the recognition of the representative character of the manager of a joint Mitakshara family discussed and case-law reviewed.

This was an appeal preferred on the 5th July 1920 from a decision of K. K. Sen, Esq., Additional District Judge, Midnapur, dated the 19th March 1920, modifying that of Babu Baroda Prasad Roy, Subordinate Judge, Midnapur, dated the 22nd December 1917.

The facts of the case are as follows:—

The Plaintiffs, who are two brothers governed by the Mitakshara law, sued the Defendant for arrears of rent. The suit was laid at a claim for Rs. 2,526 and odd for arrears of rent, cesses and damages for 2 annas 5 gds. *kist* of 1322 and for 1323 in respect of a tenure of 731 bighas and 3 kattas of land at an annual rental of Rs. 1,694-14 as. held by the Defendant under the Plaintiffs in Jalpai Mahal Taluk Touzi No. 2639 of the Midnapur Collectorate. The Plaintiffs own twelve and a half annas share in the zamindari

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and are *putnidars* under the proprietors of the remaining three and a half annas share, and consequently the Plaintiffs are the immediate landlords of the Defendant. The suit was instituted on the 12th December 1916 in the Court of the Subordinate Judge of Midnapur. Previous to the institution of the suit, a son was born to the Plaintiff No. 1 on the 16th November 1916, and after the institution of the suit a son was born to the Plaintiff No. 2 on the 15th April 1917.

The defence, *inter alia*, was that he did not hold one tenure as alleged, but held two tenures, one of 722 bighas and 3 kattas of land and another of 9 bighas of land. On the 28th February 1917 the Defendant filed an additional written statement contending that the suit could not proceed inasmuch as the minor son of the Plaintiff No. 1, born on the 16th November 1916, had not been joined as a co-Plaintiff. On the 20th December 1917 he filed a supplementary written statement objecting that the suit could not proceed as the minor son of the Plaintiff No. 2, born on the 15th April 1917, had not been joined as a co-Plaintiff. The Defendant further contended that the names of the minor sons not having been registered under the Land Registration Act, the suit was not maintainable by the Plaintiffs.

The learned Subordinate Judge of Midnapur who tried the suit held that the Plaintiffs were competent to maintain the suit without joining their minor sons as co-Plaintiffs, and decreed the suit. He, however, found that the Defendant held two tenures as alleged by him and not one, and as to the question of damages held as follows:—"As the suit cannot be taken as a rent suit because two tenures taken as one are subject-matters in the suit, I find that the Plaintiffs cannot be allowed damages under the Bengal Tenancy Act.

I shall allow interest at 12 per cent. per annum over the arrears due from the dates of default. . . . It is therefore ordered that the suit be decreed in part for Rs. 2,248-9-3 with costs in proportion."

In regard to the issue as to whether the Plaintiffs only could maintain the suit without joining their minor sons as co-Plaintiffs, the learned Subordinate Judge held as follows:—

"I therefore hold that the family of the Plaintiffs that is admittedly governed by the Mitakshara School of Hindu law had three members instead of two at the time the suit was instituted. There can be no doubt that the Plaintiff No. 1's son became jointly interested in everything belonging to the Plaintiffs with his birth and I am unable to agree with the learned pleader for the Plaintiff in his contention that the Plaintiff No. 1's son is not a necessary party to this suit because when the cause of action for this suit arose he was not in existence. Under Or. 22, r 10 the son of the Plaintiff No. 2 might be made a co-Plaintiff with the Plaintiffs as being jointly interested in the arrears of rent with his birth. . . . According to the Mitakshara law the sons of the Plaintiffs appear to me to be jointly interested with their fathers in the property and the unrealised arrears of rent that fell due before their birth. But I think that the learned pleader for the Plaintiffs is right in contending that according to the circumstances of the present case the Plaintiffs may be taken as acting as managers on behalf of themselves and their minor sons, and that the suit should not be thrown out because the infants have not been brought on the record as co-Plaintiffs. I follow the principle laid down in the case of *Krishna Jivan Tewari v. Bishnath* (39) and the rulings quoted therein. This

(39) 1. L. R. 34 ALL 615 (1912).

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issue is also decided in Plaintiffs' favour and the suit is found to be maintainable at the instance of the Plaintiffs only."

On appeal by the Defendant, the learned Additional District Judge held that the Plaintiffs could not maintain the suit for the entire rent in the absence of their sons, but he decreed the claim in respect of twelve and a half annas share, inasmuch as the Plaintiffs had been registered under the Land Registration Act as proprietors in respect of that share. Both the Plaintiffs and the Defendant preferred second appeals (Nos. 1747 of 1920 and 1655 of 1920 respectively) against the decision of the learned Additional District Judge.

The following portion of the judgment of the learned Additional District Judge will be found material to this report:—

"Directly the son of the first Plaintiff was born, he was interested in every property including rents due to the family and this suit should have been brought by the two Plaintiffs and this son, and when a son was born to the second Plaintiff during the pendency of the suit, this son should have been joined as a co-Plaintiff under Or. 22, r. 10, C. P. C. This has not been done." The learned Judge, however, thought that the two Plaintiffs should be considered to have brought the action as managers on behalf of themselves and their sons as Plaintiffs. In this view I am unable to agree. They did not describe themselves as such in the plaint and there is nothing to shew that they sued on behalf of the sons also. The case of *Krishna v. Bishnath* (29) relied on by the learned Judge has not, to my mind, any application to the present suit. The case of *Harhar Pershad v. Mathura Lal* (37) appears to be clearly in point. There it was held that even the manager

of a Mitakshara family could not sue for rents without joining the other members as parties. I hold that the Plaintiffs were not entitled to a decree for the entire rents and could not maintain the suit in the absence of the first Plaintiff's son at least.

"The learned pleader for the Respondents have tried to support the decree of the lower Court on the ground that the two Plaintiffs were the registered proprietors and under sec. 60 of the Bengal Tenancy Act, they could recover the entire rent. It appears, however, that the two Plaintiffs have claimed for rents partly as proprietors and partly as *putnidars*. The D Register shews that they are registered in respect of twelve and a half annas share of the estate. They are thus entitled to a decree for rent in respect of this share. The claim in respect of the rest (three and a half annas share) which is for a *putni* must be disallowed since there is nothing to shew what is the extent of the interest of the two Plaintiffs and what of their son therein. The appeal is allowed. The decree of the lower Court is modified to the extent as directed above."

Dr. Dwarkanath Mitter (with him *Babu Probodh Chandra Chatterji*) for the Appellants in S. A. 1747 of 1920, and for the Respondents in S. A. No. 1655 of 1920.

S. A. No. 1747 of 1920.—The suit was for arrears of rent due to the Mahasada Raj. Two infant sons born to the Plaintiffs were not joined as parties to the suit. The question is whether the father in a joint Mitakshara family is competent to maintain the suit for rent on behalf of his infant son. I submit the suit is maintainable. The act is beneficial to the infant and the decree is binding on him. The manager of a joint Hindu family so effectively represents all other members of the

(37) 8 C. L. J. 256 (1906).

(39) 1 L. R. 34 All. 616 (1912).

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family that the family as a whole is bound by his act.

Refers to *Jogendra Deb v. Fanindra Deb* (4) and *Kishen Prasad v. Harnarain* (5), where the suits were carried on in the name of the managing member alone.

A suit for arrears of rent is outside the scope of sec. 188 of the Bengal Tenancy Act. *Pramada Nath Roy v. Ramani Kanta Ray* (1).

The cases of *Sati Prasad v. Radhanath* (2) and *Satiprasad v. Sanatan* (3) are distinguishable as there was a statutory bar under sec. 188, Bengal Tenancy Act.

Refers to *Krishna v. Bishnath* (39).

The rent accrued due before the sons were born and so the suit would lie at the instance of the Plaintiffs.

At any rate, the Plaintiffs ought to be allowed to amend the plaint and add the infant sons as co-Plaintiffs.

S. A. No. 1655 of 1920.—The Plaintiffs are registered proprietors and under sec. 60 of the Bengal Tenancy Act, they are entitled to recover the entire rent. Refers to *Nilmadhub Patra v. Ishan Chandra Saha* (53) and *Bhupendra Narain Dutt v. Manmotho Nath Mitter* (54).

Babu Mahendra Nath Roy (with him *Babu Gopendra Nath Das*) for the Respondents in S. A. No. 1747 of 1920, and for the Appellants in S. A. No. 1655 of 1920.

S. A. No. 1747 of 1920.—I submit that in a suit for rent all the members of a

Hindu Mitakshara family must join as Plaintiffs. The infant sons not having been joined as co-Plaintiffs, the present suit is not maintainable and must fail. It is not a question of evading payment of rent. The real question is whether the present suit is at all maintainable.

Refers to *Mir Tapura Hossein v. Gopinarayan* (35), *Harihar Prasad v. Mathura Lal* (37), *Sati Prasad v. Radhanath* (2) and *Nepal Chandra Ghose v. Mahendra Nath Roy Chowdhry* (55), S. C. Sen's Bengal Tenancy Act (4th Edn.) at p. 608, where the point is discussed.

The case of *Bhola Ray v. Jung Bahadur* (34) is distinguishable.

In the plaint, the Plaintiffs are not described as managers. Plaintiffs ought not to be allowed to amend the plaint because they persisted in not joining the infant sons even after the objection had been taken in the written statement. No amendment ought to be allowed at this stage; the claim is now barred by limitation.

The argument that rent accrued due before the birth of the sons has no substance, because the moment the sons were born they acquired an interest in the estate including the arrears.

S. A. No. 1655 of 1920.—Refers to sec. 60 of the Bengal Tenancy Act and sec. 78 of the Land Registration Act. The word "rent" in sec. 60, Bengal Tenancy Act refers to the whole rent and the suit must be instituted by all persons entitled to the whole rent. The suit as found by the first Court and not displaced by the lower Appellate Court is in respect of two tenures. So the decree not having the effect of a

(1) L. R. 35 I. A. 78; s. c. I. L. R. 35 Cal. 331; 12 C. W. N. 249; 7 C. L. J. 139 (1907).

(2) 16 C. L. J. 427 (1914).

(3) 25 C. W. N. 38 (1920).

(4) 14 M. I. A. 367 (376); 17 W. R. 104 (1907).

(5) L. R. 38 I. A. 45; s. c. I. L. R. 38 All. 273; 15 C. W. N. 331 (1911).

(39) I. L. R. 34 All. 615 (1912).

(53) I. L. R. 25 Cal. 787 (1908).

(54) 41 Ind. Cas. 859.

(2) 16 C. L. J. 427 (1914).

(34) 19 C. L. J. 5 (1913).

(35) 7 C. L. J. 251 (260, 1907).

(37) 8 C. L. J. 256 (1909).

(55) I. L. R. 31 Cal. 707 (1908).

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rent decree, sec. 60 of the Bengal Tenancy Act has no application. The Plaintiffs' claim is liable to be dismissed in its entirety.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J —These two appeals are directed against the decree in a suit for arrears of rent. The Defendant holds a tenure in the zamindari mahal Tamruk situated in the District of Midnapur. The Plaintiffs, who are two brothers governed by the Mitakshara law, own twelve and a half annas share in the zamindari and are *putnidars* under the proprietors of the remaining three and a half annas share. The Plaintiffs are consequently the immediate landlords of the Defendant as a tenure-holder, and as such they instituted the present suit on the 12th December 1916, for recovery of arrears of rent due from him. On the 12th February 1917, the Defendant filed a written statement, setting forth various objections to the claim. On the 28th February 1917, he filed an additional written statement, contending that the suit could not proceed, inasmuch as the minor son of the first Plaintiff, born on the 16th November 1916, had not been joined as a co-Plaintiff. On the 20th December 1917, he filed a supplementary written statement, objecting that the suit could not proceed as the minor son of the second Plaintiff, born on the 15th April 1917, had not been joined as a co-Plaintiff. The trial Court held that the Plaintiffs were competent to maintain the suit without joining their minor sons as co-Plaintiffs, and, after dealing with the objections on the merits, decreed the claim in part. Upon appeal, the District Judge held that the Plaintiffs could not maintain the suit for the entire rent in the absence of their sons, but he decreed the

claim in respect of 12 and a half annas share, inasmuch as the Plaintiffs had been registered under the Land Registration Act as proprietors in respect of that share. Both the parties were dissatisfied with this decree. The Plaintiffs have appealed (No. 1747 of 1920) on the ground that they were competent to maintain the claim for the entire rent as managers of a joint Mitakshara family, even though their minor sons were not brought on the record. The Defendant has appealed (No. 1655 of 1920) on the ground that sec. 60 of the Bengal Tenancy Act had been misconstrued and misapplied by the District Judge and the claim should have been dismissed in its entirety. We shall consider first the appeal preferred by the Plaintiffs.

It may be observed at the outset that the Plaintiffs, who are members of a joint Mitakshara family, are joint landlords within the meaning of the sec. 188 of the Bengal Tenancy Act, which provides that where two or more persons are joint landlords, anything which the landlord is, under the Act, required or authorised to do, must be done, either by both or all those persons acting together, or by an agent authorised to act on behalf of both or all of them. This provision has no application to the institution of a suit for arrears of rent, which is not something that the landlord is required or authorised to do by the Bengal Tenancy Act; see *Pramada Nath Ray v. Ramani Kanta Ray* (1). This renders inapplicable the decisions in *Sati Prasad v. Radhanath* (2) and *Satiprasad v. Sanatan* (3) where, in cases instituted by the present Plaintiffs, it was

(1) L. R. 35 I. A. 73; s. c. I, L. R. 35 Cal. 331; 12 C. W. N. 249; 7 C. L. J. 139 (1907).

(2) 16 C. L. J. 457 (1914).

(3) 25 C. W. N. 88 (1920).

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ruled that sec. 188 governed a suit for alteration of rent on alteration of area under sec. 52 and a proceeding for settlement of fair and equitable rent under sec. 105. The case before us, which is not subject to the operation of sec. 188, must consequently be determined with reference to what Sir Arthur Wilson called, "the general principles of legal procedure," in *Pramada v. Ramani* (1).

The proposition that in suits relating to transactions affecting a joint Hindu family all the members thereof need not always be joined was fore-shadowed by Sir James Colville in *Jogendra Deb v. Panindra Deb* (4), when he observed that cases sometimes occur "wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit, which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." This assumes that in respect of the subject-matter of the litigation, the members of the family had no conflicting interests *inter se*. This principle has been reiterated by the Judicial Committee in two recent decisions. In *Kishen Prasad v. Harnarain* (5), where the Judicial Committee reversed the decision of the Allahabad High Court in *Shamrathi Singh v. Kishan Pershad* (6), Lord Robson observed as follows:—

"The Indian decisions as to the powers of the managing members of an undivided

Hindu joint family are somewhat conflicting. It is, however, clear that where a business like money-lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on at all."

Again, in *Sheo Sankar v. Jaddo Kumar* (7) where the Judicial Committee affirmed the decision of the Allahabad High Court, in *Jaddo v. Sheo Sankar* (8) Lord Moulton observed as follows:—

"There seems to be no doubt upon the Indian decisions, from which their Lordships see no reason to dissent, that there are occasions, including foreclosure suits, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interest of the family itself."

These pronouncements by the Judicial Committee weaken the effect of the decisions in *Bal Kissen v. Topeswar* (9), *Lala Suraj Prasad v. Golab Chand* (10), *Debi-prasad v. Dharamjit* (11) and *Biswanath Pershad v. Jugdip Narain* (12) which had

(1) L. R. 35 I. A. 73; s. c. I. L. R. 35 Cal. 331; 12 C. W. N. 249; 7 C. L. J. 139 (1907).

(4) 14 M. I. A. 367 (376); 17 W. R. 104 (1867).

(5) L. R. 38 I. A. 45; s. c. I. L. R. 33 All. 272; 15 C. W. N. 321 (1911).

(6) I. L. R. 29 All. 311 (1907).

(7) L. R. 41 I. A. 216; s. c. I. L. R. 36 All. 363; 18 C. W. N. 968 (1914).

(8) I. L. R. 33 All. 71 (1910).

(9) 17 C. W. N. 219; s. c. 15 C. L. J. 446 (1911).

(10) I. L. R. 28 Cal. 517 (1901).

(11) I. L. R. 41 Cal. 727 (1914).

(12) I. L. R. 40 Cal. 342; s. c. 17 C. W. N. 1025 (1912).

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already been doubted by the Full Bench in *Brijnandan v. Bidya Prasad* (13), namely, that all the co-parceners are necessary parties to a suit on a mortgage of joint family property, so that if a decree is passed in such a suit without their being joined as parties the decree is not binding on them, and they are entitled to sue for declaration that their interests are not bound thereby. The opinion expressed by the Judicial Committee, namely, that where a suit is brought on a mortgage by or against a manager of a joint Hindu family in his representative capacity, the other members of the family are not necessary parties to the suit, which will consequently not fail by reason of their non-joinder, harmonises with the rule enforced in Allahabad in *Horilal v. Munman* (14), *Madanlal v. Kissen Singh* (15), in Madras in *Sheikh Ibrahim Tharagan v. Rama Aiyar* (16) and in Patna in *Abdul v. Sibalal* (17), *Bajr Nath v. Dalip* (18), *Muhammad Sadik v. Khedan Lal* (19), *Girwar v. Mahbunnessa* (20) and *Raghunandan v. Parmeswar* (21). In Bombay a similar result has been reached by a circuitous process, for although it has been held that all the co-parceners are necessary parties to a suit brought on a mortgage by or against the manager, the decree in a suit, not so constituted against all the members, but brought against the manager alone in his representative character, when executed, passes the interest of the other co-parceners also in the property, though the sale may be avoided

by them on the ground that they were not liable for the debt contracted by the manager; see *Ram Chandra Narain v. Shripatrao Dharamjit* (22), *Laxman Nilkant v. Vinayak Keshav* (23), *Chinnana v. Sada* (24), *Ram Krishna v. Vinayak Narain* (25) and *Madhu Sudan v. Bhau Atmaram* (26). The true position is tersely put by Benson and Sundara Iyer, JJ., in *Sheikh Ibrahim Tharagan v. Rama Aiyar* (16).

"The ordinary rule no doubt is that all persons in whom the right to any relief exists should be joined as Plaintiffs. But this rule is not of universal application. The language of sec. 26 of the Civil Procedure Code, 1882, corresponding to Or. 1, r. 1, of the present Code, is 'that all persons may be joined in one suit as Plaintiffs in whom the right to any relief

is alleged to exist, whether jointly, severally, or in the alternative . . .' Sec. 30 of the Code of 1882, corresponding to Or. 1, r. 8, lays down the general rule of procedure where one or more persons wish to sue on behalf of or for the benefit of themselves and other persons having the same interest in a suit. But it cannot, in our opinion, be laid down that in no case has a person a right to sue on behalf of himself and others, where the procedure laid down in sec. 30 is either not applicable or has not been taken advantage of. There are several statutory exceptions to the rule, and there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties. The judgment of the Judicial Committee in *Kishen Pra-*

(13) I. L. R. 42 Cal 1068 (F. B.) (1915).

(14) I. L. R. 34 All. 549 (F. B.) (1912).

(15) I. L. R. 34 All. 572 (1912).

(16) I. L. R. 35 Mad. 685 (1911).

(17) 2 P. L. T. 572

(18) [1920] Pat. 261; 1 P. L. T. 582.

(19) 1 P. L. J. 154; 2 P. L. W. 265 (1916).

(20) 1 P. L. J. 468 (1916).

(21) 2 P. L. J. 206 (1917)

(16) I. L. R. 35 Mad. 685 at p. 691 (1911).

(22) I. L. R. 40 Bom. 248 (1915).

(23) I. L. R. 40 Bom. 329 (1915).

(24) 12 Bom. L. R. 811 (1910).

(25) I. L. R. 34 Bom. 354 (1910).

(26) 15 Bom. L. R. 96 (1912).

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sad v. Harnarain (5), already referred to, shows that the case of the manager of a Hindu family is such an exception."

This view does not militate against the decisions of the Judicial Committee in *Balwant Singh v. Rockwell Claney* (27) and *Ganesha Row v. Tulja Ram Row* (28). In the first case, Sri John Edge held that a mortgage by the elder of two brothers was void as against the minor younger brother, even though the mortgage was for discharging the father's debts, inasmuch as the elder brother did not profess to represent the younger brother in the transaction, and acted on his assumed position as absolute owner. In the second case, Mr. Ameer Ali held that where a minor co-parcener has in fact been joined as a party to a litigation, represented by the manager as his guardian *ad litem*, leave of the Court in accordance with the statutory procedure is essential to the validity of a compromise by the manager on behalf of the minor, see *Upendia Nath v. Shib kuman* (29). On the other hand, the Judicial Committee held in *Gulab Singh v. Raja Seth Gokuldas* (30), that a manager would be acting within his powers and authority, if, in order to save the heavily encumbered joint family estate, he placed the same under the charge of the Court of Wards. It is, we think, fairly obvious that even if we assume, contrary to the opinion expressed in *Daya Shan-lar v. Hub Lal* (31), that the manager of a joint family cannot, as a universal rule,

be deemed entitled to sue or liable to be sued on behalf of the family, *Padmakar Vinayak Joshi v. Madhab Joshi* (32) and *Kashinath v. Chimnaji* (33), the tendency of modern decisions, specially those of the Judicial Committee, is in favour of recognition of the representative character of the manager, though, no doubt, the question must be decided in each individual case or special class of cases, subject to the operation of relevant statutory provisions, if any, such as the one embodied in sec. 188 of the Bengal Tenancy Act. An instructive example is afforded by the decision in *Bhola Ray v. Jung Bahadur* (34), where it was ruled that the Plaintiff, who alone had always collected rent as the head of the joint Mitakshara family, was himself competent to maintain the suit, even though he had an infant nephew. The addition of the infant as co-Plaintiff raised, in that case, a question of limitation, it was ruled, that this did not affect the right of the original Plaintiff to continue the suit and to recover the amount due. A stricter view had been previously adopted in *Mu. Tapura Hossein v. Gopinarayana* (35), where it was ruled that when rent is due to the members of a joint Hindu family, it is not open to the manager alone to maintain a suit for rent without joining the other members, either as Plaintiffs or as Defendants, except when the tenant has dealt with such managing member as sole landlord. In support of this view, reliance was placed, amongst other decisions, on *Shamrathi v. Kishan Pershad* (6), which as we have seen, has been overruled by the Judicial Committee on appeal; *Kishen Prasad v. Harnarain*

(5) L. R. 38 I. A. 45; s. c. I. L. R. 33 All. 272; 15 C. W. N. 921 (1911).

(27) L. R. 79 I. A. 10; s. c. I. L. R. 34 All. 296; 16 C. W. N. 177 (1912).

(28) L. R. 40 I. A. 132; s. c. I. L. R. 36 Mad. 295; 17 C. W. N. 765 (1913).

(29) 23 C. W. N. 634 (1913).

(30) L. R. 40 I. A. 117; s. c. I. L. R. 40 Cal. 784; 17 C. W. N. 918 (1913).

(31) I. L. R. 37 All. 105 (1914).

(6) I. L. R. 29 All. 311 (1907).

(32) I. L. R. 10 Bom. 21 (1885).

(33) I. L. R. 30 Bom. 477 (1906).

(34) 19 C. L. J. 5 (1913).

(35) 7 C. L. J. 251 (260) (1917).

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(5). See also *Muhammad v. Khedan* (19) and *Romesh Chunder v. Bhuyan Bhaskar* (36). The decision in *Harihar Pershad v. Mathura Lal* (37), also harmonises with the less stringent view, though in that case, as in *Bhola Ray v. Jung Bahadur* (34), the minor member had been placed on the record represented by the adult managing member as guardian *ad litem*. That, however, is, in most cases really a matter of form, though it has the appearance of substance. As explained in *Sham Kuar v. Mahananda* (38), a guardian cannot be appointed under the Guardians and Wards Act, 1890, in respect of the property of a minor who is a member of a joint Hindu family governed by the Mitakshara law and possessed of no separate estate. In such an event, if the minor is added as a party to the suit, the manager would represent himself and his minor co-parcener as his guardian *ad litem*. But precisely the same result is reached, if the manager be deemed to have instituted the suit or to have defended the claim in his representative character; and as pointed out in *Krishna Jiva Tewari v. Bishnath Kakkar* (39), where all the adult members of a joint Hindu family appear on the record as Plaintiffs or Defendants, it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit; *Horilal v. Munman* (14), *Nathu*

Lal v. Lala (39a) and *Sheo Dulari v. Brij Bhukan* (40).

It is well-established that the manager of a joint Hindu family has power to acknowledge a debt and pay interests thereon so as to bind all the members including minors; *Saroda Prashad v. Durgaram* (41) and *Chidambaran v. Ramaswami* (42); and he may give a discharge under sec. 7 of the Indian Limitation Act. *Banwari Lal v. Daya Shankar* (43). It is competent to him to agree to a reference to arbitration on behalf of himself and his minor co-parceners; *Harendra v. Salimullah* (44) and *Uppara v. Gaddam* (45). He is equally competent to enter into a compromise, beneficial to his minor co-parceners, with a view to put an end to a threatened litigation; *Bai Rewa v. Jetthabhai* (46). A decree obtained against him in a suit, to which the other members are not parties, may be operative against the latter under certain circumstances, provided the matter was one in which the manager sued was entitled to represent the whole family; *Amrita Sundari v. Serajuddin* (47), *Balki v. Brojobashi* (48) and *Jijamba v. Sagniram* (49). It is equally well-settled that in a joint Hindu family all the members need not join in granting leases; the manager can grant leases and sue for rents on behalf of the family, *Ayyappa v. Venkata* (50) and *Parthasarathi v. Ranga-*

(5) L. R. 38 I. A. 45; s. c. I. L. R. 33 All. 273; 15 C. W. N. 321 (1911).

(14) I. L. R. 34 All. 549 (F. B.) (1912).

(19) 1 P. L. J. 154; 2 P. L. W. 385 (1916).

(34) 19 C. L. J. 5 (1913).

(36) 1 Pat. L. W. 846 (1916).

(37) 8 C. L. J. 256 (1908).

(38) I. L. R. 19 Cal. 301 (1891).

(39) I. L. R. 34 All. 615 (1912).

(39a) 9 All. L. J. 410 (1912).

(40) 1 O. L. J. 456 (1914).

(41) I. L. R. 37 Cal. 481 (1910).

(42) 27 Mad. L. J. 631.

(43) 13 C. W. N. 815 (1909).

(44) 12 C. L. J. 386 (1910).

(45) [1919] Mad. W. N. 425; 9 Mad. L. W. 314.

(46) 11 Bom. L. R. 1064 (1909).

(47) 19 C. W. N. 665 (1914).

(48) 16 C. W. N. 1013 (1912).

(49) 22 Mad. L. J. 45.

(50) I. L. R. 15 Mad. 484 (1892).

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swami (51); he can also recognise the transferee of a non-transferable holding, *Golapdi Meah v. Purna* (52).

In these circumstances, we are not prepared to hold that a suit for rent instituted by the managing members of a joint Mitakshara family must of necessity fail, merely because the infant coparceners have not been placed on the record as joint Plaintiffs or *pro forma* Defendants. In the case before us, there is manifestly no substance in the objection taken piece-meal by the Defendant. He held the tenure under the Plaintiffs and had always paid rent to them; and it cannot be maintained with any show of reason that he would have secured immunity from a possible claim by the infants if they had been brought on the record and represented by their respective father as guardian *ad litem*.

The result is that the appeal by the Plaintiffs is allowed, the decree of the District Judge set aside and the decree of the Subordinate Judge restored with costs here and in the lower Appellate Court. The appeal by the Defendant must as a corollary stand dismissed with costs.

II C. S.

Suit decreed.

Appeal No. 1747 allowed;

Appeal No. 1655 dismissed.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1645 OF 1920.

WALMSLEY, J. JITENDRA NATH ROY,
B. B. GHOSH, J. Defendant, Appellant,
1922, v.

Held, 19 and ASHUTOSH GOSWAMI
20, July. and ors.,

Judgment, 20, July. Respondents.

*Abatement of rent—Ouster by title paramount—
Diara proceeding.*

(51) [1916] 4 Mad. L. W. 654.

(52) 21 C. W. N. 774 (1917).

Where a portion of the lands comprised in a tenure was wrongly resumed by the Government in a diara proceeding and formed into a separate estate, and the Government settled it with the tenure-holder and realised rent from him in respect of the same, and the landlord did not object to the resumption proceedings and accepted malikana.

Held, in a suit for rent of the tenure by the landlord against the tenure-holder, that the act of the Government was an ouster of the Defendant from a portion of his tenancy under the Plaintiff by a title paramount, and such title having been admitted by the landlord, the tenant was entitled to an abatement of rent in respect of the tenure to the extent of the amount payable by him to the Government.

This was an appeal preferred on the 24th June 1920, against the decree of Mr. Iradutullah, Additional District Judge of Zillah Fardpur, dated the 27th of March 1920, modifying the decree of Babu Nalini Kanta Bose, Officiating Subordinate Judge, 1st Court of that District, dated the 5th of May 1919.

The facts of the case, material to this report are as follows:—

The Plaintiffs in zemindari and *putni* right sued the Defendant for recovery of arrears of rent due from 1320 to Aswin Kist of 1323 B. S. in respect of a *kaimi jama* at an annual rent of Rs. 583-10-2½ p., with cesses and damages, total claim being laid at Rs. 2,776-8-10½ p. The defence, *inter alia*, was that 30'65 acres of land of Moujas Barankula and Gangnandapur comprised in the Defendant's tenancy under the Plaintiffs were wrongly resumed in 1912 by the Government in a *diara* proceeding, and the Government caused a new separate taluq to be recorded in the name of the Plaintiffs and a new *garmakurari jote* from the year 1912 to 1923

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to be recorded at an annual rent of Rs. 80 in the name of the Defendant, and since then the Government had been realising the said rent from the Defendant by issuing certificates under the Public Demands Recovery Act, and the Defendant being obliged to pay the said rent had been paying the same under protest, and that in the circumstances there ought to be suspension of rent until the *diara* proceedings were set aside by the Plaintiffs, and that the Plaintiffs must apply for apportionment even if it be found that the *diara* proceedings were legal, and that in any view of the case the Defendant was entitled to a deduction of rent.

The learned Subordinate Judge of Faridpur who tried the suit allowed the Defendant abatement of rent to the extent of Rs. 80 for which the Defendant had been made liable to the Government, and so gave a decree to the Plaintiffs for Rs. 1,932 and odd.

The following extracts from the judgment of the learned Subordinate Judge will be found material —

“I have found that the lands resumed by Government in *diara* proceedings are re formations *in situ* and not accretions to Defendant's *jote*. It has been contended on Defendant's side that the Plaintiffs gave their consent to the resumption proceedings and actually procured the assessment of these lands with the ulterior motive of getting *malikana* from the Government as the Plaintiffs had otherwise no chance of getting additional rent for the lands from any body. Ex. G4 copy of the *diara* proceedings will go to shew that the Plaintiffs did not object to *diara* presumption proceedings. It is not clear from the proceedings that the Plaintiffs gave their actual consent to these resumptions. . . . It, however, appears that notices were served upon the proprietors

(Plaintiffs). The Plaintiffs did not raise any objection to resumption proceedings although notices were served upon them. Government proposed to grant settlement of the *diara* lands to the Plaintiffs. They did not appear to take settlement and so Government kept them under *khas* management and allowed *malikana* to Plaintiffs. . . . There is nothing to shew that the Government started the resumption proceedings at the instance of the Plaintiffs. Plaintiffs no doubt could object to the resumption proceedings at the time, but they did not object and as a result thereof are getting *malikana* from the Government. A separate taluq has been created by the Government regarding these *diara* lands and there is evidence to shew that the Government is realising Rs. 80 per annum as rent from the Defendant. Defendant is now deprived of his right to enjoy the *diara* lands as part and parcel of his original *kaimi jote*. These *diara* lands have been carved out of Defendant's *jote*. The Defendant paid the dues under protest to Government when certificate was executed under the Public Demands Recovery Act. It has been argued that Defendant could take steps for setting aside *diara*. There is no doubt that he was entitled to institute a suit for setting it aside. But it will be seen that Plaintiffs as proprietors ought to have objected to *diara* proceedings and that the Plaintiffs have been benefited by the *diara* resumption for the present to a certain extent while the Defendant has suffered loss to the extent of Rs. 80 per annum. Here the eviction was by a superior landlord. Considering all the circumstances of the case and the evidence I am convinced that no case for suspension of rent has been made out. But I think it will be equitable under the

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circumstances to allow the Defendant the abatement of rent to the extent of Rs. 80 per annum and of cesses to the extent of Rs. 2 as, 8 per annum as the Defendant has been made liable for such amount to Government. The circumstances disclosed in this case do not call for an apportionment of rent on any other principle. Accordingly ordered that the suit be decreed for Rs. 1,932-7 as. 10 $\frac{3}{4}$ p. with damages at 25 per cent. with proportionate costs."

On appeal by the Plaintiffs, the learned Additional District Judge of Faridpur disallowed the Defendant's claim for abatement of rent and decreed the Plaintiff's suit for Rs. 2,758 and odd, and directed the Plaintiffs to refund the amount received by them as *mahkana* to the Defendant.

The following portion of the judgment of the lower Appellate Court is material to this report —

"The bed of a Barasia at the time of the revenue survey was undoubtedly permanently settled land and included in the Defendant's *jote*. The lands which have been resumed are the dried up bed of the river Barasia as it existed at the time of the revenue survey. I hold that the bed of the river at the time of the revenue survey was permanently settled land and that it was included in the *jote* of the Defendant. From this finding it follows that 30'65 acres of land were wrongly resumed by Government in a proceeding in 1912 and assessed with rent at a *jama* of Rs. 80. I do not think that the Plaintiffs had any hand in the *diara* proceeding. The Plaintiffs are absentee landlords and took no part in the proceeding. Both the Plaintiffs and the Defendant seem to have been under the impression at the time of the *diara* proceeding that there was nothing wrong with it. The result is that both the Plaintiffs and the

Defendant are losers. The Plaintiffs have become owners of the lands resumed in the *diara* proceeding not by choice but by virtue of a statute. The Defendant knew the lands better than the Plaintiffs and it was his duty to maintain the right and the possession of his landlord in the lands included in his *jote* from the encroachment of persons who have no better right than his landlords. The *diara* proceeding was unlawful and it is the Defendant's duty to bring a suit to have it set aside. In this matter I think the Defendant is more to blame than the Plaintiffs and he should bear the consequences of his own folly, so far as the Plaintiffs have not reaped any benefit by it. The Plaintiffs have not taken settlement of the *diara* lands. It appears that the Plaintiffs got only 5 per cent. of the rent assessed upon the *diara* land and the remaining amount has been fixed as Government revenue. Out of the *jama* of Rs. 80 fixed upon the Defendant in respect of 30'65 acres, the Plaintiffs only got Rs. 4 and the remaining amount is taken by the Government as revenue. The Plaintiffs, in my opinion, are only liable to refund Rs. 4 a year, besides cesses of 2 as., and not the sum of Rs. 82-8 which the Defendant paid to Government. For the remaining amount the Defendant may sue the Government. I hold that the Defendant is entitled to deduction of Rs. 14-7 as. from the rent and cesses claimed. The lower Court's decree is modified and the suit is decreed in part for Rs. 2,758-8-1 $\frac{1}{2}$ pies."

Against this decision of the Additional District Judge the Defendant preferred this second appeal.

Babu Surendra Chandra Sen (with him Babu Hemendra Chandra Sen) for the Appellant.—Upon the facts found, I submit, the Defendant can claim a suspension of rent till the Plaintiffs set aside

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the *diara* proceeding and restore the wrongly resumed lands to the Defendant. But the Defendant did not appeal to the Court of Appeal below against the decision of the Munsif disallowing the claim for suspension.

At any rate, I submit, the decision of the lower Appellate Court is wrong and the decree of the Munsif allowing abatement of rent ought to be upheld. The facts found do amount to an ouster of the Defendant from a portion of his tenancy by a title paramount and as such the Defendant is entitled to an abatement of rent to the extent of the amount which is realised from him by the Government. Plaintiffs admitted the paramount title of the Government to the lands resumed, and so the eviction of the Defendant by the Government was by a title paramount.

Babu Shib Chandra Palit (with him *Babu Manilal Bhattacharya*) for the Respondents, and *Babu Upendra Narain Bagchi* for the added Respondent.—The Defendant is not entitled to an abatement of rent. It was for him to contest the action of the Government while the *diara* proceedings were taken. He was in possession and was cognizant of the fact that the lands resumed formed part of his *jote*. Plaintiffs are absentee landlords.

The facts found do not amount to an ouster of the Defendant from the lands in question by a title paramount. The act of the Government was an act of trespass only as against the tenant. Plaintiffs were not bound to protect the Defendant from unlawful eviction by the Government as a trespasser.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—This appeal arises out of a suit for rent with regard to a *kaimi jama* held by the Defendant under the

Plaintiffs. The objection of the Defendant which is now material to mention is that the landlords are not entitled to the full rent claimed which is reserved under the lease but that he (Defendant) is entitled to an abatement to the extent of Rs. 80 which amount the Defendant has to pay to the Government under the following circumstances :—There was a river within the estate called Barasia river on the bed of which lands formed. The Government instituted *diara* proceedings with reference to the lands formed on the bed of the river. It has been found by the trial Court and that finding has not been displaced on appeal, that the Plaintiffs had notice of the proceedings commenced by the Government. As a result of those proceedings, the Government constituted the lands so formed into a separate estate and offered settlement to the Plaintiffs. The Plaintiffs did not accept settlement and it is found by both Courts that the Plaintiffs did not take any step to resist the proceedings taken by Government with regard to the creation of a separate estate of the lands in question. As the Plaintiffs did not take settlement of this estate, the Government settled the lands with the Defendant temporarily and paid *malikanas* to the Plaintiffs which the Plaintiffs have been accepting without any protest. Upon that, it was found by the trial Court that the Plaintiffs had acquiesced in the possession taken by the Government of the lands so formed on the ground that they were newly formed lands and had been accepting such benefit as they were entitled to under the law, that is, by accepting a *malikana* from Government. It is, however, found now in this case that the action of the Government in taking proceedings with regard to these lands was wrong as the lands were included within the permanently settled

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estate of the Plaintiffs and also within the *kaimi jama* of the Defendant. On the finding, however, that the Plaintiffs had acquiesced in the act of the Government which amounted to a dispossession not only of the tenant but also of the Plaintiffs as landlords with the result that the Defendant had to pay rent of Rs 80 to the Government for these lands as being included within the separate *diara* estate, that Court held that the Defendant was entitled to an abatement of rent to that extent. On appeal by the Plaintiffs to the District Judge, the learned Judge has varied the decree of the trial Court and allowed the Plaintiffs a decree for rent for the full amount claimed minus the amount of *malikana* that the Plaintiffs have been receiving from the Government. The Judge was of opinion that it was for the Defendant to contest the action of the Government while the *diara* proceedings were taken, because, as he said, the Defendant was in possession of the lands and was cognizant of all the facts. The Defendant has appealed to this Court and he contends that the proceedings under which he has been compelled to pay the sum of Rs 80 per year as rent to the Government for occupying these lands amount to an ouster by a title paramount from a portion of the tenancy and that he is entitled to proportional abatement of rent payable to the Plaintiffs. The original Plaintiffs have parted with their interest in the zamindari during the pendency of this appeal and the assignee has on his own application been added as a Respondent to this appeal. The contention on behalf of the added Respondent is that the act of the Government was a mere trespass and, as the landlord is not bound to protect the tenant from unlawful eviction by a trespasser, the Defendant is not entitled to any abatement of rent as

against him. As a matter of fact, it has been found by the learned Judge that at the time when the Government took action under the *diara* proceedings, all parties were under the impression that there was nothing wrong in it. The action of the Government cannot be construed as an act of trespass against the tenant Defendant alone, but they claimed title as against the landlords also, and notice was given to the landlords of the action that they were going to take. The landlords acquiesced in the act of the Government in taking possession of these lands as *diara* and in the formation of these lands into a separate estate of which the Plaintiffs were recorded as owners without any protest or, in other words, the Plaintiffs admitted the paramount title of the Government which they claimed to these lands. The tenant could not have been expected to be aware of the title of the landlords. If the act had merely been an act of trespass as against the tenant's interest, the Plaintiffs' contention would have been sound. But, under the circumstances of this case, when the Plaintiffs themselves had in a manner admitted the superior title of the Government to take possession of the lands by proceedings taken under the law, the Plaintiffs cannot now turn round and say that it was a mere act of trespass on the part of the Government to dispossess the tenant from his tenure and that the tenant is entitled to no relief. In substance, therefore, it is an ouster of the tenant from a portion of the tenancy under the Plaintiffs by a title paramount and the Defendant is, therefore, entitled to an abatement of rent in proportion. The decree, therefore, of the learned District Judge is set aside and that of the Munsif restored with proportionate costs in that Court as allowed by that Court. The De-

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Defendant will get full costs in this Court as well as in the lower Appellate Court.

WALMSLEY, J.—I agree.

H. C. S. Appeal allowed..

The facts of the case will appear from the judgment.

Babu Manmatha Nath Roy for the Appellant.

Babu Satis Chandra Chowdhury for the Respondent.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1723 OF 1920.

DHORENDRA KRISHNA

MOOKERJEE, J.

MUKHERJEE, Defendant,

Appellant,

CHOTZNER, J.

v.

1922,

MOHENDRA NATH

16, June.

MUKHERJEE, Plaintiff,

Respondent.

The Public Demands Recovery Act (III, B. C., of 1913)—Sale held in 1907 for imaginary arrears of revenue, if a nullity—Suit to set aside such sale, if barred by sec. 36.

When the revenue authorities on the 2nd September 1907 proceeded to sell a property for an imaginary arrear, there was usurpation of jurisdiction on their part and the sale was a nullity. Thereupon a right accrued to the Plaintiff under the law as it then stood to institute a suit to recover the property within 12 years from the date of dispossession; and this right cannot be affected by the retrospective operation of sec. 36 of the Public Demands Recovery Act of 1913.

BALKISSEN v. SIMPSON (1) and COLONIAL SUGAR REFINING CO. v. IRVING (8) referred to.

This was an appeal against the decree of Babu Lal Behari Chatterjee, Subordinate Judge, 2nd Court of Zillah Hooghly, dated the 15th of March 1920, confirming the decree of Maulvi Lutfur Rahaman, Munsif, 3rd Court, Seerampur, dated the 13th of January 1919.

(1) L. R. 25 I. A. 151; s. c. I. L. R. 25 Cal. 833; 2 C. W. N. 513 (1898).

(8) [1906] A. C. 328.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the third Defendant in a suit for recovery of possession of land upon establishment of title. The Plaintiff alleged that the disputed property had been sold on the 2nd September 1907 under the Public Demands Recovery Act although there were no arrears due in respect of the land. He consequently prayed for recovery of possession from the representatives in interest of the purchaser at the sale. The Courts below have decreed the suit. That decree has been assailed before us on the ground that the suit was barred under sec. 36 of the Public Demands Recovery Act, 1913. This argument is based on the assumption that the right of the Plaintiff to institute the present suit is regulated by the provisions of a statute which was not in existence when his property was brought to sale. There can be no question that this contention cannot be supported on principle, and, as we shall presently see, is opposed to well-known authorities.

The sale was unquestionably held without jurisdiction. This was explained by the Judicial Committee in the case of *Balkissen v. Simpson* (1), where a sale had been held under the Revenue Sale Law in respect of an estate which was not in arrears. Lord Watson pointed out that the sale by the revenue authorities was without jurisdiction and that it was consequently not necessary for the proprietor

(1) L. R. 25 I. A. 151; s. c. I. L. R. 25 Cal. 833; 2 C. W. N. 513

DHORENDRA KRISHNA MUKHERJEE v. MOHENDRA NATH MUKHERJEE.

to take recourse to the procedure prescribed in Revenue Sale Law as essential preliminary to the institution of a regular suit for cancellation of sale held under that statute. This view had been previously formulated by this Court in *Baynath Sahu v. Lala Sital Prosad* (2) and *Harkoo Singh v. Banshidhar Singh* (3) and was subsequently confirmed by the Judicial Committee in *Mahmad Jan v. Ganga Bishun* (4) and *Mutasaddi Mian v. Mahomed Idris* (5). The position, consequently, is that when the revenue authorities on the 2nd September 1907, proceeded to sell the disputed property for an imaginary arrear there was usurpation of jurisdiction on their part and the sale was a nullity, see *Janakdhari Lal v. Gossain Lal* (6). Thereupon a right accrued to the Plaintiff, under the law as it then stood to institute a suit to recover the property within 12 years from the date of dispossession. This is clear from the decision of this Court in *Nandan Misser v. Lala Harakh Narain* (7). It is difficult to conceive that a right of this description could be affected by the retrospective operation of a subsequent statute. It is sufficient for our present purpose to refer to the decision of the Judicial Committee in *Colonial Sugar Refining Co v. Irving* (8), which has been repeatedly applied in this Court. There is nothing in the judgment of this Court in *Munjhoori Bibi v. Akel Muhamed* (9), which militates against this view nor is

the Appellant entitled to invoke the assistance of the decision in *Nagendra Nath v. Parbati Charan* (10). He is no doubt a purchaser from the purchaser at the sale held under the Public Demands Recovery Act. But that sale was a nullity and when the root of the title set up by the Appellant has been completely destroyed, we cannot imagine how he can present an effective bar to the claim of the rightful owner. We are consequently of opinion that the suit has been rightly entertained.

The result is that the decree made by the lower Appellate Court must be affirmed and this appeal dismissed with cost.

S. C. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2778 of 1919.

TEUNON, J.

NEWBOULD, J.

1922,

Heard,

8, February.

Judgment,

16, March

NARENDRA NATH DEY,
• Plaintiff, Appellant,
v.

JYOTISH CH. PAL,
Defendant, Respondent.

Unsuccessful application for sanction to prosecute, if can be the basis of an action for damages for malicious prosecution—Points to be considered in deciding preliminary issues of cause of action and maintainability of the suit—'Prosecution,' what it means in such cases.

In a certain title suit the Defendant impugned the genuineness of a copy of a Will filed by the Plaintiff and applied for sanction to prosecute the Plaintiff. After a good deal of litigation an order of sanction, passed by the District Judge on appeal, was set aside by the High Court in revision. The Plaintiff thereafter sued the Defendant in damages for malicious prosecution, but the lower Courts dismissed the suit on preliminary issues of cause of action and maintainability of suit:

{10} 20 C. W. N. 819 (1914).

(2) 2 B. L. R. (F. B.) 1 (1868).

(3) I. L. R. 25 Cal. 876 - s. c. 2 C. W. N. 360 (1898).

(4) L. R. 38 I A. 80: s. c. I. L. R. 38 Cal. 537; 15 C. W. N. 443 (P. C.) (1911).

(5) 19 C. W. N. 764 (P. C.) (1915).

(6) I. L. R. 87 Cal. 107 (1909).

(7) 14 C. W. N. 607 (1910).

(8) [1905] A. C. 368.

(9) 17 C. W. N. 889: s. c. 17 C. L. J. 315 (1912).

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Held—That the lower Courts were wrong in considering the question of reasonable or probable cause at that stage of the case. That issue cannot be decided until after the Plaintiff has adduced evidence in support of the allegations in his plaint. The only question to be decided was the purely legal question whether the application for sanction to prosecute can prove the basis of an action for damages for malicious prosecution.

The maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure. The application for sanction was a preliminary or initial stage in a criminal prosecution and it is immaterial that this was done in a Civil and not a Criminal Court. The Plaintiff therefore had a cause of action and should be given an opportunity to prove his case.

CROWDY v. REILLY* (1), DE ROZARIO v. GOLAB (HAND) (2), GOLAP JAN v. ISHOL-NATH (3) and BISHUN v. PHULMAN SINGH (4) referred to.

This was an appeal preferred on the 20th December 1919 against a decree of the Subordinate Judge of 24-Pergannahs (Babu Paresh Nath Ray Chowdhury), dated the 15th September 1919, affirming a decree of the Munsif at Barasat (Babu Kurnud Kanta Sen), dated the 27th August 1918.

The facts of the case are as follows :—The Appellant brought a title suit against the Respondent. The Respondent alleged that there were interpolations in the copy of the Will filed by the Appellant and applied to the Munsif who tried the title

suit for sanction under sec. 195, Cr. P. C., to prosecute the Appellant. There was a good deal of litigation in connection with this application and finally an order for sanction which had been passed by the District Judge on appeal was set aside by the High Court in revision. Thereupon the Appellant brought the suit out of which the present appeal arose claiming damages for malicious prosecution and also for pain of body and mind and injury to his reputation. The lower Courts dismissed the suit on findings against the Appellant on preliminary issues as to his cause of action and the maintainability of the suit. Hence the Appellant preferred the present second appeal to the High Court.

Babus Sharat Ch. Roy Choudhury and Satya Charan Sinha for the Appellant.

Babu Amarendra Nath Bose (for Babus Manmohan Nath Mukherjee and Nagendra Nath Bhattacharjee) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

NEWBOLD, J.—The Plaintiff who is the Appellant before us instituted a suit against the Defendant-Respondent to recover damages for malicious prosecution. Both the lower Courts have dismissed the suits on findings against the Plaintiff on preliminary issues as to his cause of action and the maintainability of the suit.

The main facts of the case as they appear from the pleadings of the parties are as follows : The Appellant brought a title suit against the Respondent and another person and in that suit he filed Letters of Administration with copy of the Will annexed. The Respondent alleged that there were interpolations in the copy of the Will and applied to the Munsif who tried the title suit for sanction under sec. 195,

(1) 17 C. W. N. 554 (1912).

(2) I. L. R. 37 Cal. 358 (1910).

(3) I. L. R. 33 Cal. 880 : s. c. 15 C. W. N. 917 (1911).

(4) 20 C. L. J. 518 (1914).

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Cr. P. C., to prosecute the Plaintiff under various sections of the Indian Penal Code. There was a good deal of litigation in connection with this application and finally an order of sanction which had been passed by the District Judge on appeal was set aside by this Court in revision. After this order was passed, the Appellant brought the suit out of which this appeal arises claiming Rs. 494-8-0 damages for his expenses in the litigation arising out of the application for sanction to prosecute and also for pain of body and mind and injury to his reputation.

Both the lower Courts have fallen into error in considering the question of reasonable or probable cause at this stage of the case. That issue cannot be decided until after the Plaintiff has adduced evidence in support of the allegations in his plaint. The only question now to be decided is the purely legal question whether the application to the Munsif for sanction to prosecute the Appellant can prove the basis of an action for damages for malicious prosecution. As was pointed out in *Crowdy v. Reilly* (1) the maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure. The application for sanction was a preliminary or initial stage in a criminal prosecution and it is immaterial that this was done, as the law required, in a Civil and not in a Criminal Court. On behalf of the Respondent reliance is placed on the decisions of this Court in the cases of *De Rozario v. Golab Chand* (2) and *Golap Jan v. Bholanath* (3). Both those cases have been distinguished and discussed in *Bishun*

Prasad v. Phulman Singh (4) and they are distinguishable from the present case on the ground that in them no process issued on the Plaintiff. We hold that in the present case the allegations in the plaint that the Defendant maliciously and without just, reasonable or probable cause instituted proceedings for sanction and that the Plaintiff was obliged to defend the cases are sufficient to disclose a cause of action and consequently the Plaintiff's case should not have been dismissed without giving him an opportunity to prove these allegations.

We accordingly decree this appeal. The decrees of the lower Courts are set aside and the case is remanded to the Munsif at Barasat Second Court for trial on the merits. The Plaintiff-Appellant will get his costs in this Court. He will also have hearing fees in the Courts below which we assess at three gold mohurs. Under sec. 13 of the Court Fees Act we direct that the amount of Court-fee paid on the memorandum of appeal presented to this Court be returned to the Appellant.

TEUNON, J.—I agree.

J. N. R. *Appeal decreed with costs.*

[CRIMINAL APPELLATE JURISDICTION.]

APP. NO. 386 OF 1922

AND

REV. NO. 677 OF 1922.

RANKIN, J.

1923,

25, January.

PROMOTHO NATH

MUKHOPADHYA,

Appellant,

NEWBOULD, J.

SUHRAWARDY, J.

1923,

4, January.

v.

KING-EMPEROR,

Respondent.

(1) 17 C. W. N. 554 (1912).

(2) I. L. R. 37 Cal. 458 (1910).

(3) I. L. R. 38 Cal. 880; a. c. 15 C. W. N. 917 (1911).

Criminal Procedure Code (Act V of 1898), sec. 342—Examination of the accused at the close of the prosecution case, if mandatory—Non-compliance with the section if vitiates the trial—Intention of

(4) 20 C. L. J. 518 (1914).

PROMOTHO NATH MUKHOPADHYA v. KING-EMPEROR.

the Legislature in making this provision about the examination of the accused.

In a case under sec. 500, I. P. C., the accused were called upon to plead on the 14th March 1922 and at that time they stated that they pleaded not guilty and also that they would both file written statements. The examination, cross-examination and re-examination of the prosecution witnesses were completed on the 12th April 1922 on which date the case was adjourned until the 25th for the purpose of the accused entering on their defence. On the 12th or the 25th no further examination of the accused took place :

Held—That there was no compliance with the provisions of sec. 342 of the Criminal Procedure Code. The duty of the Magistrate under sec. 342 arises when the witnesses for the prosecution have been examined, cross-examined and re-examined. The promise to file written statements made at the time of the plea in no way exonerated or exempted the Court from examining the accused at a later stage as required by sec. 342.

In this country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives, and shall call upon an individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating. It is important also to have regard to the time at which this examination should take place. To ask an accused for his defence before he has the whole of the prosecution evidence in front of him, is

not a compliance with the section. And to ask the accused not at the beginning of his defence but later on when his statements may be subject to heavy discount owing to the evidence given in his hearing by his own witnesses in the meantime, is not to be assumed to be a substantial compliance with the requirements of the section.

In this country an accused is not allowed to give evidence on his own behalf and in view of this sec. 342 is of cardinal importance. There is all the difference in the world between a written statement presumably prepared, almost certainly revised, by the lawyers appearing for the defence and a statement made by the accused himself so that the Magistrate can observe his demeanour and his manner while he makes it and come to his conclusions as to the value of his evidence.

The trial became illegal from the moment when, without compliance with sec. 342, the Magistrate called upon the accused to enter on their defence.

These were an Appeal and a Rule against the conviction and order of Mr. A. Z. Khan, the Third Presidency Magistrate of Calcutta.

The cases were first heard before a Bench composed of Newbould and Suhrawardy, JJ., who having differed in opinion, they were referred to Rankin, J., for disposal.

The facts will fully appear from the judgments.

The dissentient judgments of Newbould and Suhrawardy, JJ., were as follows :—

NEWBOULD, J.—Promottha Nath Mukhopadhyaya and Ramendra Nath Ghose have both been convicted of defamation punishable under sec. 500, I. P. C., by the Third Presidency Magistrate of Calcutta. The former has been sentenced to pay a fine of Rs. 500 or in default of payment to

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undergo three months' simple imprisonment and has appealed to this Court. On the latter a non-appealable sentence of Rs. 50 fine with one month's simple imprisonment in default has been passed and he has obtained a Rule against the conviction and sentence and this Rule has been heard with the appeal.

The complainant in this case is Mr. F. W. Kidd, Deputy Commissioner of Police, South District, Calcutta. Promotha Nath Mukhopadhyaya is the Editor and Ramendra Nath Ghose, the Printer and Publisher of a daily newspaper called the *Serrant*. The charges framed and found to have been established against the accused relate to certain allegations against the complainant published in the issues of this paper, dated 20th and 23rd January 1922. Two charges were framed in which were set out the statements in each issue said to be defamatory. Those set out in the first charge were (a) "That a lady of 40 named Sm. Hem Nalini Ghose was severely assaulted from behind by a European Officer reported to be Mr. Kidd," (b) "That gentlemen present report that Mr. Kidd dealt the deadly assault on the lady." Those set out in the second charge were (a) "He (Mr. Kidd) hit her (Hem Nalini) on the top of the head from behind," (b) "Kidd went up to her (Hem Nalini) and struck her (Hem Nalini) on the head from behind," (c) "Mr. Kidd hit a woman on the head."

That these statements are on the face of them defamatory cannot be disputed. Nor do the accused deny their responsibility for the publication of these statements. On behalf of the second accused the point was taken that as printer he should have been charged with an offence punishable under sec. 501, I. P. C., and that this being a separate offence the joint trial of the two accused was

Even if a separate charge had been framed under this section there would have been no illegality in the joint trial. But Ex. 6, the signed declaration of the second accused shows that he was publisher as well as printer and this evidence is un rebutted. The main lines of defence taken before us were based on the first and ninth Exceptions to sec. 499 of the Indian Penal Code. Reliance was also placed on the general Exception in sec. 79 and Exp. 4 to sec. 499, I. P. C.

The first Exception to sec. 499, I. P. C., declares that it is not defamation to impute any thing which is true concerning any person if it be for the public good that the imputation should be made and published. For the prosecution it was not contended that the publication would not be justified if the facts stated were true. Whether the imputation contained in the statements contained in the charge is true or not is the most important issue in the case. The facts that are admitted and the different stories of the prosecution and the defence are fully set out in the judgment of the lower Court and it is not necessary for me to repeat them. The learned Magistrate has held that the defence has failed, since if Hem Nalini the injured woman had been the complainant and Mr. Kidd the accused in a case brought for assault, Mr. Kidd would be given the benefit of the doubt. I agree that the plea of *veritas* set up by the defence fails but after an examination and careful consideration of the whole evidence I have no hesitation in coming to a positive finding that Mr. Kidd did not strike the blow that caused the wound on Hem Nalini's head. The case for the defence is greatly weakened by the omission in the accused's written statement of any plea that the imputation was true. This was no bar to the plea being argued after evi-

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dence had been given in support of it. But having regard to the fact that the written statement was filed on the 20th May when practically the whole of the evidence on both sides had been given and also to the absence of any explanation of the failure to take this plea it is hard to resist the conclusion that at that time the accused's legal advisers took the same view of their case on this point that I do, namely, that it had entirely failed. The principal difficulty in the way of the defence is the evidence of Hem Nalini herself. She has deposed that she was struck near the place where the central meeting was held at the time when the ladies got up to go and that the weapon used was a policeman's baton. On all these points she contradicts the defence story of the occurrence which is that she was struck at a place about 50 ft. to the south-west of the place of meeting, that it happened some little time after the ladies had gone from the place of meeting and the weapon used was a cane carried by Mr. Kidd which is about twice the length of a policeman's baton but much lighter. The person who was actually struck was not likely to be mistaken on all these three points but if Hem Nalini is correct on any one of these the whole case for the defence breaks down on this main issue. Having regard to the admitted facts that Hem Nalini received an injury on the head and that Mr. Kidd was beating people with a cane it is not surprising that the rumour should have started that he caused this injury. The youngmen present were greatly excited and there would be little difficulty in getting witnesses from among them to support the story published by the accused. A comparison of the evidence of the alleged eye-witnesses and their statements at different times fully supports the contention of the learned Standing Counsel

that the story has been altered from time to time to try and make it agree with facts that could not be disputed. The last version of the story was that Mr. Kidd struck the woman not deliberately but in the course of indiscriminate hitting and mistaking her for a man. But even this contention fails. Apart from the other reasons for distrusting the defence witnesses it is significant that none of them speak of Mr. Kidd raising his stick to strike people on the head except when he struck Hem Nalini. Mr. Kidd has expressly denied that he ever struck any one on the head with his stick. I am unable to share the difficulty felt by the trying Magistrate in acting upon Mr. Kidd's testimony "with the same confidence as he is entitled to by his position and standing." I do not attach the same importance to his omission to mention that he had struck any one when he was partially examined on the 17th February. Nothing really turns on the mistake he made as to the position of the mosque and his first wrong impression that the wounded person was a boy and he has given reasonable explanations of these errors. As regards the so-called confusion of a palm tree and cocoanut tree, Mr. Kidd's botany is correct. In argument before us Mr. Kidd's conduct has been severely commented on because he made no enquiry to find out who assaulted the woman. But there is no evidence that there was no such enquiry made and obviously Mr. Kidd who was the accused would have been the last person to hold such an enquiry. He has also been attacked because he rendered no aid to the wounded person. This seems unfair when the evidence shows that offers of assistance from the police were rejected with insult. It is also said that there was no justification for using force since the illegal meeting had come

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to an end when the ladies left the place. But it was on their departure that the control they had exercised came to an end. The Police were confronted with an unruly mob. But in this case the conduct of the police is not the important issue nor is it necessary to decide who actually wounded Hem Nalini. We are only concerned with the truth or falsity of the allegation that Mr. Kidd wounded her and I have no hesitation in holding that this allegation is absolutely false. This finding disposes of the plea based on the first Exception to sec. 499, I. P. C.

The ninth Exception to this section has now to be considered. This exempts from criminal liability an imputation made in good faith for the public good. The learned pleader for the accused relied on the decision of this Court in the case of *In the matter of Shibo Prosad Pandah* (1) and some later cases of other High Courts in India following this ruling. The principle there laid down is stated in the head note as follows: "In dealing with the question of good faith the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are in substance true but whether he was informed and had good reason after due care and attention to believe that such allegations were true." The learned Standing Counsel on behalf of the Crown accepted this principle in its entirety but urged that the accused had failed to show due care and attention as a basis of their alleged belief of the defamatory statements. Here again if we refer to the written statement of the principal accused, we find that a very weak case is set out. He admits the necessity for enquiry before publication of the first information that reached him. He then goes on to say that he deputed two repre-

sentatives of his Press to make enquiries and that he published the information on the basis of their reports and a bulletin received from the Congress Publicity Board. But he refuses to disclose the names of the representative on whose reports he relied. But sec. 105 of the Evidence Act throws the burden of proving the applicability of the ninth Exception on the accused. They cannot therefore escape their criminal liability by relying on professional etiquette though they may minimise the moral stigma of a conviction. The evidence adduced at the trial was certainly insufficient to discharge this burden. Narendra Nath Sett (D. W. 14), a vakil of this Court, has deposed that he advised the first accused to verify the news before publication and that on this advice one person was sent to the hospital to see the wounded lady herself and another to the South Congress Office. But no evidence has been given to show that reports or that any reports were received before the story of Mr. Kidd assaulting this lady was published. It is urged that the report itself shows by intrinsic evidence that a reporter, was sent to the hospital. Even if he were, his report could not have confirmed the story that the wound was caused by Mr. Kidd. Nor can I see why the volunteers should be considered more credible because they repeated before the Congress Board the story which the Editor hesitated to believe when it was told by them at his office. The enquiry held by Mr. J. M. Sen Gupta is relied on as justifying the publication of the statements which form the subject of the second charge. He held this enquiry as the representative of a body whose declared policy was to disobey a lawful police regulation. It was an *ex parte* enquiry and the statements there made were not sufficient authority

(1) I. L. R. 4 Cal. 124; s. c. 3 C. L. R. 123 (1878).

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to justify the contradiction of the Government communique. An ingenuous remark of one of the defence witnesses Nirode Bandhu Guha (D. W. 10) reveals the true object of this enquiry. I quote his own words, "The enquiry of Mr. Sen Gupta was made with a view to publish in the papers that Mr. Kidd had assaulted the woman." On this issue I am in full agreement with the trying Magistrate that there was an entire absence of due care and caution and hold that the plea of good faith entirely fails.

I fail to see how any case can be made out under the general Exception of sec 79, I. P. C., when the plea under the ninth Exception to sec. 499, I. P. C. has failed, since "good faith" must be proved in either case. Nor can the defence based on explanation 4 to sec 499, I. P. C. be supported after my finding that the plea under the first Exception to that section has entirely failed.

I would therefore dismiss this appeal and discharge this Rule.

SUHWARADY, J.—The accused in the appeal and in the connected Revision case stand convicted by the Third Presidency Magistrate of Calcutta under sec. 500, I. P. C.; the accused Promotha Nath Mukerjee has been sentenced to a fine of Rs. 500, in default to simple imprisonment for three months and the accused Ramendra Nath Ghosh to a fine of Rs. 50 in default to simple imprisonment for one month. The first accused has appealed and the second accused has obtained a Rule, against their conviction. The two accused were the editor and printer and publisher respectively of a daily English newspaper called "*Servant*." They were charged under two heads for publishing statements containing libel against Mr. F. W. Kidd, a Deputy Commissioner of the Calcutta Police, in two issues of the

newspaper. The first head of the charge is that they committed an offence under sec. 500, I. P. C., by publishing in the issue of "*Servant*" of 20th January 1922, "the following imputation concerning the said Mr. Kidd, to wit (a) that a lady of 40 named Sm. Hem Nalini Ghosh was severely assaulted from behind by a European Officer reported to be Mr. Kidd, (b) that gentlemen present report that Mr. Kidd dealt this deadly assault on the lady, intending to harm or knowing or having reason to believe that such imputations would harm the reputation of Mr. F. W. Kidd, etc." The second head is that they committed the above offence by making and publishing in the issue of the said paper of the 23rd January 1922 "the following imputation concerning the said Mr. Kidd, to wit that (c) he (Mr. Kidd) hit her (Hem Nalini) on the top of her head from behind, (b) Kidd went up to her (Hem Nalini) and struck her (Hem Nalini) on the head from behind" and (c) "Mr. Kidd hit a woman on the head." The accused have been convicted on both the heads and sentenced as above.

The admitted facts of the case are that on 20th November 1921, the Commissioner of the Calcutta Police issued a notification prohibiting the holding of meetings within his jurisdiction for a period of three months. In violation of that notification meetings were held previous to the date of occurrence by persons belonging to the political party of the accused in other parts of Calcutta and dispersed by the Police. On the 19th January 1922, a similar meeting was intended to be held in Harish Park in Bhowanipur but the Police having guarded the place the venue was changed to a plot of vacant land to the north-west of Mr. C. R. Das's house and on the west of the Russa Road. When the meeting was being held the Police

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at Harish Park getting scent of it, Assistant Commissioner Kunja Behari Mukerjee, Sub-Inspector Hem Chandra Lahiri and Inspector Purna Chandra Mukerjee with one or two other Indian Police Officers and several constables arrived at the meeting at about 4-15 P.M. They found that about a dozen ladies were seated in the middle surrounded by a number of youngmen known as "volunteers" with a ring of spectators round them. The Police Officers first tried to separate the volunteers and the ladies from the outer group by wedging in a ring of Policemen between them. They then told the ladies among whom was S^m. Urmilla Devi, sister of Mr. C. R. Das, who virtually regulated the meeting, that the volunteers and they could not hold the meeting against Police orders. No heed was paid to the warning, and as each youngman got up to read a speech he was arrested by the Police. When about 20 of such men were arrested and kept within a cordon of constables and about half-an-hour after the arrival of the Police, Mr. Kidd appeared on the scene. Before the arrival of Mr. Kidd the Police did not use any force beyond pushing the crowd back (P. W. 7 Assistant Commissioner Kunja Behary, p. 13 of the paper-book). He began to push back the outer group of the spectators and shortly after the meeting broke up with a shout. "The ladies formed a sort of procession and surrounded by the volunteers proceeded eastward to the Russa Road. Mr. Kidd ran after them and ordered the Police present to separate the volunteers from the ladies. The volunteers were partly dispersed. Mr. Kidd pushed them, drove them and struck some of them with a leather mounted thick cane (Ex. 1) that he was carrying." I quote this from the Magistrate's judgment.

The case for the prosecution is that Mr. Kidd went with the ladies a short distance, came back to the pavement, then went towards the north as some stones were being thrown from that direction, came again to the road side and from there noticed a group of people numbering 20 to 30 on the south-west of the place of the meeting near a cocoanut or palm tree as Mr Kidd describes it. Thinking that another meeting was being held there he asked Sub-Inspector Hem Lahuri to go and disperse it. The Sub-Inspector went there and found a woman lying on the ground wounded on the head and bleeding with a number of volunteers and spectators stooping over her. He came back to Mr Kidd and reported that a woman was lying injured. Mr. Kidd did not understand him to say that it was a woman. He personally went to the spot and found somebody lying there injured whom he took for a boy. It is said that the volunteers refused Police help, treated the injured person with ice and subsequently secured a taxi cab and removed her to the Sambhunath Pandit Hospital. It is admitted that she was unconscious when removed to the Hospital (Ex. 2, p. 73). I have given the main facts of the case and will deal with the defence version of the occurrence and other admitted facts of the case when considering the pleas of the accused.

The accused have filed a written statement in which they admit the making and publishing the statements and imputations stated in the charge but plead good faith and privilege. The learned vakil for the accused has urged several points before us of which two demand serious consideration. I will deal with the other points at the end of my judgment. He has chiefly relied on Exceptions I and IX to sec. 499, I. P. C. He first

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contends that the imputations alleged to be defamatory were true, or in other words, that in fact Mr. Kidd did strike the woman and cause the injury on her head. He has taken what is technically known as the plea of *veritas*. He next submits that whether the imputations were true or not, his clients made and published them in good faith and in either case for public good.

I shall deal with the first plea first. The defence having admitted the publication of the defamatory statements, it is conceded, and that is the law, that the onus is on it to prove their truth. The accused in their written statements (which I may remark were filed after the entire evidence in the case both for the prosecution and the defence was concluded) does not specifically and pointedly take the plea that the imputations were true. But it is urged by the learned Advocate for the defence that, as the cross-examination of the witnesses for the prosecution and the evidence led by the defence were directed towards establishing the truth of the imputations, we ought in law and justice to consider the plea; and decisions have been cited to show that where in a criminal case the evidence adduced establishes the innocence of the accused on a ground not taken by him, the Court ought to give effect to it. It is not incumbent on me to accept any such general rule but considering the importance of the case in which conduct and reputation of a responsible Police Officer are involved, I propose to examine the evidence bearing on this point. The learned Magistrate has also tried this issue and devoted a considerable portion of his able and exhaustive judgment to a consideration of the evidence on this question. Besides, Exception I to sec. 499, I. P. C., may be taken to be covered by Ex-

ception IX to that section for if the truth of the libellous matter is established, the good faith of the maker cannot further be questioned, if of course the publication is made for the public good. The accused are therefore entitled to prove good faith either by showing that the imputations were true or that they did not act carelessly and negligently in believing them to be true.

As the prosecution chose to advance evidence first in anticipation of the defence, I propose to discuss that evidence before considering that for the defence. In examining the evidence for the prosecution two points strike me markedly which, to my mind, should have been cleared but were allowed to remain unexplained.

The first is that no explanation was offered nor was any suggestion made either in the evidence for the prosecution or in the cross-examination of the defence witnesses as to how the woman, Hem Nalini, came by her injuries. It is admitted that the people assembled at the meeting carried no weapon and offered no resistance. P. W. 7 Mr. Kunja Behary says—“They did not resist arrest and were saying ‘come arrest us.’ There was no demonstration of force on the side of the people assembled, only the crowd was pressing forward, as is usual when there is a large gathering.” It may therefore be safely presumed, and that is the suggestion of the prosecution, that it was some Policemen who had struck the woman, but no attempt was made to find out the assailant. Sub-Inspector Hem Lahiri’s evidence, if believed, read with that of Mr. Kidd, is to the effect that the Sub-Inspector informed Mr. Kidd that a Bengali Police Officer had struck the woman. It is strange that Mr. Kidd being a superior Police Officer and receiving information

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that a woman was severely assaulted, probably by a subordinate of his, did not think it worth his while to enquire into the matter either on the spot or ever afterwards and to find out the real culprit, as any such discovery would have completely exonerated him and given a complete quietus to the defence contention. Mr. Kidd is quite positive on the point. He says: "I have not tried to find out who assaulted the woman. If it is proved that another man is the culprit I am exculpated. I should like to know who the culprit was and it has always been my desire. I enquired from Hem Lahiri as to what he knew about this occurrence, but not definitely upon the point. I have received no information from anybody as to who assaulted the woman. Hem Lahiri said that he had reason to believe that a Bengal Police Officer had struck the woman. I took no steps to find out whether there was anything in the suggestion or not." One should have expected otherwise from a Police Officer of the rank and position of Mr. Kidd.

The other point which presents itself is closely connected with the preceding one. It is that no enquiry was made by Mr. Kidd or any other Police Officer into the case of the injured woman. Mr. Kidd and Kunja Babu offer an explanation for this apparent indifference by saying that as it was a non-cognizable case no enquiry was instituted. I regret that the explanation does not commend itself to me. Mr. Kidd and Hem Babu found a person whether a boy or a woman lying unconscious with a wound on the head and bleeding. How could they on the spot decide that it was a non-cognizable case? In fact Mr. Kidd says that he did not enquire whether the wound was serious or not or whether the person was likely to die or not. He adds that he did not think

it his duty to make any further enquiry. I regret I am unable to agree with him. Kunja Babu frankly admits that he assumed that it was a non-cognizable case. He says in cross-examination: "I made no enquiries in this particular matter because there was no complaint at the Thana and we generally do not enquire into non-cognizable cases. I assumed that it was a non-cognizable case. I gave no orders for any enquiry to be made. To my knowledge nothing has been done in regard to the assault on this lady." The explanation does not seem to me to be satisfactory. I now pass on to consider the evidence adduced in the case by the prosecution. As regards the occurrence six witnesses have been examined, three of whom, the complainant, Assistant Commissioner, Kunja Behary and Sub-Inspector Hem Chandra, are Police witnesses. The other three, S. M. Kassim, Satyendra Mohun Roy and Madhuri Mohun Mukerji, are outside witnesses said to be present at the time. The evidence of the Police witnesses is, as it is expected to be, merely negative. As I have observed, it does not offer any explanation or suggestion about the assault on the woman. It is not necessary that it should, but it contains certain internal indications of not being quite straightforward which led the Magistrate to cast suspicion on portions of it. I will take those points in the order in which they have come out.

(1) It is admitted by the prosecution that the complainant, after the dispersal of the meeting, used his stick and struck several boys. Kunja Babu says—"I saw him strike 2-3 boys with his hand and cane throughout the whole time. I think he kicked one boy; this is the boy on the western footpath." Witness No. 6 Kassar says—"I saw Mr. Kidd actually

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hitting one boy. I saw him rush towards people who fled on seeing him rush. I saw Mr. Kidd strike the boy from behind and the stroke fell on the boy's leg. Besides Mr. Kidd I did not see any other Police Officer striking all the time that I was there. I saw Mr. Kidd rushing at the outer edge of the crowd and hitting out with his stick but it fell on the empty air as the people moved away on seeing him." To the same effect is the evidence of witness No. 9 who says that he saw the complainant strike one or two men and also make a rush at the people. All the prosecution witnesses speak in the same vein but the complainant himself did not say a word in his examination-in-chief about his striking any one or using his stick on that occasion. He no doubt said something to that effect when he was recalled after the examination of the above witnesses but the learned Magistrate rightly doubts that the omission was merely accidental and I agree with him. (2) The mistake made by the complainant that the person injured was a boy. Hem Babu says that he told Mr. Kidd that a woman was injured. Kunja Babu was near by and he heard him say so, but Mr. Kidd somehow carried the wrong impression that it was a boy, although it appears that on the following morning the Officers collected at Alipore and discussed the incident. Even in the report he submitted to the Government afterwards he stuck to the story that it was a boy. This error and the omission noticed in the preceding paragraph render the case open to the construction that the complainant tried at the outset to create an impression that he did not strike any one at the meeting and if he did, he never hit a woman. These undesirable understandings have led the learned Magistrate to remark that he could not act upon Mr. Kidd's testimony with such confidence

as was due to his position and standing.

(3) The introduction of the name of Sergeant Sullivan in the case. The complainant knew that the case for the defence was that he was the only European Officer present at the meeting (*vide* Ex. 3, the statement of Urmilla Devi published in the issue of the "*Servant*" of the 23rd January), yet when he was examined on the 17th February he makes no mention of the presence of any other European besides himself. On the 6th March all the other prosecution witnesses speaking to the occurrence were examined-in-chief in the following order—Assistant Commissioner Kunja Behari, S. M. Kassim, Satyendra Mohun Ray, Madhuri Mohun Mukerji and Sub-Inspector Hem Chandra Lahiri. None of the witnesses preceding Hem Babu spoke of the presence of Sullivan or of any other European Officer at the time of the occurrence. It is the Sub-Inspector Hem Lahiri who first introduced Sullivan in the opening sentence of his examination-in-chief. The Police witnesses took up the cue and in their cross-examination which came some days later spoke of the presence of Sullivan from the time of the arrival of the Police on the scene. Kunja Babu makes curious statements regarding Sullivan. In his examination-in-chief on the 6th March he says—"The two Inspectors assisted me and Mr. Kidd supervised. There was no European there at the time. Four Sergeants came about 10 to 15 minutes afterwards." He was recalled on the 23rd March ostensibly for the purpose of asking him about Sullivan. He then said that Sullivan was at the meeting from before the arrival of Mr. Kidd but this fact had escaped his memory until he read the statements of some other witnesses in the papers. In cross-

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examination he made the following statement—"I was specifically asked by the Public Prosecutor if there was any other European Officer at that time and I definitely stated that there was none until 4 Sergeants arrived." Within a week of the meeting, and before the institution of the present case, a joint statement was prepared by Kunja Babu and Hem Babu and strangely enough Sullivan was totally ignored at the time. With reference to this matter, the only remark that can be made is that it does no credit to the prosecution or help in presenting its case as ungarbed truth. I may add that this Sergeant Sullivan has not been put in the box to support this portion of the prosecution story.

(4) Sub-Inspector Hem Lahiri says that the persons surrounding the injured woman told him that it was a Bengali Police Officer who had struck the woman and he said so to Mr Kidd. Assistant Commissioner Kunja Behari in whose presence the information about the injured person was conveyed to Mr. Kidd by Hem Babu does not speak to this conversation. Mr. Kidd himself does not mention a Bengali Police Officer in his examination-in-chief though he improves upon the story in his cross-examination after the examination of Hem Lahiri. The only other witness who speaks about it is Satyendra on whose evidence I will comment later. It was consistently the story of the defence from the beginning that it was an European who committed the assault as is evident from the statements published in the "*Servant*" of the 20th January. I feel no hesitation in holding that this story has no foundation on fact. It is worthy of note that the officers met at Alipore the following morning and discussed the incident, at which meeting it may be presumed, that,

if it was a fact, it must have been mentioned that the "volunteers" themselves had accused a Bengali Police Officer with hitting the woman. But in the Government communique (Ex 2, p 73) which was based on Mr. Kidd's report, no mention is made of this important fact; on the other hand, it is stated there that so far as Mr Kidd saw, no member of Police force struck any woman.

In discussing the above points I have generally commented on the evidence of the Police Officers. Of the other three prosecution witnesses to the occurrence said to be bystanders, the learned Magistrate has rightly pronounced the witness Madhuri Mohun Mukerjee as unreliable and unworthy of belief. I entertain no better opinion of the witness Satyendra Mohun Ray. He was a chance witness and the reason he gives for his presence at the meeting is not satisfactory. His story is that he was told by a broker that a plot of land near the Kalighat Tramway Depot was for sale by the Improvement Trust and he went there alone to inspect it without knowing where it was. Not being able to identify it, he went to Hem Babu, an old friend of his, at the Tollygunj Thana, to obtain some information about it where he found the Sub-Inspector proceeding to Kalighat with the Assistant Commissioner in a car. He followed on foot. He witnessed all that happened at the meeting. He heard Mr. Kidd forbid the people (to hold the meeting) himself and through other Police Officers but they paid no heed. Mr. Kidd does not say so. He again found Mr. Kidd allow all persons to go who wanted to accompany the ladies and did not obstruct them. Mr. Kidd's version is that he was trying to the volunteers from the ladies. no chance to talk to Lahiri on the and went home by tram, and then

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he adds in the same breath that he met Lahiri on the road near the Russa Bioscope. He did not know the plot of land up till the day he was examined in Court nor did he make any further enquiry about it from the broker or the Improvement Trust. He even does not know the name and address of the broker. I cannot put any reliance on a witness like this. The production of such evidence mars a good cause and excites suspicion where it ought not to exist.

The only witness who may be fairly treated as independent is S. M. Kassim. During the 15 or 20 minutes that he was there he found Mr. Kidd striking the outer edge of the group. He saw him strike a boy and run towards the maidan and scatter the crowd. He saw him thus for 5 minutes and then went away. He does not speak of seeing injured person; so the incident must have happened after he had left. His evidence does not carry the complainant's case far and the defence does not challenge it as it does not militate against its case, rather, in its view, supports it.

I now turn to the evidence for the defence as far as it relates to the point under consideration. The accused have examined 5 eye-witnesses, Nos. 6, 7, 9, 11, and 12, to prove their case that the assault on the woman was committed by the complainant. Had the case rested on the evidence of these witnesses, I should have felt considerable difficulty in rejecting the whole of this evidence in view of the flaws in the complainant's case which I have pointed out, but it seems to me that the case for the defence has been given away by the injured woman. In the statement (Ex. 17) she made to the Assistant Commissioner on the day following the day of occurrence, she said that a Sahib was dispersing the crowd and when the other

ladies stood up she also stood up when some one struck her on the head with a lathi. The summary of her evidence in Court is this. She received a hurt on the head with a black lathi-like thing, a little over a cubit in length. The stroke fell on her head from behind. Looking at Ex. 1 (the stick Mr. Kidd was carrying she said that the stick with which she was struck might have been like that, but blacker. She was shown a Policeman's baton (Ex. 2), and she said, "The thing with which I was struck was just this thing." Attempt was made in examination to improve matters, but it created more confusion. The suggestion of the defence was, as it is here, that the woman became dazed after the blow on her head and could not really notice the weapon. But she said in re-examination that she saw the stick when she turned round to see after the blow. If she saw the stick she must have noticed the striker, but she concluded that the person who struck was a Sahib, because she saw the Sahib by her side with a stick. In her statement to the Assistant Commissioner (Ex. 17) she says that she could not say who had assaulted her. She further said in her examination in Court that as she was getting up, she got the blow and fell down at the spot. She is more explicit in her statement, Ex. 17. There she said "The Sahib began dispersing the people then Mr. C. R. Das's wife, daughter and sister stood up. I also stood up. At this time some one struck me from behind with a stick or lathi on my head. I reeled and fell and some people held me." This story is totally inconsistent with the version of the affair given by the other witnesses for the defence, which is that when the ladies had left the place of the meeting and reached Russa Road, Mr. Kidd followed them beating people up to Russa

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Road; then he came back from the pavement beating people all the way and as this woman was going towards Rup Chand Mukherjee's Street, he struck her on the head with a stick. The learned vakil for the defence asks us to hold that the woman, as the result of the blow, got dazed and confused and could take no notice of her surroundings. He therefore invites us to hold that the story given by the witnesses is a true narration of facts. That may or may not be, but it is difficult to discard the version of the chief actor in the tragedy. The learned Magistrate has rightly observed that if Mr. Kidd were the accused in an assault case, with the woman as the complainant, it would not be possible to convict him on the evidence adduced in this case.

The conclusion at which I have arrived is that the accused have failed to substantiate beyond doubt the plea of *veritas* and the exemption claimed under Exception I, therefore, fails. But though I hold, in the state of the evidence in this case, that the defence has not succeeded in establishing the truth of the charge, I confess that I entirely agree in the observation of the learned Magistrate that the net result of the evidence on either side is that it is very doubtful whether Mr. Kidd hit the woman and that even if the complainant is not entirely absolved of the charge, he is entitled to the benefit of doubt.

The next question that demands consideration, and which in my opinion is the most important, is whether the imputations were made for the public good in good faith under the 9th Exception to sec. 499, I. P. C. It is conceded that if the imputations were made in good faith they must, considering the position of the accused, be taken to have been made for the public good. The question then remains have the accused shown that they acted

with good faith in making and publishing the statements mentioned in the charge?

"Good faith" has been negatively defined in sec. 52, I. P. C., as—"Nothing is said to be done in good faith which is done or believed without due care and attention." The learned vakil for the accused argues that even if he does not succeed in establishing the truth of the allegations, he is entitled to show that his clients were "informed and had good reason after due care and attention to believe that such allegations were true" and reliance was placed for this proposition on the case of *In the matter of Shibo Prosad Pandah* (1) and other cases in different High Courts following the above case. The cases do not lay down any new rule of law different from that contained in the 9th Exception to sec. 499 read with sec. 52 of the Penal Code. Sec. 79 of the Penal Code does not limit or expand the defence available under the 9th Exception; and it seems to me that that section does not apply to a case where the Code expressly provides similar ground of exoneration in respect of a particular offence. In a case of defamation the accused has to establish good faith, if he pleads it, as any other fact and the question whether he committed a mistake of fact or law does not arise. Sec. 105 of the Evidence Act, 1872, lays the burden on the accused to prove that they acted in the matter with due care and attention, but when evidence is adduced on both sides the question of onus loses its importance.

I now turn to the evidence in the case. I have discussed at some length the evidence on the first issue as, in my judgment, it has considerable bearing on the question under consideration. If the imputation conveyed by the defamatory state-

(1) 1 L. R. 4 Cal. 124; 5 C. 30; L. R. 123 (1878).

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ments were entirely unwarranted, the Court would jealously and stringently scrutinize the evidence of good faith; but where circumstances existed casting suspicion on the absolute innocence of the prosecutor, it seems to me that stringency would be relaxed on production of sufficient evidence to strengthen that suspicion.

The case for the defence is that some volunteers of the Congress Committee shortly after the meeting came to the office of the newspaper and reported the incident to the accused naming the complainant as the assailant. Babu Narendra Nath Sett, a vakil of the High Court, happened to be present at the time. The first accused asked his advice as to whether he could publish it in his paper. Narendra Babu advised him to make further enquiries and he sent a representative to the Hospital and another to the office of the Calcutta South Congress Committee. The latter interviewed the Assistant Secretary of the Congress Committee who referred him to the report submitted by the former to the Congress Publicity Board. The reporters brought certain information to the accused who also obtained a copy of the above report or "bulletin." In these circumstances the accused plead that they honestly believed in the truth of the report and published it in the paper.

I will first deal with the imputations made in the issue of the paper of the 20th January. The learned Magistrate is of opinion that he is "not satisfied that the editor made any enquiry worth the name which would show his good faith before rushing into print and publishing the report received from the volunteer boys and the Congress Publicity Board, if any." He has not indicated what further enquiry the editor should have made in order to justify himself for publishing the report

beyond observing that he should have made a personal enquiry from the complainant himself. The learned Standing Counsel has also laid stress on the failure of the Editor to appeal to Mr. Kidd, for information.

If it is attempted to lay down as a rule of law that a person before publishing defamatory statements should, even as a matter of prudence, seek information as to the truth of the imputations from the person against whom they are made, I regret I cannot persuade myself to be a party to laying down any such dangerous doctrine. I fail to perceive that the position of the person defamed should make any difference, for however highly placed a person may be, he may not be above human frailties. The contrary view would make the 9th Exception to sec. 499 superfluous. For if the person against whom the imputation is to be made admits the truth of it, protection is given by the first Exception: if, on the other hand, he denies the truth of it, the defamer will not be entitled to plead good faith under the 9th Exception under any circumstances.

The learned Standing Counsel has argued with great vehemence that the accused should not have believed in the information supplied to him by the Congress volunteers or the report submitted to the Publicity Board and that he acted without due care and attention in placing such trust. In order to determine whether the accused was justified in believing the truth of the reports one has to place oneself in the place of the accused and survey the situation from his stand-point. It may be true that a disinterested listener outside the fold of the party will consider it prudent to institute further investigation into the truth of the accusation or even

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disbelieve the informants, but a person professing the same political or religious creed as that of his informants may honestly take a different view. The Court in determining whether the accused should or should not have placed implicit reliance on the credibility of his source of information should not in my opinion place before itself the standard which it would demand to convince it of the trustworthiness of the persons supplying the information. It should take into account the mental attitude of the person, his prejudices and predilections and the surroundings in which he is placed. This view is supported by the case of *Emperor v. Abdool Wadood Ahmed* (2) following *Bhawoo Jiraji v. Mulji Dayal* (3). The learned Judges there observe, "Good faith under this 9th Exception requires not logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must in each case be considered with reference to the general circumstance and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning." It is conceivable that there may be mutual confidence or a code of honour even among criminals.

The accused belong to the same political party and profess the same political faith as their informers. According to their estimation they are following a course which is commendable and does not attach to itself ignominy or moral obloquy. I am not aware that the profession of

a particular political or religious belief, not inconsistent with accepted ideas of moral decency, necessarily imports dishonesty of purpose or detracts from the trustworthiness of a person holding such belief. You may abhor his faith but not necessarily his character. The accused say that they received certain information from their reporters. It is true that those reporters have not been examined because, it is said, it is a breach of etiquette for the editor of a paper to divulge his sources of information, but whatever information the editor may have received, it was confirmed and strengthened by a copy of the report which was submitted by the Congress Committee to their Publicity Board and which, it is evident, came into the hands of the editor. At being the official document of his party it can hardly be said that it was an error of judgment on his part to believe in its accuracy. That this report, with slight verbal alterations, was published in the issue of the paper of the 20th January is borne out by the evidence of defence witness No. 15, Assistant Secretary to the Congress Committee. I do not agree with the Magistrate in thinking that this witness was a made-up one for he is a responsible officer of the organisation through whose hands the report may have, in the ordinary course of business, passed, though he was not the writer of it. The accused have been charged with publishing defamatory statements contained in this report. To a person situated as the accused editor was, the report bore intrinsic evidence of infallibility. Its veracity was further augmented by a report of the statement of witnesses recorded by Mr. J. M. Sen Gupta, Barrister-at-Law and published in the issue of the 23rd January. It began with the statement of Urmilla Devi, a lady of high respectability

(2) I. L. R. 31 Bom. 293 (1907).

(3) I. L. R. 13 Bom. 377 (1932).

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and position, who spoke to every incident that happened on that day except the actual assault. She, however, within a few minutes of the occurrence received information that a woman was assaulted, after she had left, by a European Officer and according to her Mr. Kidd was the only European Officer on the spot. She further saw that the woman was carried on a taxi unconscious and bleeding. This evidence was supplemented by three eye-witnesses, young men working in the Congress cause. I am not called upon in this case to consider whether this evidence or that which has been produced in Court is sufficient to convict the complainant of the assault. I have held it is not. I have only to consider whether it was sufficient to produce in the mind of the accused, circumstanced as he was, a reasonable belief in the accuracy of his information. I cannot hold that the above circumstances coupled with the remarkable apathy of the Police to which I have already adverted and the further fact that the complainant was the only European Officer on the spot, which I believe to be true, using his stick, I take it for a lawful purpose, did not afford a reasonable ground to the accused to believe that the statements he published were true. I am therefore of opinion that the accused have succeeded in establishing their plea of good faith in publishing the imputations.

I think it proper to refer to an observation made by the learned Magistrate which finds place in two places in his judgment and on which he seems to have laid great stress. I refer to the passages in his judgment in which he charges the defence with change of front in that the case of the defence originally was that the assault on the woman by the complainant was deliberate; whereas in Court the case was changed into one of

indiscriminate assault. This is what he says:—"This charge of indiscriminate assault has been sprung up and developed in the course of the trial of the case. In the original publications, which I have quoted and which form the basis of this case, that charge is that Mr. Kidd deliberately and brutally hit the woman from behind. This was the first report that the 'Servant' received and published. The statements of some witnesses about this not being deliberate act and being in the course indiscriminate and wanton assault came much later on." I wonder what led the learned Magistrate to fall into this error. It appears that in the statements published on the 20th and 23rd January it is said that the complainant was assaulting people indiscriminately and "right and left" (see pp. 72, 75 and 76 of the paper-book, Ex. I and Ex. 3). At p. 87 it reads that a witness in reply to a question put by Mr. Surendra Nath Mullick at a non-official enquiry said, "I think it was a random blow not particularly meant for the lady."

If having been found that the imputations made in the issue of the 20th January were made in good faith, it will follow that those published in the issue of the 23rd January were similarly made. In fact between the 20th and 23rd January the accused obtained further materials to strengthen their conviction, viz., the statements of witnesses recorded by Mr. J. M. Sen Gupta (D. W. 13) which, the witness admits, were published in the newspaper but he did not go through them line by line.

I now refer to two other minor points urged by the learned vakil for the accused.

(1) He also claims protection under Exception IV to sec. 499, I. P. C., on the ground that as it was well known that Mr. Kidd was in the habit of striking people

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in such meetings, the imputations charged did not lower his character in the eye of the public. I do not think there is any substance in this argument. It is not proved that Mr. Kidd had such wide notoriety or that the public had formed such estimate of his character. In fact the prosecution has adduced sufficient evidence to prove that the imputations were calculated to harm the complainant's reputation.

(2) It is also argued that the conviction of the second accused under sec. 500, I. P. C. is wrong inasmuch as he is a printer and as such, if the offence is proved, should be convicted under sec. 501, I. P. C. The second accused was charged as printer and publisher and he does not deny that he was a publisher also. Besides, alteration of the section of the Code will not materially help the accused nor vitiate their joint trial.

In the above view of the case, I am of opinion that the charge fails and both the accused should be acquitted.

[The two Hon'ble Judges of the Division Bench having differed in their judgments, the case was referred to the Hon'ble Mr. Justice Rankin.]

Babus Dasarathi Sanyal, Narendra Kumar Bose, Samarendra Kumar Dutt, Hemendra Nath Bose, Bon Behari Sarkar, Lalit Mohon Sanyal, Satindra Nath Roy Chowdhury and Asita Ranjan Ghosh for the Appellant.

Babus Dasarathi Sanyal, Samarendra Nath Dutt, Hemendra Nath Bose and Bon Behari Sarkar in Revision No. 677 of 1922.

Mr. B. L. Mitter, Standing Counsel (with *Rai Tarak Nath Sadhu Bahadur*) for the Crown in both the appeal and the Revision.

The JUDGMENT OF THE COURT was as follows:—

In my opinion this case must be disposed of on the footing that there has not been a compliance by the Magistrate with the provisions of sec. 342 of the Criminal Procedure Code.

According to the order sheet the accused were properly called upon to plead. That was on the 14th March 1922 and at that time they stated that they pleaded not guilty and also that they would both file written statements. The duty of the Magistrate under sec. 342 is not in question at that stage. It arises when the witnesses for the prosecution have been examined, cross-examined and re-examined and according to the order sheet that process was completed on the 12th April 1922, on which date the case was adjourned until the 25th for the purpose of the accused entering on their defence. It is quite clear that the promise to file written statements made at the time of the plea in no way exonerates or exempts the Court from examining the accused at a later stage as required by sec. 342. There is no minute in the order sheet to the effect that on the 12th April or on the 25th April anything purporting to be an examination of the accused took place, nor is there any indication of the questions put and the answers obtained upon such examination. It appears from the report made by the Magistrate that at the close of the prosecution case he had discussions with the learned Counsel for the defence as to the number and nature of the witnesses the accused were going to call. It also appears from the Magistrate's report that he always understood, and so far as he now remembers he was told, that the accused would file the written statements promised by them. In these circumstances the Magistrate has

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said in his report, "it will thus be seen that I did examine the accused and give them the fullest opportunity to make their statements. And they did so in their written statements filed on the 20th May 1922, when not only had the prosecution witnesses been cross-examined and re-examined but also their own defence been finished."

Now, the first question which I have to address myself to is the question whether there has been a compliance with the section. In this country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case, the Court itself shall put aside all Counsel, all pleaders, all witnesses, all representatives, and shall call upon an individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating. In the case of an accused who is in no difficulty in understanding the proceedings, a question addressed to his Counsel in his hearing and answered by his Counsel in his hearing may perhaps be taken in certain circumstances as a compliance with the section. It is not a full compliance with the section, but I say nothing whatever to create any more trouble than is absolutely necessary in any case of that character. What is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips. Now, I cannot think that the fact

that there was a discussion with Counsel about the number and nature of the witnesses is the same thing at all as what the section requires. It is important also to have regard to the time at which this examination took place. In the decided cases it has been pointed out that to ask an accused for his defence before he has the whole of the prosecution evidence in front of him, is not a compliance with the section. In my opinion to ask the accused not at the beginning of his defence but later on when his statements may be subject to heavy discount owing to the evidence given in his hearing by his own witnesses in the meantime, that is not to be assumed to be a substantial compliance with the requirements of the section. In the present case I have an instance not on the side of the accused but on the side of the complainant of this very matter and it is a very good illustration because in this case much difficulty has been caused and much criticism has been made because the complainant whose examination was not finished till after the other witnesses for the prosecution had been examined had introduced matters the value of which might have been taken quite differently if they had been introduced at the earliest possible opportunity. In like manner an accused who is only given an opportunity to state his defence after the witnesses called by himself have been examined and cross-examined may not be in as good a position as if he had been invited to make his defence at the proper time and before those witnesses were heard. The fact that the accused were asked to put in written statements in my opinion is of no great moment for this purpose. There is all the difference in the world between a written statement presumably prepared, almost certainly revised, by the lawyers appearing for the de-

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fence and a statement made by the accused himself, so that the Magistrate can observe his demeanour and his manner while he makes it and come to his conclusions as to the value of his evidence. In this country an accused is not allowed to give evidence on his own behalf and, in view of this sec. 342, is of cardinal importance. I say these things not because I am desirous of introducing any new technicalities or any new difficulties as regards procedure in the lower Courts. I quite appreciate that the Specially Magistrates in the City of Calcutta have to get through a mass of important and difficult work and that some slips are not only natural but inevitable. At the same time the question whether a non-compliance with sec. 342 is fatal to the proceedings is a question as to which I am not prepared, sitting as I now am, to call into question the decision given in the case of *Mazahur Ali v. King-Emperor* (4). The importance of that case is that the learned Chief Justice distinctly stated thus: "On the merits, as far as I can see, there is nothing to be said in support of this application, but these are the words of the section which, in my judgment, expressly provide that the Magistrate shall question the accused generally on the case at a certain stage in the proceedings." It is no doubt arguable that the words of the section are mandatory, but that it does not follow that every non-compliance is more than an irregularity. In the present case on the facts it is also argued with great plausibility that if it is a proper question to entertain whether or not these accused have suffered any prejudice, the answer should be in the negative. It seems to me highly undesirable that the ruling in the case of *Mazahur Ali v. King-Emperor* (4) should be whittled down by

(4) 27 C. W. N. 93 (1923).

a Court which is not entitled to overrule it: and I expressly reserve my opinion on the question whether that case did or did not go too far. That, however, is the measure of justice and strictness which was meted out to the accused there and I am not going to exact a lower scale in the present case.

In *Mr. B. L. Mitter's* argument there was a contention that whether or not failure to comply with the section properly amounts to an irregularity or to an illegality vitiating the proceedings depends on the question of merits, that is to say, on the question whether the accused person has been prejudiced or has not been prejudiced. I must point out that there are some manifest difficulties in this view. My duty, I think, is clear, namely, to follow the decisions of a Division Bench of the Court and to treat this trial as having become illegal from the moment when without compliance with sec. 342, the Magistrate called upon the accused to enter on their defence.

The case is therefore sent back to the same Magistrate to begin the proceedings anew as from the end of the re-examination of the witnesses for the prosecution, that being the point at which in my opinion, for non-compliance with sec. 342, the proceedings became illegal under the authority to which I have already referred.

Mr. Sanyal must excuse me if I do not discuss certain matters which he has mentioned in arguing this part of the case, but I have to remember that anything I might say at the present moment might seriously embarrass one or the other of the parties when the proceedings begin afresh in the lower Court.

The result therefore is that the convictions of the accused are set aside and the case sent back to the same Magistrate to

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begin the trial afresh from the point which I have indicated.

The fines, if paid, must be refunded.

The same order is made on the revision petition at the instance of the second accused, the printer.

J. N. R.

Case remanded.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

<p>LORD PHILLIMORE. LORD CARSON. SIR JOHN EDGE. 1922, Heard, 4, May. Judgment, 31, May.</p>	<p> E. SUBBARAYA PILLAI, since deceased (now represented by Subra- mania Pillai and ors.), and ors., Appellants, v. . RAJAH KUMAR VEN- KATA PERUMAL RAJU BAHADUR VARU and ors., Respondents.</p>
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Limitation Act (IX of 1908), Art. 113—Contract for sale of land—Intending purchaser if beneficial owner or has a charge on the property—Right to sue for possession without claiming specific performance—Transfer of Property Act (IV of 1882), sec. 54.

Under a contract of sale of land, no charge is created in favour of the intending purchaser, who does not by reason of such contract alone become entitled to sue for possession, absolutely or conditionally on his fulfilling his part of the stipulations in the contract.

A suit to enforce his rights under the contract with reference to the property is essentially one for the specific performance of a contract to which Art. 113 of the Limitation Act applies.

This was an appeal from a decree of the High Court at Madras, dated the 14th February 1916, which reversed a decree of the Subordinate Judge of North Arcot, dated the 22nd April 1901.

The suit out of which the appeal arose was instituted by the manager of the

Court of Wards on behalf of Rajah Kumar Venkata Perumal, a son of the Rajah of Karvetnagar, for a declaration of his rights and title to four villages and for possession thereof.

The suit was based on an agreement, dated the 25th August 1888, between Saravana Pillai (the original first Defendant) and the Plaintiff which provided that on taking an account Rs. 99,568-15-6 had been found due to Pillai and that he should sell the suit villages to the Plaintiff on payment of that sum and that if the Plaintiff were unable to pay the full amount in cash a mortgage should be taken on the villages agreed to be sold.

Saravana Pillai (since deceased) and five mortgagees from him were made Defendants and it was alleged that Pillai was a trustee for the Plaintiff.

The suit was tried by the Subordinate Judge of Arcot who decided that the parties were bound by the terms of the agreement and that Pillai was the owner of the villages but that the Plaintiff's remedy was an action for specific performance which had, however, become barred by limitation, and he dismissed the suit and passed a decree accordingly.

From this decree the Plaintiff appealed to the High Court at Madras (Subrahmanya Ayyar, Officiating C. J., Benson and Bhasham Ayyangar, JJ.), who found that the agreement proceeded on the footing that the Plaintiff was the beneficial owner of the villages and that the first Defendant held the same for his benefit. They accordingly set aside the judgment of the Court below and remitted the case (on the 15th December 1903) for findings on three specific issues.

The issues remitted were tried by the District Judge of North Arcot who recorded his findings thereon and the proceedings terminated in a final decree of

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the said High Court, dated the 14th February 1916, which settled the amounts due by the Plaintiff to the first Defendant and provided for redemption by the Plaintiff and for sale in default subject to certain terms and conditions.

From this decree the principal Defendants appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and B. Dubé for the Appellants.—The High Court have taken a wrong view of the construction of the contract. It was in reality an agreement in which Saravana Pillai agreed to sell the villages to the Plaintiff for a fixed sum. The suit therefore is in reality a suit for specific performance of a contract and is barred by Art. 113 of the Limitation Act.

Reference was also made to *Ramchand Manjmal v. Goverdhandas Vishindas Ratanchand* (1) on the question as to whether the Appellants were justified in bringing this appeal seeing that no appeal had been filed by them against the order of the High Court of 15th December 1903.

Mr. J. M. Parikh for the Respondents submitted that if the appeal were allowed, it should be without prejudice to the claims of Respondents Nos. 8, 9 and 10 who were mortgagees from the first Defendant.

Their LORDSHIPS' JUDGMENT was delivered by

LORD CARSON.—In this suit the present Rajah of Karvetnagar seeks to recover possession from the Defendants of certain villages on payment of such sum, if any, as may be found due.

Both the Subordinate Judge of North Arcot and the Judges of the High Court of Judicature at Madras were in agreement

that the legal relation between the Plaintiff and the first Defendant is settled and determined by a contract in relation to the said villages entered into on the 25th August 1888, between Sri Maharajulangu, the Plaintiff's father, and the first Defendant. Saravana Pillai, who was the first Defendant, is now dead, but is represented in this appeal. The remaining Defendants claimed to be *bonâ fide* purchasers for value from the first Defendant without notice of any claim by the Plaintiff. The Subordinate Judge held that upon the construction of the said contract Saravana Pillai was the owner of the villages, and agreed to sell the same to the Plaintiff for a consideration of Rs. 99,568-15-6, to be paid or secured as stated in the fifth paragraph of the said contract of the 25th August 1888. The High Court, on the other hand, held that upon the true construction of the contract the Plaintiff was the beneficial owner of the villages and Saravana Pillai only the legal owner, and that in the matter of pecuniary obligations incurred by Saravana Pillai in connection with the purchase of the villages, and in the matter of the other money dealings between him and the Plaintiff, there was found due from the Plaintiff a sum of Rs. 99,568-15-6 in settlement of accounts. It is admitted in the judgments of the High Court that if the said contract were a contract for sale the suit would essentially be one for the specific performance of a contract, and in that case it would be clearly barred under Art. 113 of the Limitation Act. It is well to bear in mind that the terms of this section relate to any contract.

On the view taken by the High Court of the contract, however, it was held that the suit is really one for the possession of immoveable property by a beneficial owner thereof against the legal owner on pay-

(1) L. R. 47 I. A. 124; S. C. I. L. R. 47 Cal. 918; 24 C. W. N. 721 (1920).

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ment, if necessary, of such sum, if any, as may be found due; that the execution of a conveyance by the first Defendant to the Plaintiff was not essential, and is unnecessary if he gets a decree for the recovery of the villages as beneficial owner.

The villages in question originally belonged to the Plaintiff's late father—the then zamindar of Karvetnagar. They were sold in 1883 in Court auction in O. S. No. 5 of 1879, and purchased by the first Defendant as stated in the contract. It is alleged by the Plaintiff that this purchase was made on behalf of the Plaintiff's father; that a part of the purchase money was paid out of his funds and the balance obtained from one Krishnama Chari, to whom the villages appear to have been sold by the first Defendant subject to a condition of reconveyance on payment of a stipulated sum. A suit to compel such reconveyance was instituted in the High Court at Madras, and on the 16th October 1889, a decree directing reconveyance was made. In pursuance thereof a conveyance was duly executed on the 7th February 1890, and since that date the first Defendant had until he died been in possession of the villages, acting as the absolute owner thereof. The contract of the 28th August 1888, was entered into during the pending of the original suit. It recites briefly the facts above stated and refers to the pendency of the said suit, and then proceeds as follows:—

“Under these circumstances, under the order of Sri Maharajulanguaru the accounts were looked into in their presence in respect of items due to the said Saravana Pillai relating to the said villages, and also relating to all money transactions between Saravana Pillai and Sri Maharajulanguaru. On looking into the accounts, the amount found due to the said Saravana Pillai was Rs. 99,568-15-6. Saravana Pillai consented to receive this sum of rupees, etc., and sell the aforesaid villages to Sri Maharajulanguaru.”

Whatever may have been the original nature of the purchase by Pillai or the arrangements entered into to raise the purchase money, this contract was a settlement of questions of account in relation to the said villages and other matters, and under the terms of it Pillai is treated as the legal and beneficial owner. The second clause of the contract further strengthens this construction. It provides that as soon as Pillai obtains a decree in the suit already referred to (which, as pointed out, he did obtain), he should sell the villages to Maharajulanguaru, and the said Maharajulanguaru should purchase the same for the sum of Rs. 99,568-15-6. “He should not sell to others without the consent of the Maharajulanguaru”—a provision which would be meaningless unless he was the legal and beneficial owner. The fifth clause of the agreement provides for payment of interest on the purchase money until paid, and that until the principal and interest are paid the Maharajulanguaru should mortgage the villages “which Saravana Pillai has consented to sell, or other villages, etc.”—properties which are acceptable to Saravana Pillai as security for the said principal and interest—and execute a document therefor. The Plaintiff took no further action in the terms of the said contract. In the year 1899 his estate was taken under the management of the Court of Wards, and this suit was instituted by the Manager appointed by the Court of Wards on the 24th August 1900. Before instituting this suit, it is to be observed that on the 23rd August 1900, the Acting Secretary to the Court of Wards, by a notice in writing, called upon the first Defendant to execute a conveyance of the villages to him on behalf of the Plaintiff and to tender a mortgage for execution by him on behalf of the Plaintiff.

E. SUBBARAYA PILLAI v. RAJAH KUMAR VENKATA PERUMAL RAJU BAHADUR VARU.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 161 of 1922.

Their Lordships agree with the Subordinate Judge that no charge is created by the contract over the villages in question, and that the Plaintiff had no right to recover possession of the property absolutely or conditionally on his executing a mortgage deed or making a payment to the first Defendant.

The suit, therefore, becomes one for the specific performance of a contract which is barred by the section of the Limitation Act already referred to.

This Board are, for the reasons stated, of opinion that this appeal should be allowed and the judgment of the Subordinate Judge restored, and that the Appellants should have their costs in the Courts below and of the appeal. It is unnecessary, having regard to this conclusion, to consider the case of the Respondents, the legal representatives of Defendant No. 3—for whom Mr. Parikh appeared—further than to say that it was agreed in the course of the argument by Mr. DeGruyther, Counsel on behalf of the Appellants—that the interests of Mr. Parikh's clients should not be affected by any question of any statutes of limitation which might be raised in answer to their claim, owing to the delay which has been occasioned by the institution and the carrying out of the proceedings in this suit, and their Lordships so determine.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor: Mr. John Josselyn for the Appellants.

Solicitors: Messrs. Barrow, Rogers and Nevill for the Respondents.

G. D. M.

Appeal allowed.

MOOKERJEE, J.

RANKIN, J.

1922,

Heard, 1 and

2, August.

Judgment,

10, August.

KALIKRISHNA RAY and
anr., Appellants,

v.

MAKHANLAL MOOKER-
JEE, Respondent.

Probate and Administration Act (V of 1881), sec. 21—Indian Succession Act (X of 1865), sec. 89—Hindu Will's Act (XXI of 1870), sec. 2—Residue left by Will for the maintenance and worship of idol—Idol, if residuary legatee—Letters of administration, who is entitled to, shebait or priest.

Where a testatrix, a Hindu widow, by her Will, after providing for expenditure on the occasion of her obsequious ceremonies and payment of certain legacies, directed that the residue of her estate should be devoted to the maintenance and worship of the idol established by her husband's ancestors, and the executor named in the Will did not take out probate:

Held—That the idol was the residuary legatee within the meaning of sec. 89 of the Indian Succession Act, which is applicable to Hindus, and that the person entitled to letters of administration under sec. 21 of the Probate and Administration Act was the shebait of the idol.

Held, further—That the appointment of a priest (purohit) to conduct the worship of the idol by the shebait does not transfer the management of the debutter estate from the shebait to the priest; and that the priest is not entitled to the grant of letters of administration as residuary legatee or otherwise.

MAHARANI INDURJEET KOOER v. CHUNDEMUN MISSE (1) and NAFAR CHANDRA v. KAILASH CHANDRA (2) referred to.

(1) 16 W. R. 99 (1871).

(2) 25 C. W. N. 201 (1900).

KALIKRISHNA RAY v. MAKHANLAL MOOKERJEE

It is well-settled that when the worship of an idol has been founded, the shebaitship is vested in the founder and his heirs, unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution.

This was an appeal from a decision of A. J. Chotzner, Esq., District Judge, 24-Parganas, dated the 1st March 1922.

The facts of the case will appear from the judgment.

Babus Rupendra Kumar Mitra and Pasupati Ghose for the Appellants.

Babus Probodh Kumar Das and Panchanan Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal is directed against an order for the grant of letters of administration, with copy of the Will annexed, to the estate left by one Bidhumoni Debi. The lady made a testamentary disposition of her properties on the 29th November 1898 and died on the 16th December 1898; she directed the expenditure of Rs. 600 on the occasion of her obsequious ceremonies and Rs. 1,400 in the payment of specified amounts as legacies to various persons. The residue, she directed, would be devoted to the maintenance of the worship of the idol Sri Sri Iswar Lakshmi Janardan established by the ancestors of her husband. The executor named in the Will did not take out probate and it was not till the 5th November 1904 that one Rajendra Nath Roy, a first cousin of the lady, came forward to take out letters of administration with copy of the Will annexed. We are not now concerned with the history of the management of the estate by this administrator. It is sufficient to state that on his death, one Makhanlal Mookerjee, the priest of the

testatrix, applied for letters of administration. In the first instance, an *ex parte* order was made in his favour; this was subsequently re-called and the case was reheard in the presence of Kalikrishna Ray and Satis Chandra Ray who are the grand-sons of the brother of the testatrix and have come forward to obtain letters of administration. The District Judge has made a grant in favour of the priest under sec. 21 of the Probate and Administration Act. We are now called upon to consider whether this order can be sustained.

Sec. 21 runs in these terms:—

“When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the Will, and letters of administration may be granted to him or them accordingly.”

The District Judge has made an order in favour of the priest on the ground that he was the residuary legatee. In our opinion this position cannot be supported; and, indeed, in the course of argument, the view that the priest was the residuary legatee has been abandoned. The Will directs the payment of a legacy of Rs. 50 to the priest; this clearly does not make him the residuary legatee. But it has been admitted before us that this sum has already been paid to the priest out of the estate. He cannot consequently be regarded as a legatee having a beneficial interest in the estate. The residuary legatee is unquestionably the idol established by the ancestors of the testatrix. It is to the idol that the residue of the estate is bequeathed, and under sec. 89 of the Indian

KALIARISHNA RAY v. MAKHANLAL MOOKERJEE

Succession Act, which is applicable to Hindus under sec. 2 of the Hindu Wills Act, a residuary legatee may be constituted by any words that show an intention on the part of the testatrix that the person designated should take the surplus or residue of his property. Consequently, the person entitled to letters of administration, as residuary legatee under sec. 21 of the Probate and Administration Act, is the *shebait* of the idol. It cannot be suggested that the priest is the *shebait*. The *shebait* appoints the *purohit* to conduct the worship, but that does not transfer the management of the *debutter* estate from the *shebait* to the *purohit*; *Maharani Indurjeet Koor v. Chandemun Misser* (1) and *Nagar Chandra v. Kailash Chandra* (2). Where the appointment of a *purohit* has been at the will of the founder, the mere fact that the appointees have performed the worship for several generations will not confer an independent right upon the members of the family so appointed, and will not entitle them as of right to be continued in office as priest; *Nanabhai v. Trimbak* (3) and *Narayana v. Ranga* (4). We are consequently of opinion that the Respondent is not entitled to the letters of administration as residuary legatee or otherwise and the order made in his favour cannot be supported.

The result is that the appeal is allowed and the application for letters of administration made by Makhanlal Mookerjee dismissed with costs, both here and in the Court below. The hearing-fee in this Court will be assessed at two gold mohurs.

The case will be remitted to the lower Court so that the question of grant of letters of administration to the Appellants

or other persons may be further considered. The residuary legatee is the person entitled to the office of *shebait*. We are not in a position to decide, from the materials on the record, who is entitled to the *shebaitship*. But we may add that it is well-settled that when the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution; *Sree Gredhareejee Goswamce v. Rumanlalji Gossamce* (5), *Jagadindra Nath v. Hemanta Kumari* (6) and *Mohan Lalji v. Gordhan Lalji* (7). In this connection, it must be borne in mind that as stated in the Will of the lady, the worship of the idol was established by the ancestors of her husband. She is consequently not the original founder; nor can she be regarded as a founder because of her subsequent benefaction which is nothing beyond an accretion or addition to the existing foundation; *Annaswami Pillai v. Ramakrishna Mudaliar* (8) and *Appasami v. Nagappa* (9). The question of *shebaitship* is thus a matter for careful investigation, and we direct that the application for letters of administration made by the present Appellants be re-heard, after notice to the heirs of the husband of the lady and to the Government Pleader as representing the Crown.

P. K. C.

*Appeal allowed;
Case remitted.*

(1) 16 W. R. 99 (1871).

(2) 25 C. W. N. 201 (1920).

(3) [1878] Bom. P. J. 195.

(4) I. L. R. 15 Mad. 183 (1891).

(5) L. R. 16 I. A. 137 (1889).

(6) L. R. 31 I. A. 203; s. c. 8 C. W. N. 809 (1904).

(7) L. R. 40 I. A. 97; s. c. I. L. R. 35 All. 283; 17 C. W. N. 741 (1913).

(8) I. L. R. 34 Mad. 219, 229 (1900).

(9) I. L. R. 7 Mad. 439 (1884).

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD DUNEDIN.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

1922,

Heard, 13 and

15, June.

Judgment,

16, June.

PALCHUR SANKARA-

REDDI and ors.,

Appellants,

v.

PALCHUR MAHALAKS-

MAMA, since deceased,

and ors., Respondents.

Appeal—Witness, credibility of—Weight to attach to opinion of trial Court—When question does not depend upon witness's demeanour and manner in the box but on inferences from facts, Appellate Court as good judge of fact as trial Court.

When the question of credibility of a witness depends upon the light which is thrown upon it by his demeanour in the box, by the manner in which he answers the questions and by how he seems to be affected by the questions that are put to him and so on, the trial Judge has an advantage not shared by the Appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the Court of Appeal is really in as good a situation as the Judge of first instance

These were two consolidated appeals from two decrees of the High Court at Madras, dated the 10th December 1917, which reversed two decrees of the Temporary Subordinate Judge of Nellore, dated the 15th August 1916.

The facts are shortly as follows:—

One P. Chenchuragava Reddi died on the 26th October 1914 after a somewhat protracted illness.

On the 20th November 1914, the Appellants instituted a suit against the first Respondent who is the widow of Chenchuragava Reddi.

They alleged that the latter died intestate, and that the widow was fabricating a Will, and they prayed for a declara-

tion that they were the nearest reversioners of the deceased and that the Will was not genuine.

On the 9th December 1914 the impugned Will, dated the 22nd October 1914, was unsuccessfully presented for registration by the widow, and on the 30th September 1915 the widow and her nephew instituted the second suit under sec. 77 of the Registration Act.

Both suits were tried by the Subordinate Judge of Nellore, and by consent the same evidence was accepted in each.

The learned Subordinate Judge decided against the genuineness of the Will propounded by the widow but held that the Plaintiffs had not established beyond reasonable doubt that they were the nearest reversioners to the estate of the deceased.

In the event he passed decrees dismissing both the suits.

Against these decrees the parties presented appeals to the High Court at Madras which were heard together and one judgment was delivered on 10th December 1917 by Abdul Rahim and Oldfield, JJ.

The learned Judges decided in favour of the genuineness of the Will, reversed the judgment of the Subordinate Judge and passed decrees directing the Sub-Registrar to register the Will on its presentation by the Appellant within 30 days from the date of the decrees.

Against these decrees the Appellants appealed to His Majesty in Council.

Sir William Finlay, K. C. and Mr. B. Dubé for the Appellants.

Messrs. L. DeGruyther, K. C. and Narasimham for the 2nd Respondent were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—One Palchur Chen-

PALCHUR SANKARAREDDI v. PALCHUR MAHALAKSMAMI.

churagava Reddi, an inhabitant of a village in the District of Nellore, died on the 26th October 1914, at the age of about 60, and was possessed of considerable property. He left a widow, but no children and no near relatives except such as were relations of his wife. His wife had a sister, who had a son, Vemireddi Babureddi. On the 9th December 1914, his widow and his nephew presented for registration a Will before the Sub-Registrar. The registration was opposed by the Appellants in the present suit, who allege that they are the nearest agnates of the deceased and as such are entitled in reversion to succeed to the estate after the termination of the widow's interest, upon the ground that they conceived that the deceased had died intestate. Registration was refused, as it was considered that sufficient proof had not been given that the Will was duly executed, and this decision of the Sub-Registrar was confirmed on appeal by the Registrar.

The present Appellants brought a suit for a declaration that they had the position of nearest agnates, and that the so-called Will was not executed in fact, and was, if executed, executed by the testator while in a condition of unsound mind.

To this suit defences were lodged for the widow and Vemireddi Babureddi, who was the chief taker under the Will, in which they alleged that the Will had been duly executed. A counter-suit was brought by them to have it declared that the Will was genuine, and also to have the Registrar enjoined to register the Will. These two suits came before the Subordinate Judge.

In this state of matters, what might be called the natural order would be first to take up the question of whether the parties who were attacking the Will had

any title to raise the question, because, of course, unless they had such title—that is to say, unless they proved their relationship—they had no right to be heard, whether there was a Will or not. But the learned Judge approached the questions in the other order, and after a prolonged investigation he held that the Will had not been executed at all, and was a forgery. He then took up the question of relationship, and held that the relationship had not been sufficiently proved. In the result, therefore, he dismissed both suits. On appeal, naturally the High Court took up the matter in the same order as the learned Subordinate Judge had done, and they came to the conclusion that the Will had been duly executed. That being so, it did not become necessary to go into the question of relationship. The High Court gave these Respondents here a decree in their suit and dismissed the appeal in the other suit.

From these decrees these consolidated appeals are brought to His Majesty in Council. The question of whether the testator was in a sound state of mind has really dropped out. As the Subordinate Judge found that the Will had not been executed, it was not necessary for him to go into the question of mental testamentary capacity; it was very feebly insisted upon before the High Court, and it was, quite rightly, entirely given up before their Lordships.

Sir William Finlay, who argued the case exceedingly well, really put the only point in the case. He said that the execution of the Will was necessarily a question of fact; that the fact depended in such a case upon credibility; that the Judge who had heard the witnesses had come to a certain conclusion; and that there was no sufficient reason for the

PALCHUR SANKARAREDDI v. PALCHUR MAHALAKSMAMA.

High Court to alter that. He quoted certain well-known authorities which, although authorities in the Courts in India, really represent a canon which is equally good in every system of law, namely, that when you have to deal with a pure question of credibility very great weight ought necessarily to be given to the judgment of the Judge who saw the witnesses. Their Lordships are not at all likely to throw any doubt upon that doctrine, nor do they think that the High Court threw any doubt upon it. It was just as alive to the doctrine as are their Lordships.

There are two ways in which one may approach the question of credibility. When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box, by the manner in which he answers questions, and by how he seems to be affected by the questions that are put to him, and so on. No doubt there the trial Judge has an advantage which cannot possibly be shared by any Appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the Court of Appeal is really in just as good a situation as the Judge of first instance. Their Lordships think that it is quite evident from their judgment that the High Court entirely recognised this, and they agree with the criticisms which were made by the High Court upon the judgment of the learned Subordinate Judge.

There really were two matters bearing upon the question of whether the Will was really the Will of the deceased or not. The first was inspection of the Will itself. It was said against the Will that the signature of the deceased was in a shaky hand. It is to be noted that it was not

said that the signature was uncharacteristic, but merely that it was shaky. Their Lordships do not think that that is an objection in which there is much weight. Indeed, so far it seems almost in favour of the Will being genuine, because, if a man sets himself to commit a forgery, he would naturally try to make the signature as exactly like the genuine signature as he could, and certainly would not introduce shakiness into the signature. The shakiness in the signature is perfectly easily accounted for by the fact that the Will was only made a few days before the testator's death, and that he was very ill and probably suffering a good deal of pain. Then comes the other matter—the story itself. As the learned Subordinate Judge says, the story of execution of the Will is quite perfect. The question is whether the story can be taken as true or not. It is spoken to by quite a considerable number of witnesses, and the point is whether there are really any sufficient criticisms against those witnesses. The Appellants, in their story, are in rather a curious position. They do not wish to say what in most cases would be the natural thing to say. This man had no intention of making a Will at all; he meant to die intestate. On the contrary, they rather put in the forefront that this man had every intention of making a Will, and there has been a great deal of evidence that there was a certain amount of hearsay, based, no doubt, on something that the testator had said, and which had been communicated to the witness Chengiah—against whom there is nothing to be said—that he had some intention of devoting a very large portion of his fortune to a charity in connection with a school for boys. Now this is a rather difficult position for the Appellants to put themselves into,

PALCHUR SANKARAREDDI v. PALCHUR MAHALAKSMI.

because the moment that they assert that there was another Will they put themselves out of Court, because their only right to prevail is upon intestacy, and, therefore, they rather hint that it was most likely that the man would make a Will, and then go on to say it is pretty apparent from what we have heard that if he did make a Will, this is not the sort of Will that he would have made. It is really the old position of wishing to wound and being afraid to strike. Their Lordships cannot help thinking, and the Appellate Court probably thought too, that unfortunately this notion that the deceased meant to make a Will in favour of the school got so much into the mind of the learned Subordinate Judge that his judgment was swayed by that predominating opinion to begin with, and that he then looked at each witness with a sort of idea of trying to find out why the witnesses could not be reliable, instead of beginning with the witnesses and then seeing if there was any special reason why they should not be speaking the truth.

Their Lordships do not propose to go through the matter by examining the evidence of each of the witnesses, because they entirely concur with a single sentence of the learned Judges in the High Court, who say this, speaking of the evidence of the various witnesses: "We do not find that enough has been shown to justify us in distrusting their evidence and in saying that they were all participants in a forgery."

There is another matter which has great weight, namely, the attitude taken by the widow herself. The widow herself propounded the Will. It is quite true that in the later development of the case she no longer went along with the second Defendant, who is now the second Re-

spondent in this case, and there has been light to a certain extent thrown upon her attitude. It is quite evident that she was anxious for a certain disposition to be made of part of the property. She seems to have been willing to give up so much of her own life interest as was secured to her by the Will, and she was anxious that the second Respondent, who was the principal taker, should go along with her in order that a settlement should be made upon a relative of her own who was going to be married. When she found that the second Respondent would not go along with her in that, she seems, so to speak, to have turned round, but only turned round in this way, that she absented herself: she did not take the active part of coming to the Court to deny that the Will had been executed, though when they came to the High Court she instructed her Counsel to go further. Under those circumstances it is impossible not to remember her original attitude, and their Lordships are inclined to believe that her original attitude was prompted by the fact that she knew it was the truth.

For these reasons their Lordships think these consolidated appeals fail, and should be dismissed, and they will humbly advise His Majesty accordingly. The Appellants will pay the costs of the second Respondent, who alone appeared.

Solicitors *Messrs. Chapman, Walker and Sheppard* for the Appellants.

Solicitor *Mr. Henry S. L. Polak* for the 2nd Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD BUCKMASTER.

LORD ATKINSON.

LORD SUMNER.

LORD CARSON.

SIR JOHN EDGE.

1922,

Heard, 25, May.

Judgment, 25, May.

THE FORT PRESS

Co., Ltd.,

Appellants,

v.

THE MUNICIPAL

CORPORATION OF

THE CITY OF

BOMBAY and anr.,

Respondents.

Compulsory acquisition of land on behalf of Municipality—Starting of proceedings, if precludes parties agreeing as to price—Court's power to enforce agreement—Power of Collector to proceed with valuation, in spite of agreement.

After proceedings for compulsory acquisition of land have been set on foot, the parties to the proceedings remain as competent as before to come to a binding agreement regulating the amount of the purchase price, and an agreement so made is capable of being enforced in the Courts in the ordinary way.

Semhle.—The power of the Collector to determine what in his view the price should be, after he had evidence of a complete contract on the point, remains, notwithstanding such agreement.

This was an appeal from a decree of the High Court of Bombay, dated the 31st July 1919, confirming a decree of the same Court in its Original Jurisdiction, dated the 24th February 1919.

The questions arising for determination arose out of proceedings instituted by the Bombay Municipality for the compulsory acquisition of certain lands belonging to the Appellants.

During the pendency of the negotiations for the said purchase an agreement was entered into between the parties as to the purchase price.

This agreement was later repudiated by the Appellants, and the Respondents instituted the present suit claiming de-

clarations that the agreement was valid and that the Appellants were not entitled to claim before the Collector more than the amount therein agreed.

The suit was tried by Macleod, J., who passed a decree for the Respondents and made the declarations prayed for.

From this decree an appeal was preferred to the High Court in its Appellate Jurisdiction and was dismissed by Marten and Heaton, JJ.

The original Defendants now appealed to His Majesty in Council.

Messrs. G. J. Talbot, K. C. and Wootton, K. C. for the Appellants.—Once proceedings are begun under the Land Acquisition Act, 1894, the parties are no longer competent to enter into an agreement as to compensation. At most the agreement amounted to mutual admissions as to the value.

The contract was in any event left inconclusive as certain easements were by its terms left to the determination of the Collector.

The agreement was an agreement to oust the jurisdiction of the Collector and as such was illegal.

Reference was made to *Ezra v. Secretary of State* (1).

Mr Upjohn, K. C. (with him *Sir G. Lowndes*, K. C. and *E. B. Raikes*) for the Respondents.—There was undoubtedly power to enter into an agreement before calling in the Collector and there is nothing to prevent our coming to terms even after the Collector has been called in to adjudicate.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—In this case the Corporation of Bombay entered into negotiations during the years 1916 and 1917 with the Appellants (The Fort Press

" (1) L. R. 22 I. A. 28; s. c. I. L. R. 32 Cal. 605, 9 C. W. N. 454 (1905).

THE FORT PRESS CO., LD. v. THE MUNICIPAL CORPN. OF THE CITY OF BOMBAY.

Company, Limited) for the purpose of acquiring from them by agreement certain lands that were needed for local purposes. Those negotiations were not successful and on the 26th July 1917, while they were still pending, the Government issued, under the Land Acquisition Act, at the request of the Corporation, a notification that the lands were required to be taken by the Government for a public purpose. That notification was followed in due course by a notice on the 22nd August 1917, signed by the Deputy Collector of Bombay. The Collector proceeded in accordance with the powers conferred upon him by the Act to hear the dispute, but on the 12th September 1917, the negotiations between the Appellants and Respondents were reopened and a proposal was made by the Fort Press Company stating that they were willing to accept without prejudice Rs. 1,45,517, inclusive of 15 per cent. for compulsory acquisition, and the cost of the chimney as the price of the property, subject to certain specified deductions. This proposal was accepted and approved on behalf of the Corporation of Bombay. This alteration in the position of the parties was brought before the Collector in due course, but at an adjourned hearing on the 27th January 1918, it was denied on behalf of the Appellants that any agreement had been reached, and the Collector accordingly further adjourned the proceedings, in order that, as their Lordships understand the report of what took place, the parties might take the necessary steps to settle whether or not a bargain had been made. Those steps were taken with promptitude by the Respondents, who instituted proceedings in the High Court of Judicature at Bombay on the 12th March 1918, asking for a declaration that there was a contract and for a very large number of points of an-

cillary relief. They succeeded before both Courts, namely, that exercising Original and that exercising Appellate Jurisdiction and from the latter this appeal has been brought. The foundation of the Appellants' case rests on the assertion that when once proceedings for compulsory acquisition have been set on foot the interested parties cannot come to any binding agreement regulating the amount of the purchase price. There is nothing whatever in the Land Acquisition Act itself to negative any such right. If the parties before the institution of the proceedings contemplated by that Act, chose to agree, they were perfectly competent to do so and there is nothing whatever in the words of the Act to suggest that this power is thereby taken away. The Act certainly does not directly affect such a result, nor can their Lordships ascertain any reason why the fact that compulsory powers have been invoked in order to secure property from unwilling vendors, should be regarded as denuding all parties of rights they possessed before the proceedings began.

In the present case, the Corporation of Bombay enjoys by virtue of its Municipal Act of 1888, express power to acquire immoveable property at certain terms and rates and prices as may be thought right by the Commissioner when approved by the Corporation, and consequently the Board is not faced with the consideration of the question, as to whether there was any initial informality in the power of the Respondents to do what they have done.

Their Lordships think that the agreement made, which is now established beyond dispute, is an agreement which bound the parties and that the High Court exercising their Appellate Jurisdiction, were right in the view they took.

Their Lordships' opinion is not intend-

THE FORT PRESS CO., LD. v. THE MUNICIPAL CORP. OF THE CITY OF BOMBAY.

ed to interfere with the jurisdiction of the Collector. It may be a very unusual thing that he should proceed to determine what in his view the price should be, after he had evidence of a complete contract on the point, but if he thought right to do so their Lordships' judgment will not affect his taking such a course. All they decide is that the parties who were competent before the proceedings to agree what they thought was the right price for the property remain competent after the proceedings and an agreement so made is capable of being enforced in the Courts in the ordinary way.

For these reasons, in their Lordships' opinion, this appeal fails and must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors : Messrs. E. F. Turner & Sons for the Appellants.

Solicitors : Messrs Sanderson, Lee, Eddis & Tennant for the Respondents.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 372 OF 1915.

RANKIN, J.	} ROBINDBRA DEB MANNA v. JOGENDRA DEB MANNA.
1920,	
22, June.	

Civil Procedure Code (Act V of 1908), Sch. II, cl. 3—Order of reference to arbitration made by Court, whether power may be given to arbitrators to extend time—Court's jurisdiction to supersede arbitration proceedings—"The Court . . . shall fix such time as it thinks reasonable for making of the award"—Provision, if mandatory—Misconduct of arbitrator, time for filing, after award.

Matters in difference in a suit were, by a consent order, referred to two arbitrators under the provisions of the Second Schedule to the Civil Procedure Code. The order provided, inter alia, that the arbitrators should make their award

within six months from the date on which an office-copy of the said order should be served on them or within such further time as they might allow themselves by endorsement on the said office-copy. The arbitrators, from time to time, enlarged the time for making their award under the said order. After a considerable number of sittings had been held extending over a period of two years, the Plaintiff applied that the reference should be recalled or superseded and the suit proceeded with:—

Held, re-calling the reference—That the provision in cl. 3 of Sch. II of the Civil Procedure Code, viz, "the Court shall . . . fix such time as it thinks reasonable for the making of the award," is mandatory; an order which allows the arbitrators to enlarge the time, in the manner aforesaid, for making their award is not a compliance with it; and, if by such an order an unlimited authority to extend the time was meant to be given to the arbitrators, it was bad and of no effect.

(O-OPERATIVE HINDUSTHAN BANK v. BHOLA NATH BOROOAH (5) dissented from.

RAJA HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR (1) and LACHMANDAS v. ABPAKASH (4) referred to.

CHATTARBHUI v. RAGHUBAR DAYAL (7) adopted.

Held also—That the Plaintiff by consenting to the order of reference was not estopped from making the application.

PATTO KUMARI v. UPENDRA NATH GHOSE (8) distinguished.

(1) I. L. R. 12 All. 300 (P. C.) (1891).

(4) I. L. R. 30 All. 169 (1903).

(5) 19 O. W. N. 165 (1914).

(7) I. L. R. 36 All. 334 (1914).

(8) 4 P. L. J. 265 (1919).

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Under Sch. II of the Civil Procedure Code, the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed.

The facts of the case will appear from the judgment.

The Advocate-General and Mr. J. Bonnerjee, Counsel, for the Plaintiff

Sir B. C. Mitter and Mr P. N Chatterjee, Counsel, for the Defendant Jogendra Deb Manna

Mr B C Chatterjee, Counsel, for the Defendants Rajendra, Surendra and Jotindra Deb Manna

Mr R Mitter, Counsel, (for *Mr B L. Mitter*) for the Arbitrator Satish Ch. Ghose.

The other Arbitrator Khetra Mohan Banerjee did not appear

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—This suit was brought in 1915 on the 24th of March. It is an administration and partition suit between brothers as regards the family estate descending to them from their grandfather and under their father's Will. Jogendra, the first Defendant, may be said to be the main Defendant as his intromissions with the joint estate are apparently the main object of attack. Jogendra, Defendant No. 2, appears to side with him the other brothers support the Plaintiff. A Receiver of the estate has been appointed by the Court at an early stage of the suit.

By order dated 27th July 1917 and made on the Plaintiff's application, the matters in difference in the suit were referred to two arbitrators under the Second Schedule to the Code. The order provided that the arbitrators should make their award in writing within six months from the date on which an office-copy of

this order of reference be served on them or within such further time as they may allow themselves by endorsement on the said office-copy order. In case of difference of opinion between the arbitrators, they were to nominate an umpire who was to make his award within three months of the date of reference to him.

The joint remuneration of the arbitrators was agreed upon at Rs. 160 per sitting for the first ten sittings and thereafter Rs. 100 per sitting. Two clerks were appointed at Rs. 32 per sitting. The arbitrators appear to have held the sittings in the evening and for about two hours at a time. They began on the 20th December 1917 and on the 13th September 1919 they held the 122nd sitting. By this time they had not finished the Plaintiff's case: indeed they had heard two witnesses only, viz., the Plaintiff and one Jugal Kishore Pyne. The cross-examination of the third witness had only lasted for nine sittings and had not been completed. The manner in which the time has been expended can be found in the affidavits whose contradictions on detail leave the general result an undoubted scandal. The Plaintiff was examined-in-chief for some 15 sittings and cross-examined for 33. Many sittings seem to have been expended in other ways than in taking evidence, e.g., 10 days on discussions as to amending pleadings. The arbitrators' fees had amounted to about Rs. 16,700-0-0. The total law costs of the parties are put by the Plaintiff at a further sum of Rs. 30,000. Robust optimism on the part of the main Defendant puts it at Rs. 6,000 only. The Plaintiff says he has six more witnesses to call (making nine in all) though the main Defendant undertakes to deny this. In any case, four years after action brought, two years after the order of reference, 122 sittings having been held,

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the arbitrators in September 1919 were not yet in sight of the Defendants' case.

Since then nothing has been done. So far as the arbitrators are concerned, the reasons are as follows. Applications in connection with the Receivership and certain other matters came before me in January and again in May 1919, and I appear to have commented upon the unfortunate position. Moreover, in the absence of any decision about the estate or the parties' rights, and with costs apparently running mountains high, I could not see my way to order the Receiver to make distribution among the parties. These comments appear to have been carried to the arbitrators who, on the next day, 28th May 1919, enlarged their time for making their award till the end of the year and passed the following order—

"The Plaintiff does not produce the witness Babu Benode Behari Bannerjee, nor is there any application on his behalf although he verbally states that the witness is ill. It seems that the proceeding before us cannot go on in this way; the fees of the arbitrators and of their clerks have not been paid for a considerable period, and it does not appear that some of the parties are at all willing to pay them. Under the circumstances we adjourn the further sittings *sine die*."

Shortly afterwards this spirit of hopelessness took for a passing moment the form of a spirit of compromise and the good offices of the arbitrators seem to have been employed in assisting a settlement. At a sitting on the 9th July the parties present—not all were present—were thought to have come to terms. The arbitrators recorded in their minute:—"The parties discussed and settled the terms of settlement. It is proposed that a petition should be made before the arbitrators embodying the terms of settlement herein.

Next meeting on Friday 18th instant." The terms—many and complicated, as they necessarily were—were not at the time reduced to writing by the arbitrators or, as far as I can find, by anybody else. Only the Plaintiff and Defendants Nos. 1 and 5 were present. Each side, accordingly, drew up "without prejudice" a statement of terms of settlement, and these were widely discrepant. The Plaintiff maintained that there was a settlement, and pointed to the arbitrators' minutes and demanded that the arbitrators find out what it was. The main Defendant (and Defendant No. 2 who sides with him and who was not even present at the sitting) denied that any final settlement had been completed. The arbitrators in the end found—very rightly, as I think—that no settlement had been concluded. The Plaintiff on this and on other matters desired to apply to the Court and objected to the arbitration going on then the mother of this contending family died. This made no real difference to the case—none that could not have been adjusted in a few minutes—but the Plaintiff took six months to reconstitute the suit, and his application to the Court is filed on the 12th April 1920. From June 1919 to April 1920 the time has been wholly lost, and I give judgment now in June 1920 after the sheer waste of a year.

The Plaintiff applies to me in the first place to record, under Or. XXIII, r. 3, his version of the terms of settlement, or some other to be found upon the evidence. I think it clear that there was no concluded settlement and no proof even of authority to settle as regards Defendant No. 2.

But the Plaintiff further applies that the reference should be recalled or superseded, first by reason of misconduct of one of the arbitrators in giving private inter-

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views to the first Defendant, and secondly by reason of the scandal, mishandling, expense, and delay of the arbitrators' proceedings. The charge of misconduct relates to visits to the arbitrators' house by the first Defendant on five occasions in August and September 1918, and on one occasion on 22nd July 1919. The allegations as to 1918 are utterly belated and their only possible effect is to discount the case upon the later incident. On the affidavits it is very difficult to decide a question upon which the reputation of a professional gentleman would depend. I am of opinion that under the 2nd Schedule the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed, and I think, it would be wrong of me to pass any judgment whatsoever at this stage upon the point.

The main question is, whether in view of the hopeless waste of time, money and effort, I have any power to supersede the arbitration. The Advocate-General has pressed me strongly to do so and although I see no reason to think that the Plaintiff is not equally to blame with the other parties whose contentiousness and loquacity have utterly overcome the arbitrators, I think so little of the chance of any reasonable termination of the proceedings that I should have no hesitation in so doing if it is within my power. The arbitrators have failed to cope with their task. It was a difficult task, but they have made no adequate effort in the matter. Long ago they should either have retired or insisted on sitting *de die in diem*, and making some headway with the case. It is obvious that with sittings for two hours only at a time, half the time is lost. In (say) another year the case will have become so stale and overloaded that neither they nor anybody else will have

much chance of arriving at a right decision.

Sir Benode Mitter for the main Defendant contends that there is no power to interfere at this stage. He points to cl. 3 of the 2nd Schedule and contends that the doctrine of an inherent power in the Court to interfere at any stage with the arbitrators is without warrant in the Schedule and contrary to its intention. His client is apparently willing to promise to be more reasonable and expeditious but he objects to the costs already incurred before the arbitrators being thrown away, and he suggests that the Plaintiff deserves to get rid of the arbitration merely because he is getting the worst of the battle.

Upon considering the 2nd Schedule it strikes one at once that the Court is in a position in which the Statute intended that no Court should ever be. The scheme of the Schedule is simple and effective. When an order of reference is made, the Court is to fix a reasonable time for the making of the award. When that time elapses, either there is an award or there is not. If there is, the award can be set aside for certain well-defined reasons. If not set aside, it can be confirmed. If, on the other hand, the time originally fixed by the Court as reasonable has elapsed and there is no award, the matter comes back to the Court and thus is founded the right of the Court either to enlarge or not to enlarge the time. If in its discretion it refuses any further time, the reference is at an end and the suit must be re-instated for trial. There is no need whatever in this scheme for any power of interference during the period limited to the arbitrators, and it is very much better that no interference should take place. The arbitrators are to be given their chance to make their own

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award. There are not to be two different authorities in operation at this stage doubling the litigation and expense; the Court checking the arbitrators throughout or riding them on the curb. The Court will stay its hand altogether until the time limited has expired; it can part with control temporarily because the time-limit will bring the matter back to the Court after no more than a reasonable time either to deal with the award or to consider whether more time should be given, or whether the reference should be superseded. The pivot of the whole scheme is the limit of time, and I can see no reason to suppose that any better scheme could be devised. That limit is the condition or the form of the Court's control over the arbitrators. The Court is not authorised either to abandon control or to substitute any other form of control.

In the present case after about three years of ill-directed labour and expense, the Court is said to be without control. There is no provision in the 2nd Schedule under which I can interfere, now, or for that matter in another two years' time, why? Because the order of reference imposed no limit of time by which the arbitrators (collectively) are bound. They were given unlimited power to extend the time at their own hand. This they have exercised and, as the main Defendant contends, can go on exercising till they see fit to stop. Pressed by the Plaintiff with the argument that the Court in such a case must have inherent power on some terms and at some time to end a scandal, and by the main Defendant with the argument that the right to interfere is not merely absent from the 2nd Schedule and incapable of inference therefrom, but is negatived by the terms of cl. 3, I suggested at the argument that there was a third view, possibly more correct than

either, *viz*, that this reference as ordered flouted a cardinal principle of the 2nd Schedule from the outset. This view was adopted for the Plaintiff and was fully argued. It was resisted for the main Defendant whose Counsel laid stress on the fact that many orders of reference have been made in the same terms; and argued that even if such an order be wrong, there is no defect of jurisdiction. A strict compliance with cl. 1 is matter of jurisdiction, but on this view a strict compliance with cl. 3 is not. There is also a fourth view possible, *viz*, that in fixing six months from the date of service of the order, the Court fixed the time which it thought reasonable and that the order is only bad in so far as it purports to delegate to the arbitrators the Court's own duty to decide as to the enlargement of the time. On this view the Court could not enlarge the time, or supersede the reference under cl. 8.

There seems to be no doubt that in this Court a great many orders have been made in the present form. The reason is not far to seek. Apart from express limit contained in the submission, an arbitrator had at common law his whole life in which to make his award. But at common law all submissions were revocable at will. By the Arbitration Act of 1889 a submission is not revocable without leave, and unless the submission provides otherwise the award must be made within three months or within such further time as the arbitrators may in writing allow themselves from time to time. The Indian Arbitration Act follows this in principle. But in cases under these Statutes there is always power in the Court to give leave to revoke the submission, and this is the proper remedy where excessive delay or other injustice can be shewn. If, however, this well-known

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form as to time-limit be incorporated into the 2nd Schedule and if the last part of cl. 3 and the general scheme of the Schedule deprive the Court of any inherent power of revoking the reference, it is obvious that what was right and reasonable in the one class of cases is altogether out of the question in the other. If the main Defendant's contention be right, the Court has not in this case that control over a reference in this suit which it would have had in similar circumstances had the arbitration been an ordinary private arbitration. The present difficulty would seem to be the result of a false analogy.

By the first part of third clause of the 2nd Schedule two matters are dealt with *uno flatu*. First, that when sec. 1 has been complied with, the Court must make the order of reference. Secondly, that the Court by its order must fix such time as it thinks reasonable for the making of the award. The same clause by its second part forbids the interference of the Court save in the manner and to the extent provided in the Schedule. Here there are three things which go together, the Court must part with its jurisdiction to decide, it must part with it for a specified time and no more, during that time it must stand aside. If a Court should wrongly refuse an order of reference and insist upon deciding the suit, I apprehend that its decree would be bad apart from any question of the merits. If after an order of reference a Court wrongly proceeded to try the suit, it would contravene an express prohibition. If by the order of reference no time is fixed at all, the error is of the same class: no time-limit means no control; and the Court is not authorised to abandon control save to the extent and upon the terms laid down. In *Raja Har Narain Singh v.*

Chaudhram Bhagwant Kuar (1), the Privy Council dealt with this matter upon the terms of sec. 508 of the Code of 1882. They reversed the decision of the High Court at Allahabad that the words of that section were directory only, that is, that they amounted "to no more than the imposition of a public duty on the presiding officer of a Court of Justice," and that "the neglect of it could not affect the substantiality of the proceedings of the arbitrators," *Har Narain v. Bhagwant Kuar* (2). The judgment delivered by Lord Morris, after pointing out that the case must be decided entirely upon the construction of the sections, says "Their Lordships are of opinion that sec. 508 is not merely directory but that it is mandatory and imperative. Sec. 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to their Lordships that this section would be rendered inoperative if sec. 508 is to be treated as merely directory." On the facts of that case this ruling was not applied. The actual decision was that after an award had been made the Court could not enlarge the time under sec. 514, and that, as the time had run out before the making of the award, it was invalid under sec. 521 and no Court could make a decree upon it. This latter question was undoubtedly put upon a new footing in some respects by the Code of 1908. Cl. 15 of the 2nd Schedule altered sec. 521: an award made out of time, or otherwise invalid, is no longer a nullity: it is liable to be set aside by the Court, but, if not set aside, a decree made for its enforcement is not without jurisdiction. [*Shib Kristo Daw v. Satish Chunder Dutt* (3)]. But the wording of

(1) I. L. R. 13 All. 300, 308 (P. O.) (1891).

(2) I. L. R. 10 All. 137, 140 (1887).

(3) I. L. R. 39 Cal. 822 (1912).

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sec 508 is retained in cl. 3 of the 2nd Schedule with two differences, upon which nothing turns for the present purpose. The question is whether what the Privy Council said of the same words is now inapplicable because sec. 521 has been altered. It seems to be very difficult indeed so to hold. It is still true that a part of cl. 15 would be rendered inoperative if cl. 3 is to be treated as merely directory, and on a broad view of the Schedule the provision for a limit of time is a main pillar of the scheme. Without it the character of the reference is entirely changed: the power of the Court to see justice done is materially diminished. Indeed, it is cut off at the very point at which the Statute intended it to be applied.

If the words of the 3rd clause have the same meaning as before, it would seem that consent of the parties will not alter the position. "We should have been disposed," said the Court in *Lachmandas v. Abparkash* (4), "to regard that as an irregularity which would be cured by the acquiescence of the parties were it not for the clear and explicit language of their Lordships of the Privy Council."

If then the provision in the third clause is mandatory, what is it that is thus imperatively required—"The Court shall fix such time as it thinks reasonable for the making of the award." Is it a compliance with that provision for the Court to say to the arbitrators?—"You can have any time you like. So long as you are both agreed, the time is left wholly to you. Endorse the order yourselves, and at your own hand the time will be enlarged indefinitely and as often as you like." With all respect for the opinions of other people, I am very clear that this

is no compliance at all. It is not a defective compliance or an absence of strictness in compliance. It is exactly as if the order should recite "whereas by the third clause of the 2nd Schedule this Court is required to fix such time as the said Court thinks reasonable for the making of the award, now therefore this Court does not think fit to do so accordingly." It may be that it is open to the Court to define the time by reference to a condition; to give the arbitrators a certain length of time after the happening of a future event, *v.g.*, the service upon them of the order. This latter form of order appears to be fairly common: in my experience it has proved an undesirable form of order, but I do not say that it is not a compliance with cl. 3. Nor where the clause has been obeyed in substance need undue stress be placed upon a mere defect of form—*c.g.*, in the case cited *Raja Har Narain Singh v. Chaudhram Bhagwant Kuar* (1), a date was fixed by the Court for the hearing of the case and this date was taken as the limit of time given to the arbitrators. But what is necessary is that the Court should impose its own limit upon the arbitrators. In the present case, it seems to me that the Court has either not applied its own mind as to what is a reasonable limit or in any case it has refused to fix or specify it and has flatly declined to impose it upon any body. There would seem to be one thing which cannot serve as a condition by reference to the Court to fix the time, and that is the will of the arbitrators. To leave the arbitrators (collectively) with a free hand as to time, subject to no limit imposed by the Court, is exactly what the Statute is taking measures to avoid.

I cannot assent to the view assumed in the case of *Co-Operative Hindusthan Bank*

(4) I. L. R. 30 All. 169 (1908).

(1) I. L. R. 13 All. 300, 303 (P. C.) (1891).

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v. *Bhola Nath Borooah* (5) that upon this form of order the Court must be taken to have fixed six months as the time which it thought reasonable. It gave "six months or such further time, etc." If it had really decided that six months was reasonable it had no right to give any more. It was bound by the Statute to limit the arbitrators in accordance with that opinion. But in any case it seems impossible to say that it either fixed or specified in the order six months as the time for making the award. The words of cl. 3, "shall fix such time as it thinks reasonable for the making of the award"—mean "shall fix such time for the making of the award as it thinks reasonable in that behalf." They are not complied with by mentioning a time and in the same breath letting some one else impose a different time as that within which the award may be made. This is clear, if only from cl. 15, where the time is referred to as "the period allowed by the Court."

If the intention of this form of order is to simply comply with cl. 3, but to throw away cl. 8, I think the attempt is impossible. In my view no time is "fixed" or "specified" within the meaning of cl. 3, unless it be so fixed and specified for the making of the award, that on the expiry of a period laid down by the Court, because the Court itself thinks it sufficient, the Court will have power under cl. 8 to supersede the arbitration.

If the words now in cl. 3 are not merely directory, it can make no difference whether the order is said to have failed entirely to comply with an imperative requirement or to have contravened an express prohibition. The same thing has a positive and a negative aspect. The Court must preserve a certain form

of control; it does not do so. The Court has no authority to abandon control: it professes to do so.

I desire, however, to put the matter on a broader footing than a mere construction of cl. 3. The question then arises in the form whether it is competent by consent to delegate to the arbitrators the Court's function of control as to time. Upon this there is a dictum of Chitty, J., sitting at first instance in this Court, [*Co-Operative Hindusthan Bank v. Bhola Nath Borooah* (5)] In that case the arbitrator under the present form of order had purported to enlarge his own time after it had expired. The decision was that he could only do so beforehand. Having expressed this opinion the learned Judge makes the following observation *obiter*—"It was suggested that the order of this Court was *ultra vires* in so far as it permitted the arbitrator to enlarge the time for making his award. I do not think that is so. The Court proceeded by consent of the parties and there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired." I gather that the learned Judge was not put by the circumstances of that case or by the argument in sight of any objection at all to the course which he describes. He deals with none as he was proceeding on another ground they mattered little at the time. The circumstances of the present case put me in a very different position, and I cannot take shelter under this dictum. I find what I think to be a scandal proceeding under the authority of this Court and in connection with a suit which this Court has yet to decree and I am told that I cannot interfere because the pivot of the 2nd Schedule has been re-

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moved "The functions 'of the Court with regard to the enlargement of time' are the functions of the Court with regard to superseding the arbitration (cl. 8) To delegate a function of control to the party to be controlled is not in general a process to which objection is far to seek. If the argument be that because the Court has power to enlarge the time which it has fixed, it must therefore have power by consent and at the outset to let the arbitrators enlarge it without a limit this is merely to argue that because the Court has a duty to control the arbitrators, it has, therefore, power to throw the control away. The parties to a particular suit are not the only persons interested in the question whether a statutory duty shall be abandoned by the Court. If all parties desire to have a suit dismissed by consent and then to go to arbitration, no doubt there are ways in which this can be done. But under the 2nd Schedule the suit is still a suit, the arbitration is under the Court and the award will be binding, if at all, by virtue of an order of the Court. In any suit and particularly when as here a Receiver has been found necessary, interminable delay in the arbitration may mean a large number of quite unnecessary applications to the Court. For these reasons it cannot be assumed that it is no part of the intention of the Statute to limit the power of the Court as to what it may do by consent of parties. On the contrary, the general object is to lay down the terms upon which a reference may be ordered when all parties do consent, and the language of sec 89 as well as that of the Schedule leaves little room for doubting that the statutory scheme is, in all its main features, compulsory. If so, the Court cannot by consent abandon control while retaining the suit; this would be to abandon the gene-

ral principle which governs the character of the reference which is authorised by the Code. I cannot agree with Sir Benode Mitter that the only thing in the 2nd Schedule which cannot be changed by consent is the first clause.

I do not think that such a case as *Official Trustee of Bengal v. Kumudini Das* (6) is really in point here. That the Probate Court does not act without jurisdiction in the sense of sec 50 of the Probate and Administration Act or in the general sense when it gives a grant to a person who is not entitled to it or who is an improper person to take it, is no doubt a clear and correct decision. But I do not understand this case to lay down, as applicable to all subject-matters, that jurisdiction to entertain an application involves jurisdiction to do anything whatever by order made upon such application, statutory prohibitions notwithstanding. It is a mistake to suppose that a matter does not go to jurisdiction because it affects the limits, and not the mere existence, of jurisdiction. To delegate the functions of the Court, or, as I should prefer in this case to say, to declare in advance that a certain function of control shall not be exercised at all, is to do an act of a class altogether different from those which a Court authorised to hear an application for a reference is empowered to do. Jurisdiction is involved because the order professes to abrogate jurisdiction. A forum competent to entertain an application to refer a suit is not clothed with jurisdiction to throw the suit "out at window". It is not in the least necessary, so far as general principles are concerned, to hold that the whole order of reference is bad. But the professed abandonment of control is nugatory. Further, I am far from saying

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that because cl. 3 has not been complied with or because the abandonment of control as to time was wholly without jurisdiction, that an award in this case if made and not set aside under cl. 15 would not give rise to a decree valid and unappealable under cl. 16. Under the Code of 1882 that may have been the position, but steps have been taken to alter this. Now, where there is an award, cl. 16, where it applies, cures invalidity in the interest of finality. However invalid the award, the decree can be valid because on applications under cl. 15 the Court has jurisdiction to determine whether the award is invalid in consequence of non-compliance with cl. 3, or for any other reason.

I have proceeded upon the footing that there is no inherent power on the part of the Court to supersede this reference. On this point I desire to adopt what was said by Piggot, J., in *Chatarbhuj v. Raghubar Doyal* (7) "In an arbitration conducted under the orders of the Court, the Court has very large powers of control. Against 'interminable delays' at any rate it can provide at once by its order specifying the period within which the award is to be returned. It seems to me unsound on general principles to invoke the inherent jurisdiction of the Court in a matter for which provision appears to be made in the Code itself." If this inherent power does exist I should in this case recall the arbitration. If, as I think, it does not exist, then the Court's control as against interminable delays is entirely dependent upon the limit of time, and the minimum result of the considerations which I have canvassed is that the unlimited authority to extend the time is bad and of no effect, if it is to be read as given to the arbitrators irrevoc-

ably, and without reservation to the Court of any shred of its original control. If it should so be read, as the original six months have long ago elapsed, I can supersede the arbitration now. If, however, the reservation can be implied, the same result follows, as the office-copy order served on the arbitrators is endorsed with extensions of time which run out on the 30th June 1920, and the award cannot be completed within the next few days (cf cl. 8).

According to a recent Patna case [*Patto Kumari v. Upendra Nath Ghose* (8)], where an application is made under cl. 15 to set aside an award as having been made out of time, questions of estoppel may arise, and the Court is not then obliged to set the award aside. Assuming that this doctrine founded on the cases under the Common Law Procedure Act is correct and that it also applies in all cases where the award is 'otherwise invalid,' I would point out that the position here is very different. The whole of the present difficulty arises because there is no award and no more than a distant prospect of any. By consenting to the order of 27th July 1917 and by his conduct under it till last September, the Plaintiff is not estopped from objecting to the continuance of the proceedings *ad infinitum*, or after they have proved themselves incorrigible. Nothing that he can do will entitle any one else to insist as against the Court upon the continuance of discreditable and inept proceedings under the Court's authority, and in a suit which is still before the Court.

The order will be that all proceedings under the order of reference, dated 27th July 1917, be discontinued and that the suit be restored to its proper prospective list for trial. Liberty to apply for any

(7) I. L. R. 35 All. 354, 360 (1914).

(8) 4 P. L. J. 265 (1919).

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incidental directions or for a speedy trial or otherwise as the parties may be advised. Each party to bear his own costs of this application: there will be no order as to the costs thrown away in connection with the reference.

Mr K. K. Dutt, Solicitor for the Plaintiff.

Messrs Rutter & Co., Mr. B. B. Banerjee and Messrs H. N. Dutt & Co., Solicitors for the Defendants.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 2556 OF 1920.

PRAMATHA NATH SEN
GUPTA, Plaintiff,

Appellant,

v.

SHEIKH ABDUL AZIZ
MEAH, Defendant,
Respondent.

RANKIN, J.
PANTON, J.
1923,
19, January.

Commissioner pleader, taking from a party a mortgage bond in discharge of an untaxed bill of fees, etc.—Bond, if legal and can be sued upon—Duties of a Commissioner—Liability of party at whose instance appointment made to indemnify Commissioner.

A pleader Commissioner took a mortgage bond from a party, at whose instance he had been appointed, by which the said party promised to pay a certain sum as his fees, etc., and the Commissioner sued upon that bond.

Held—That the taking of the mortgage bond by the Commissioner was a breach of duty towards the parties and to the Court and it could not be sued upon as being an illegal contract. The duties of a Commissioner are inconsistent with approaching an individual party and getting him to pay sums of money in discharge of an untaxed bill of costs. It is an improper advantage obtained by an officer of

Court by abuse of his position as such officer.

GOPALARATANAMAYYAR v. BUPALANARASIMMA NAYADU (1) distinguished.

There should be no doubt cast on the broad rule that a Commissioner appointed by a Court must keep himself clear of any ambiguous conduct towards any party in the matter of his fees.

The work done by the Commissioner is not work done for the party but work done for the Court. His right to sue the party at whose instance he was appointed does not arise out of a contract of employment with that party, but upon a different principle, namely, that where one party does work or incurs an obligation at the instance of another, there is, in certain circumstances, an implied provision of indemnity.

This was an appeal preferred on the 16th of November 1920, against the decree of Moulvie Abdul Khaleque, Esq., Officiating Subordinate Judge of Zillah Noakhali, dated the 12th of July 1920, reversing the decree of Babu Dwijendra Nath Pal, Munsif, 3rd Court at Sudharam, dated the 2nd of December 1918.

A certain partition suit was referred to arbitration by the Court and the Court empowered the arbitrator to appoint a pleader Commissioner. The Plaintiff in that suit deposited Rs 100 in terms of that order and a pleader Commissioner was appointed who asked the former to put in certain additional sums as further fees and in the end the Commissioner got ready his report and informed the Plaintiff that unless two hundred rupees more were paid he could not be expected to file his report. Thereupon a mortgage bond was given to the Commissioner by the Plaintiff promising to pay Rs 200. On that bond the Commissioner brought

(1) L. L. R. 4 Mad. 389 (1932).

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the present suit. The first Court decreed the suit and the lower Appellate Court dismissed it, whereupon the Commissioner preferred the present second appeal to the High Court.

Babus Cunada Charan Sen and Jitendra Kumar Sen Gupta for the Appellant.

Babus Krishna Kamal Moitra (for *Babu Jotindra Mohan Choudhuri*) and *Subodh Chandra Ray Chaudhuri* for the Respondent.

The JUDGMENT OF THE COURT was as follows.—

RANKIN, J.—This is a second appeal brought by the Plaintiff who acted as a Commissioner in a partition suit which was referred to arbitration under the second Schedule of the Code. It appears that an arbitrator having been appointed, certain petitions were made to the arbitrator including one by the Plaintiff in the suit asking that in respect of a certain property there should be a local enquiry. On the 8th March 1915, the Court, having appointed the arbitrator to determine all the matters in difference between the parties in the suit, empowered him to dispose of all the petitions filed before him including the Plaintiff's petition for the appointment of a pleader Commissioner. The order gave the arbitrator power to appoint "whomsoever he likes" and directed the Plaintiff to deposit Rs. 100 at present as Commissioner's fees, etc., within seven days. The Plaintiff deposited Rs. 100 in terms of that order and the Plaintiff in the present suit was appointed Commissioner under that order. His actual appointment was made by the arbitrator under the power given to him by that order of the Court. The present Defendant who was then Plaintiff was applied to from time to time by the Commissioner to put in certain additional

sums as further fees and in the end the Commissioner got ready his report and approached the Plaintiff in the suit on the footing that unless a couple of hundred rupees more were paid he could not be expected to file his report. Thereupon a mortgage bond was given to the Commissioner by the then Plaintiff promising to pay Rs. 200. On that bond the Commissioner has now sued.

The first Court has decreed the suit and the lower Appellate Court has dismissed the suit on the ground that the mortgage bond taken by the Commissioner in that way is taken contrary to law and cannot be sued upon. I shall, for the present purpose, put on one side altogether any question except this, whether the taking of that mortgage bond by the Commissioner was such a breach of his duty towards the parties, to the arbitrator and to the Court, that it cannot be sued upon as being an illegal contract. In my opinion, that proposition ought to be affirmed, and none the less so that it is good law that when one party at the instance of another has done work or come under an obligation, there may be an implied contract by the party at whose instance the work has been done to indemnify the other. The Commissioner, if sufficient fees were not forthcoming, was quite entitled to go to the arbitrator and to object to do the work without remuneration. It was quite proper for the arbitrator, if he thought fit, to require the Plaintiff to pay further sums of money into the arbitrator's hand. It was quite open to the arbitrator to enquire as to the amount due, to fix the terms of the Commissioner's remuneration and to deal with the matter as justice should require. It appears that no actual rate was fixed by contract with any body. It is said that the rate usually allowed under the rules

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of the High Court was taken as a guide in assessing what was due to the Commissioner. But the Plaintiff was not in so good a position as the arbitrator to dictate to the Commissioner any terms, to tax his bills, to query entries in the diary and to see that he did his duty properly. It is quite true that in all probability, the arbitrator would feel obliged to make the Plaintiff and no other party deposit the amount necessary to meet the Commissioner's claim. What happened was that at a time when the Commissioner was assisting the arbitrator to discharge judicial duties as between one party to a partition suit and another, he was approaching the Plaintiff from time to time, and getting sums of money on account, and finally as a condition of rendering his report, he took from the Plaintiff this mortgage bond for a fixed sum of money, viz., Rs 200 which the Plaintiff thereby promised to pay. In my judgment, this is entirely contrary to the duty of a Commissioner whether he be regarded as appointed by an arbitrator or whether he be regarded as appointed by the Court, the arbitrator having power to nominate the individual. It is quite incredible that the duties of a Commissioner should be thought consistent with approaching an individual party and getting him to pay sums of money in discharge of an untaxed bill of costs upon the footing that unless this is done the report will not be filed. In my judgment, there is no doubt about the principle. The Commissioner's duty was to keep all parties at arm's length, to receive no favour from any one, to look to one no more than to another. If he wanted his money he had the arbitrator as the person whose duty it was to put proper pressure on the right party and to provide for an adequate remuneration in a reasonable and proper

way. For the Commissioner himself to put any sort of pressure upon one party so as to make the immediate payment of an untaxed bill, a condition without which the Commissioner's duty would not be done, or would be done at another time, is not merely ill-advised conduct, it is improper and illegal conduct. No such bargain so procured can stand. It is an improper advantage obtained by an officer of Court by abuse of his position as such officer. The case of *Gopalaratnamayyar v. Bupalanarasimma Nayadu* (1) is a case with reference to a suit for fees by a Commissioner after the litigation in question has come to an end. That is another matter altogether. It is not the case that the Commissioner is the servant of the party at whose instance the Court or the arbitrator makes the appointment. The work done is not work done for that party. It is work done for the Court and the right to sue a party at whose instance the Court appoints a Commissioner is not the right to sue a party for whom the Plaintiff has worked. It must be based upon a different principle of law, namely, that where one party does work, or incurs an obligation at the instance of another, there is, in certain circumstances, an implied provision of indemnity. It seems to me necessary that there should be no doubt cast on the broad rule that a Commissioner appointed by a Court must keep himself clear of any ambiguous conduct towards any party in the matter of his fees. I think the conclusions at which the learned Subordinate Judge has arrived are correct and that his decision should be upheld.

The appeal is accordingly dismissed with costs.

PANTON, J.—I agree.

J. N. R.

Appeal dismissed.

(1) 1. L. R. 4 Mad. 399 (1882).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 1244, 1245, 1247, 1248, 1249, 1281,
1322 AND 1323 OF 1919.

JABEDALI SHEIKH
and ors., Deferdants,
Appellants,
v.

WALMSLEY, J.
B. B. GHOSE, J.

1922,
2, August.

PRASINNA KUMAR
NAG and ors., Plain-
tiffs, Respondents.

Hindu widow—Alienation by document executed over 40 years—Recital of legal necessity not challenged by reversioner, value of, as evidence—If alienation can be impeached by a third party—Transfer of Property Act (IV of 1882), sec. 43, where applicable.

Where a Hindu widow sold her right, title and interest by deeds of sale executed over 40 years ago for legal necessities as recited therein and the transaction was not challenged by her then next reversioner during her life-time

Held—(1) That the presumption of there having been legal necessities as recited in the sale deeds stood unrebutted, and (2) that the sale being voidable only by the reversioner himself, any person other than the reversioner could not impeach it.

Held further—That sec. 43 of the Transfer of Property Act did not apply to persons who merely signed a sale deed whereby another person who had no title professed to transfer the property as her own.

This was an appeal against the decree of Babu Banamali Sen, Subordinate Judge, Second Court, of Zillah Mymensingh, dated the 10th of March 1919, modifying the decree of Babu Anrita Lal Mookerjee, Munsif, 2nd Court, Tangail, dated the 8th of December 1917.

The facts of the case will appear from the judgment.

Babu Dwarka Nath Chakravarty (with

him Babu Tarakeswar Pal Choudhury) for the Appellants in S. A. Nos. 1244 to 1249 of 1919—The first three appeals relate to Mouza Dubail and the other two to Balina. The first Court has rightly dismissed the Dubail cases of the Plaintiffs, and has given joint decree to the extent of $1\frac{1}{2}$ annas in Balina. The lower Appellate Court has given Plaintiff, 2/5 of $1\frac{1}{2}$ annas wrongly as the Plaintiffs do not at all claim $1\frac{1}{2}$ annas of the Balina Appellants. It is unnecessary to discuss the validity of purchase of Balina Appellants. The proper question for the Court was and should have been what was the Plaintiffs' extent of share. The law as to *khamar bari* is settled since *Hulodhur Sen v Gooroo Das Roy* (1) and fully explained recently by Mookerjee, J., in *Dwijendra Narain v Purnendu Narain* (2). The lower Appellate Court has clearly stated that the Plaintiffs' pleader had given up the point as to legal necessity. On the basis of this admission of the pleader all findings and propositions of law as to legal necessity discussed by the lower Court are necessary and cannot be accepted as such. All the five brothers of Nalini were parties to the sale to Balina Appellants. The deduction of 2/5 of $1\frac{1}{2}$ annas out of it cannot legally stand. The Court should determine what was Plaintiffs' share. There should accordingly be a remand though not for the Balina lands at any rate for the Dubail lands. There is a finding of civil death of the widow Siba Sundari which gives a valid title to Nalini and his four brothers.

Babu Mahendra Nath Ray (with him Babus Surendra Nath Ghosal and Haripada Ghose) for the Respondents in the above five appeals.—These five appeals are concluded by findings of fact. As to incongruous and inconsistent findings against the Plaintiffs

(1) 20 W. R. 126 (1878).

(2) 11 C. L. J. 189 (1910).

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we have preferred three separate appeals. Both Courts have found the lands to be *khamar* of Plaintiffs. As to Balina it has been rather conceded that there is no case of the Defendants-Appellants. There are five distinct findings of fact in Plaintiffs' favour upon evidence on record. The *kobala* Ex 2 has been found to have been with lawful consideration. It is found as a fact to be a transaction which took place about 41 years ago and the proposition of law as laid down by the Subordinate Judge to the effect that in case of recitals in the *kobala* that there were necessities—at least when the parties to the transaction are dead and most of the persons likely to know them cannot be found—is good presumption in law and there is a series of rulings of the Judicial Committee in support thereof. It is a mistake to think that there is a finding of fact as to civil death of the widow. In fact what has been found is otherwise. The Defendants' five appeals should therefore be dismissed. We have won the other three appeals Nos. 1281, 1322 and 1323 which relate to Dubail only. Sec. 43 of the Transfer of Property Act has been wrongly applied. There were the two *kobalas* by Siba Sundari, one as guardian of the minor son and the other as heir to that minor son after his death, both found as a fact upon the evidence on record to have been amply supported with legal necessities. The recitals in the *kobala* over 40 years ago when parties and witnesses are not available are some evidence of necessities. This has been always held to be the correct proposition of law. The sale to Baliati Respondents with representation during the life-time of Siba Sundari as belonging to the mother of the five brothers of Nalini was invalid; accordingly subsequent sale can-

not validate the title by application of sec. 43 of the Transfer of Property Act. [*Vide* Shephard and Brown, 7th Ed., p. 133], also *Nurul Hossein v. Sheo Shahai Lal* (3) and *Oodey Koowar v. Musstt. Ladoo* (4)]. The questions of legal necessity were not at all given up. It is a misconception of the argument of the pleader who contended "conceding for the sake of argument" (*vide* Ground No. 4 of memo of appeal). There is also an affidavit here in support thereof.

The point whether the Defendant can question the legal necessity of the Plaintiffs' purchase is the 16th issue in this case, and has been also wrongly decided by the Subordinate Judge as he holds that the Defendant can raise it, for the Defendant claims through Baliati Babus who acquired 12 gundas share of Nalini and Jogendra. This is legally wrong. The only persons competent to question the legal necessity are not the Baliati Babus nor Nalini and Jogendra nor the Defendants. As a matter of fact the reversioners who alone have the privilege by law had not at all questioned it and therefore third persons are disentitled to question the same.

Babu Dwarka Nath Chakravarty in reply—The point as to legal necessity was not taken in the grounds. The affidavit cannot be made to amplify at this late stage.

THE JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—The Plaintiffs in the suits from which these appeals arise are Prosonna Kumar and Chandra Kumar, sons of the late Krishna Kumar Nag. They instituted five suits, two of them

(3) L. R. 19 I. A. 221; s. c. I. L. R. 20 Cal. 1 (1902).

(4) 13 M. I. A. 585 (1870).

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relating to land situated in Mouzah in Balina, three relating to land situated in Mouzah Dubail. In the first Court they won in the two suits relating to Mouzah Balina while they lost the other three. That decision gave rise to five appeals, three by the Plaintiffs and two by the Defendants. In the lower Appellate Court the Defendants' appeals were dismissed, and the Plaintiffs' appeals decreed almost in full.

There are now eight appeals before us, three are preferred by the Plaintiffs and they are in respect of that part of their claim regarding the land in Mouzah Dubail which has been dismissed. They are appeals Nos. 1281, 1322 and 1323. The other five are preferred by the Defendants, they are Nos 1244, 1245 and 1247, relating to Dubail and Nos 1248 and 1249 relating to Balina. The Plaintiffs claim the entire sixteen annas interest in the land in Mouzah Balina. They say that they held it as *khamar* and enjoyed possession through *bargadars* until 1318 B. S., when the Defendants began to interfere with their possession, and that the latter after getting themselves wrongly described as raiyats in the record-of-rights dispossessed them in 1320 B. S.

The Defendants say that the land in the suits belongs to the Bahati Babus and that they, the Defendants, have been holding them as raiyats since 1309 B. S.

In regard to the land in Dubail the Plaintiffs claim an interest of 3 annas 13 gandas, and say that the plots described in the three suits were abandoned by the occupancy raiyats who held them, and that, as those raiyats had not the right of transfer they attempted to take possession but were resisted by the Defendants.

In these suits also the Defendants pleaded that the land was the *khamar*

land of the Bahati Babus, and that they held the land as raiyati under them.

Many questions were raised in the Courts below, but it would be tedious to set them out, and I do not think it necessary. It is enough to deal with the points pressed in this Court.

For the Defendants it is urged in all their appeals that the Plaintiffs' share is less than what they claim. The argument however, is applicable only to the lands in Dubail, because the Courts below are agreed in finding that the Balina lands lay in the exclusive *khamar* of Krishna Kumar and of his sons after him.

It is conceded that in the 3 annas 13 gandas share of the Taluk, Krishna Kumar, father of Plaintiffs, had a share of ten annas while his brother Ram Kumar had the remaining six annas. That division was made by a deed of settlement in 1282. Ram Kumar died in 1283, leaving a widow Siba Sundari and minor son Kamini, and a daughter Monmohini, the child of an elder wife. The daughter had two sons Nalini and Jogendra. At the time of Ram Kumar's death the latter gave birth to three more sons Harendra, Surendra and Narendra. On the day of Ram Kumar's *sraddh* Siba Sundari sold two annas out of the Ram Kumar's six annas to Krishna Kumar, and in 1286 she sold the remainder to him. On the first occasion she purported to be selling as guardian of the minor in order to provide for his maintenance. In the interval he died leaving his mother Siba Sundari as his heir and in the second document she said that she was selling the property for her own wants. Siba Sundari died in 1311.

In 1306 Monmohini sold $1\frac{1}{2}$ out of Ram Kumar's six annas to the Bahati Babus, her two elder sons also signed the docu-

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ment, but Monmohini purported to sell the share as owner.

In 1314 Monmohini's five sons being all of age sold the remaining four and a half annas to the Plaintiffs, in the names of their wives

For the Defendants it is argued that Siba Sundari having only a limited interest could not confer title on the Plaintiffs, and that therefore the Plaintiffs' (purchased) interest must be limited to the four and half annas bought from Monmohini's five sons, the reversioners to Ram Kumar's estate on the widow's death.

The Plaintiffs on the other hand say that the most that can be urged against Siba Sundari's sale is that the transactions were voidable, and that as they have not been avoided by the reversioners, the Plaintiffs have secured a good title.

The learned Judge in the Court below does not appear to have come to a decision about the validity of the purchase from Siba Sundari. He regards such a finding as immaterial in view of the fact that the Plaintiffs afterwards bought four and half annas. He holds that the Bahati Babus acquired a good title to the shares of Nalini and Jogendra who signed the deed of sale, by virtue of sec. 43 of the Transfer of Property Act. The shares of the younger brothers, who were not of age when Monmohini purported to sell the share, did not pass, he finds, to the Bahati Babus, and the latter did not take possession of them, so to that extent the Plaintiffs can plead adverse possession. The result is that the Plaintiffs' share is 13 annas 8 gandas, that is 8 annas by inheritance, 4½ annas by purchase from the reversioners and 18 gandas by adverse possession.

So far as the application of sec. 43 of the Transfer of Property Act is concern-

ed, I think the learned Judge is clearly wrong because the sons made no erroneous representation and did not profess to transfer; it was their mother who claimed to be owner and professed to make the transfer and that she never was the owner of the property is not questioned.

It follows that there is no halting place between 14½ annas and 16 annas and it is necessary to decide the question whether Siba Sundari's transfers were operative. The documents purport to have been executed for legal necessity or at any rate for good cause, and they are not void but voidable. The persons who are entitled to seek to avoid them are the reversioners, but they have never done so, and it is not open to the Defendants who did not claim as the reversioners to raise the question. I think therefore that Plaintiffs' father acquired good title by the purchases from Siba Sundari and that in consequence their share must be fixed as 16 annas.

The other question, affecting the Dubaul lands only, is in regard to the nature of the relief to be given to the Plaintiffs. For the Defendants it is said that if the Bahati Babus were in possession, not in denial of the Plaintiffs' rights, and if the Defendants took settlement from them in good faith, they, the Defendants, cannot be ejected, and the Plaintiffs cannot get anything more than the right to recover rent proportionate to their share. The Bahati Babus, however, were not entitled to the entire interest in the land, and they had no right to grant settlement to the Defendants with regard to the share of the Plaintiffs. The latter are therefore entitled to recover *khas* possession of the land. In view of the finding recorded above that share is not if

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annas 8 gandas of 3 annas 13 gandas but the whole of 3 annas 13 gandas.

The result is that the Plaintiffs' appeals are decreed with costs, that is to say, their three suits Nos. 2045, 2046 and 2049 are decreed with costs in all Courts and Defendants' appeals are dismissed with costs.

B. B. GHOSH, J.—I agree.

S. C. C.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD BUCKMASTER.

LORD ATKINSON.

LORD SUMNER.

LORD CARSON.

SIR JOHN EDGE.

1922,

Heard, 22, May.

Judgment, 11, July.

RAI BAHADUR

CHHOTY LAL,

Appellant,

v.

THE COLLECTOR

OF MORADABAD,

Respondent.

Registration Act (XVI of 1908), secs 32 (c), 35, 75 (2)—Presentation for registration by attorney—Conditions to be strictly followed—Acceptance of presentation by attorney by Sub-Registrar, prima facie evidence that presentation was in order—Document, if must be "duly presented" a second time after Registrar orders registration in appeal.

The Registration Act has imposed several conditions regulating the presentation of documents for registration, and it is of great importance that those conditions, framed with a view to meet local circumstances, should not be weakened or strained on the ground that they may appear to be exacting and strict.

The power of attorney, which gives authority to an agent to present a document for registration on behalf of his principal, under sec. 32, sub-sec. (c) of Act XVI of 1908, must not be general in its form, but must confer the special authority to present on behalf of the principal, and even though the Sub-Registrar accepts the presentation under a

general power of attorney, it is open to an interested party to show that the power of attorney was in fact imperfect. The fact that the presentation is accepted by the Registrar as in proper form is, however, prima facie evidence that the conditions have been satisfied and after such acceptance the burden of proving any alleged informality rests on the person who challenges the registration.

IN RE SHAIK ABDUL AZIZ (1) and JAMBU PARSHAD v MUHAMMAD AFTAB ALI KHAN (2) referred to.

Where a mortgage bond was duly presented for registration, but the mortgagor not having attended to admit execution, the Sub-Registrar refused to register the mortgage under sec. 35 of the Registration Act, and on the mortgagee's appeal, the Registrar ordered its registration:

Held—That there was nothing in sec. 75 to prevent the registering officer from registering a document which had been duly presented originally and the execution of which was proved, without requiring a fresh presentation according to the formalities imposed by sec. 32, though if such presentation was made, the registering officer would be bound to register it, in view of the mandatory provision of sec. 75, sub-sec. (2).

This was an appeal against an order of remand, dated the 7th March 1918, and made by the High Court of Judicature at Allahabad in an appeal from the Subordinate Court of Moradabad.

The suit giving rise to this appeal, viz., Suit No. 31 of 1915 on the file of the Subordinate Court, was instituted on behalf of the infant sons of the late Sahu Parshadi Lal by the Manager of

(1) I. L. R. 11 Bom. 691 (1887).

(2) L. R. 42 I. A. 32; s. c. I. L. R. 37 All.

49; 19 C. W. N. 282 (1914).

RAI BAHADUR CHHOTAY LAL v. THE COLLECTOR OF MORADABAD.

the Court of Wards to enforce a registered mortgage bond, dated 20th November 1911, and admittedly executed to the said deceased by the first Defendant. The amount claimed in the plaint was Rs. 11,280, and interest, and the ordinary decree for sale was asked for together with other reliefs.

The present Appellant, a subsequent transferee from the mortgagor, who was the 15th Defendant, pleaded *inter alia* that the mortgage had not been duly registered according to law. The Subordinate Judge held that this defence was established, and passed a decree dismissing the suit without determining other questions raised by the parties.

The High Court on an appeal by the Plaintiff held that the registration of the mortgage was valid and remanded the case to the Subordinate Court for disposal.

The present appeal was preferred against the said order of remand, and the main question was whether the said mortgage was not duly registered, and, if not, whether the suit must fail altogether.

The said mortgage or hypothecation bond was executed on the 20th November 1911 by the first Defendant to the father of the said infants, to secure repayment with interest of Rs. 10,000. It contained a personal covenant to pay and it hypothecated certain villages therein mentioned. It appears that the mortgagee shortly afterwards fell ill, and he executed in favour of Pandit Nanak Chand a special power of attorney, which was duly authenticated in the registry office on the 3rd February 1912, to enable him to present the deed for registration. Nanak Chand, on the 5th February 1912, acting under the said power of attorney, presented the deed for registration to the

Sub-Registrar, who made an endorsement to this effect on the deed.

On the 8th February 1912 the mortgagee died. The mortgagor failed to attend at the registration office, and on the 28th February the Sub-Registrar made an endorsement on the deed as follows: "Under sec. 35, Act XVI of 1908, registration of this document was refused." An application was then made to the Registrar of Moradabad. "The proceedings before the Registrar resulted in an order by him, under the first clause of sec. 75 of Act XVI of 1908, whereby he ordered the document to be registered. In the meantime, the estate of the minor sons of Sahu Parshadi Lal had been taken under the management of the Court of Wards, and the Collector of Moradabad, in his official capacity as manager of the Court of Wards, became charged with looking after the interests of the minors in this matter. The Registrar's order for the registration of the document was dated 28th June 1912. Within the prescribed period of 30 days, that is to say, on the 23rd July 1912, the Collector sent the document in suit to the Sub-Registrar with an official letter, enclosing also a certified copy of the order of the District Registrar." On the last-mentioned date the Sub-Registrar, being satisfied (as appears from an endorsement then made by him) "that the execution of the document was proved before the said officer," accepted it for registration, and on 2nd August 1912 he registered it.

The present suit was instituted on the 23rd November 1914, praying for the relief above-mentioned. The first Defendant, the mortgagor, raised no defence; other Defendants, being transferees from him, raised various issues, of which only the fourth had been tried. It was as follows: "Whether the deed in suit was

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validly presented for registration, and if not, can the suit for enforcement of the hypothecation stand?"

On the said issue the Subordinate Judge, who delivered his judgment on the 29th January 1916, held that the document had not been duly registered, and he passed a decree dismissing the suit.

The present Respondent appealed to the High Court against the said decree, and on 7th March 1918 judgment was delivered therein reversing that of the Subordinate Judge. The learned Judges were of opinion that the original presentation of the document for registration under the mortgagee's power of attorney was valid and that there had been no material irregularity in the subsequent proceedings. They accordingly made an order remanding the suit for trial on the remaining issues, and they ordered that the costs of the appeal should be costs in the cause.

Mr DeGruyther, K. C. (with him *Mr B. Dubé*) for the Appellant—"The presentation of the deed by Nanak Chand on the 5th February 1912 is not in accordance with secs. 32 and 33 of the Indian Registration Act. Presentation was made under sec. 32 (c) and it is open to me to show that the presentation of the power of attorney was defective.

Jambu Parshad v Muhammad Aftab Ali Khan (2).

The power of attorney was in fact never produced and was not executed. It would itself have to be registered before execution (r. 187 of the Registration Manual). Moreover it should have been presented personally.

Referred to sec. 32 and sec. 75 (2), Indian Registration Act.

(2) L. R., 42 I. A. 22; s. c. I. L. R. 87 All. 49; 19 C. W. N. 282 (1914).

In any event an application for registration by post is quite irregular and vitiates the registration which was granted.

Messrs. Dunne, K. C. and *Kenworthy Brown* for the Respondent were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER On the 20th November 1911, Maulvi Maqbulul-Rahman executed a mortgage of considerable property in the District of Meerut in favour of Sahu Parshadi Lal, to secure repayment of Rs. 10,000 and interest. The mortgagor subsequently executed several transfers of the mortgaged property, some by way of mortgage and some apparently by way of absolute transfer.

The Appellant claims under one of such transfers, but the extent and character of his interest is nowhere stated, nor need it be investigated as it is admittedly sufficient to support the appeal. He contends that the mortgage of the 20th November 1911, was not properly registered in accordance with the provisions of the Indian Registration Act, XVI of 1908, and is consequently invalid.

The Respondent is the Manager of the Court of Wards, acting on behalf of the three infant children of the mortgagee, who died on the 8th February 1912.

That the mortgage required to be registered is plain. The only question is, was registration effected? The facts are these. The mortgage was presented for registration before the Sub-Registrar of Moradabad on the 5th February 1912 by Pandit Nanak Chand acting under a power of attorney, and was received by him. The mortgagor did not attend to admit execution, and on the 28th February 1912, the Sub-Registrar refused re-

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gistration, making an endorsement on the deed in the following terms: "Under sec. 35, Act XVI of 1908, registration refused" Sec. 35 relates solely to the admission of execution of the deed, and as the mortgagor did not appear, the Sub-Registrar was bound to take the course he did, leaving the interested parties to appeal to the Registrar under sec. 73 [see *In re Shaik Abdul Aziz* (1)].

It will, therefore, be noticed that the reason why registration was refused had nothing to do with defect in presentation; but as it is now asserted that the original presentation was irregular, it is important to examine the facts and statutory provisions upon that head. The Registration Act has imposed several conditions regulating the presentation of documents for registration, and it is of great importance that those conditions, framed with a view to meet local circumstances, should not be weakened or strained on the ground that they may appear to be exacting and strict.

Sec. 32 is the first section dealing with the matter, and it is in the following terms.—

"32 Except in the cases mentioned in sec. 31 and sec. 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

"(a) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

"(b) by the representative or assign of such person, or,

"(c) by the agent of such person, representative or assign, duly authorised by power of attorney executed and authenticated in manner hereinafter mentioned"

The exceptions mentioned in secs. 31 and 89 need not be considered as they have nothing to do with the present case.

Presentation here was not made in person; it was made under sub-sec. (c) by an agent purporting to be authorised by a power of attorney. Such power of attorney must not be general in its form, but must confer the special authority to present on behalf of the principal, and even though the Sub-Registrar accepts the presentation under a general power of attorney, it is open to any interested party to show that the power of attorney was in fact imperfect. [See *Jambu Parshad v Muhammad Aftab Ali Khan* (2)]. The fact that the presentation is accepted by the Sub-Registrar as in proper form is, however, *prima facie* evidence that the conditions have been satisfied; and after such acceptance, the burden of proving any alleged informality rests on the person who challenges the registration. In the present case no question arises upon the character of the power, it has not been put in evidence and having been formally accepted by the proper official it may be regarded as complying with the provisions as to its character imposed by sec. 32, sub-sec. (c).

By sec. 33, however, special conditions are established with regard to the execution of such a power of attorney. This section provides that certain powers of attorney shall alone be recognised, viz., sub-sec. (a):—

"(a) If the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar, or Sub-Registrar within whose district or sub-district the principal resides."

It is said that in this case that condition has not been satisfied, because the Sub-Registrar's certificate, which was

(1) I. L. R. 11 Bom. 691 (1937).

(2) L. R. 42 I. A. 22; a. c. 7. L. R. 37 All. 49; 1914. W. N. 282 (1914).

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endorsed on the document on the 5th February 1921, in the following terms:—

“Presented by Pandit Nanak Chand, son of Pandit Tara Chand, caste Brahman, professional lawyer, resident of Moradabad, muhalla Raja Gali, at the office of the Sub-Registrar, Moradabad, this 5th day of February, 1912, between the hours of 3 and 4 p. m. on behalf of Sahu Parshadi Lal under a special power of attorney duly authenticated in this office on 3rd February, 1912

“(Signed) SHAM BEHARI LAL,
Officiating S. R.”

does not refer to the fact that the power of attorney was executed before the Sub-Registrar. The endorsement is certainly lax in this respect, but it is made under no statutory obligation, and it has no statutory effect; it is only the evidence to show that the presentation has been accepted by the Sub-Registrar and its acceptance by him, he being the officer whose business it is to see that all essential regulations are regarded, is, *prima facie*, evidence that the power of attorney was regular in all respects. So far as the original presentation is concerned, therefore, their Lordships think that there is nothing to displace the inference that it was duly made, arising from the fact of its acceptance by the Sub-Registrar. His refusal to register was due to the circumstances which have already been narrated, and in due course appeal was had to the Registrar by the present Respondents.

On the 28th June 1912, the District Registrar ordered registration, following upon which, on the 22nd July, the Collector of the Court of Wards forwarded the mortgage and the copy of the Order by post to the Sub-Registrar and asked for registration. The Order of the 28th June 1912 removed the difficulty that prevented registration in the first instance, and accordingly, on the 23rd

July 1912, the Sub-Registrar accepted the document for registration and made upon it the following endorsement:—

“Having seen the order of the District Registrar, Moradabad, dated 28th June, 1912, I have satisfied myself that the execution of the document was proved before the said officer, and the document is therefore accepted for registration

“(Signed) SHER SINGH, Officiating S. R.
“23rd July, 1912”

And it was registered accordingly.

It is objected that such registration was bad because the presentation to the Sub-Registrar after the District Registrar's order ought to have been made with the same formalities as those necessary for the original presentation, and this, according to the Appellant's contention, is the only meaning that can be given to sub-sec. (2) of sec. 75, which is in the following terms:—

“75—(1) If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered

“(2) If the document is duly presented for registration within thirty days after the making of such order, the registering officer shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in secs. 58, 59 and 60

“(3) Such registration shall take effect as if the document had been registered when it was first duly presented for registration”

The weight of this argument depends upon the phrase “duly presented,” and it is pointed out that the subsequent use of the same words in sub-sec. (3) shows that “duly presented” means presented in accordance with all the formalities imposed by sec. 32.

Their Lordships are not prepared to differ with this reasoning, but it does not conclude the case in the Appellant's favour. Upon the hypothesis that sec. 75, sub-sec. (2) may be dealing with a case such as the present, in which ori-

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ginal presentation has been properly made, and in these circumstances, and as every condition has been satisfied, there would, in their Lordships' opinion, be nothing to prevent the District Registrar, when he had determined the question of execution, from directing that the registration should then be made. The last words in sub-sec (3), which provide that the registration shall date back, do not necessarily refer only to a registration effected pursuant to the provisions of sub-sec (2), but to every registration consequent on the order made by the Registrar. The main point about sub-sec (2) is that it is mandatory in form and compels the registering officer to effect the registration if the document be duly presented. If this procedure be followed and registration is refused, the processes of the Court are open for the purpose of compelling obedience, a privilege that would not be enjoyed if the formalities were omitted. Their Lordships can find nothing in the section to prevent the Registrar or the Sub-Registrar from registering a document which had been duly presented, and the execution of which has been proved, without requiring a repetition of all the original steps, but he cannot be compelled to register unless the document be "duly presented" a second time. There are many mischiefs against which the Statute was designed to afford protection in requiring obedience to the provisions for presentation in the first instance, but when once the execution of the document has been proved, and the original conditions for presentation complied with, there is no reason why they should all be repeated.

For these reasons their Lordships think that the conclusion to which the High Court have arrived is correct, although they are not prepared to accept all

the reasoning by which that conclusion is supported, and they will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor *Mr Douglas Grant* for the Appellant

Solicitor *The Solicitor, India Office* for the Respondent.

G D M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 784 OF 1921.

BUCKLAND, J.	}	LEICESTER & CO.
1922,		v.
10, July.		S. P. MULLICK.

Betting losses—Hundi executed by loser in favour of winner in consideration of the latter withdrawing his name from R. C. T. C. and preventing his being posted as defaulter, whether such consideration legal and suit lies on Hundi—Business of book-makers, of illegal—Indian Contract Act (IX of 1872), secs. 2 (d), 23 and 30—Bengal Public Gambling Act (IV of 1913, B. C.), sec. 2 and Bengal Amusements Tax Act (V of 1922, B. C.), considered.

The Defendant lost a sum of Rs 8,500 to the Plaintiff firm on bets on horse races and on his failure to pay was reported to R. C. T. C. The Defendant subsequently executed in favour of the Plaintiff firm a Hundi for a sum of Rs 8,500 in consideration of their withdrawing his name from the R. C. T. C. and thereby preventing his being posted as a defaulter:

Held (in a suit brought on the Hundi to recover the said sum)—That the consideration for the Hundi was the Plaintiff firm's promise to withdraw the Defendant's name from the R. C. T. C. in order to prevent the Defendant from being posted as a defaulter; that such consideration was legal and that therefore the Plaintiff was entitled to recover.

HAYMS v. STUART KING (1) followed.

LEICESTER & Co. v. S. P. MULLICK.

Contracts by way of wagering and gaming are void, but not illegal.

JUGGERNATH SEW BUX v. RAM DAYAL (3) followed.

There is nothing illegal in the agreements which it is the business of a partnership firm of book-makers to make, nor are such agreements prohibited by law. Therefore a suit by such a firm is maintainable.

THWAITES v. COULTHWAITE (5), HYAMS v. STUART KING (1) and O'CONNOR AND GULD v. RALSTON (4) referred to.

The facts of the case will appear from the judgment.

Mr. S. C. H. Meyer, Counsel, appeared for the Plaintiff.

Sir B. C. Mitter, Mr. S. N. Banerjee (Sr.) and Mr. S. N. Bhattacharjee, Counsel, appeared for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

BUCKLAND, J.—There is not much dispute about the facts of this case and they are simple. The Plaintiffs sue as a firm and are described in the cause title as carrying on business in co-partnership as Turf Accountants, a business otherwise known as that of book-makers, which consists of gambling on horse races, the profits of which they share. The Defendant engages in horse racing; he owns race horses and bets on horse races in considerable amounts. On the 20th October 1920 he owed the sum of Rs 8,500 which he had lost to the Plaintiffs at the Barrackpore races. As he did not pay, the Plaintiffs reported him to the Barrackpore Turf Club, by the Secretary of which he was, it has been stated, though no formal proof has been given of the fact, reported to the

Royal Calcutta Turf Club. On the 6th December, the Defendant received a letter signed by the Secretary of the Royal Calcutta Turf Club referring to the report received from the Secretary, Barrackpore Races as to considerable sums owing from the Defendant to several book-makers, among whom the Plaintiffs are included, amounting to Rs 15,220 in all, and informing him that if that sum was not paid into the office of the Royal Calcutta Turf Club by the 22nd February he would be posted as a defaulter and notice to that effect would be published in the Sheet Racing Calendars. Pending settlement of his account he was informed that the entries of his horses for certain races had not been accepted and that in the meantime he was not to bet or enter the race enclosures. The authority for such a letter or that the Royal Calcutta Turf Club was entitled so to deal with the Defendant upon such a report, has not been questioned and the hearing has proceeded upon the basis that the letter and the penalties prescribed were in order. On the 20th December the Defendant went to the Albert Club, which I am informed is an institution to which persons carrying on the business of book-makers resort, and there he found the Plaintiff and his other book-maker creditors. He executed Hundies in favour of his several creditors for the amounts of his losses, among them one for Rs 8,500 in favour of the Plaintiff and at the same time wrote letters addressed to them, in a form drafted by Mr. Goodman of which the letter addressed to the Plaintiffs is in the following terms.—

“The Albert Club, Ltd,
‘Grosvenor House,’
Calcutta, 20-12-1920.

To

Messrs. Leicester & Co.

(1) [1906] 2 K. B. 696.

(2) 1 L. R. 9 Cal. 791 (1883).

(4) [1920] 3 K. B. 451.

(5) [1896] 1 Ch. 496

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Dear Sir,

In consideration of your withdrawing my name from the R. C. T. C. and thereby preventing my becoming posted as a defaulter, I agree to pay you the sum of Rs. 8,500 (rupees eight thousand five hundred only) and hand you my promissory note herewith for the amount named.

Yours faithfully,
S. P. Mullick."

Subsequently the Defendant's name was withdrawn and he has been able to enter the race enclosures and to bet, and has done so, but he has not paid the amount for which he drew the Hundi in suit. The only dispute on the facts is as to how the Defendant came to write that letter and to draw the Hundi. The Plaintiff's account of the matter is that the Defendant came of himself and wanted to have his name withdrawn from the Royal Calcutta Turf Club and the defaulters' list, and in consideration of the Plaintiff promising to take steps to have that done, the Defendant signed the Hundi and letter. The Defendant asserts that what was done was done at the suggestion of the Plaintiff and that the Plaintiff said he wanted the Hundi and letter to keep his account in form, and that he had no intention of instituting any suit against him. There is not much to choose between the versions given by the two witnesses and the letter makes it clear what was intended. The Plaintiffs now sue to recover the amount of the Hundi, and in order to succeed they rely for consideration on that stated in the letter and not on the original debt. The suit was filed under Or. 37 of the Civil Procedure Code and the plaintiff states that the Defendant promised to pay the sum in question "for value received." The Defendant in his written statement says that the Hundi was executed for a debt due on betting transactions. It is

not till the suit comes to a hearing that the real question of fact is raised, and that is done in reply to the Defendant's contention that there was no consideration. For this the parties cannot be held responsible, it is the result of a system of pleading which does not admit of a reply. This suggests that in cases where the real contest will follow from the nature of the defence, due to that being one which the Defendant has to prove and the Plaintiff did not anticipate, the Plaintiff should be required to place on record his pleas in answer. In this particular instance no difficulty arises, but that is not always the case and it is at times embarrassing that pleas may legitimately be taken in reply which are not on record until they find their place in the issues.

The issues settled were :—

1 Is the Plaintiff firm entitled to maintain this suit?

2 Was there consideration for the Hundi in suit and was such consideration legal?

3 Was the Hundi executed by the Defendant by reason of undue influence exerted by the Plaintiff firm?

4 To what relief, if any, is the Plaintiff entitled?

The third issue does not strictly arise on the written statement but objection to it was not pressed. I will first state the provisions of law which in my opinion are applicable to the case.

The first is sec. 30 of the Indian Contract Act, the material portion of which is in the following terms :—

"Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made."

Sec. 23 which states that :—

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"The consideration or object of an agreement is lawful unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law" has also been referred to.

Reference has also been made to the Bengal Public Gambling Act, 1913, which amended sec. 1 of the Bengal Public Gambling Act, 1867, by excluding from the definition of gaming, wagering or betting on a horse race when such wagering or betting takes place, (a) on the day on which the race is to be run and (b) in an enclosure which the stewards controlling the race have with the sanction of the local Government set apart for the purpose

The Bengal Amusements Tax Act, 1922, which imposes taxes on certain forms of betting including that of the kind carried on by "licensed book-makers," who are defined in the Act as persons who carry on the business or vocation of or act as book-makers, etc., was also referred to in the course of the argument. But that statute was only passed this year and its effect, if any, upon a case such as this is a matter for future consideration.

It has also been contended that certain statutes of Anne which deal with gaming apply to India, and in support of this proposition I have been asked to refer to the preface by Mr. Whitley Stokes to the collection of Statutes relating to India. That only shows the obscurity in which the whole question of the application to India of English Statutes passed prior to the year 1726 is shrouded, and the contention has not been supported by argument. This, I think, exhausts the statutory provisions of the law on the subject which obtain or obtained at the time with which I have to deal.

Before applying them to the case, I will briefly dispose of the only disputed ques-

tion of fact, which is whether the Defendant signed the Hundi and letter at the solicitation of the member of the Plaintiff firm who has given evidence, or whether on receipt of the letter from the Secretary of the Royal Calcutta Turf Club, he went to see him in order to make arrangements which would prevent the consummation of the penalties with which he was threatened. On the evidence I am satisfied that it was the Defendant who sought the meeting. The penalties to which he had rendered himself liable are severe, especially to an owner of race horses, and he had a powerful motive for seeking relief. I will ignore the stigma attaching to a person who does not pay bets and is consequently debarred from betting or entering the race enclosures. The Defendant says that it was a matter of no concern to him to be posted as a defaulter, and it is not for me to provide him with a standard of honour higher than that which he sets up for himself. The Plaintiff said that the Defendant came of himself. That statement I accept. He had already reported the Defendant and from that report the substantial penalty to the Defendant would ensue: I know of no reason why he should have asked the Defendant to meet him when he could do no more and the meeting might prove infructuous. The outcome of the meeting was the agreement contained in the letter of the 20th December and upon that letter being signed and with that letter the Defendant gave the Hundi in suit.

I now turn to the issues of which the second is the most important and involves the substantial point to be decided.

The argument of the learned Counsel on behalf of the Plaintiff is founded on the well-known case of *Hyams v. Stuart King* (1) in which the facts were that a cheque

(1) [1909] 2 K. B. 698.

LEICESTER & Co v S P. MULLICK.

was given for lost bets. The loser paid part of the amount of the cheque which was held over for a time by the payee. Subsequently the parties came to a fresh verbal agreement by which in consideration of the Plaintiff forbearing to sue and forbearing to declare the Defendant a defaulter the Defendant promised to pay the balance of the cheque. Such consideration was held by the Court to be a good consideration and the Plaintiff was held to be entitled to recover. Fletcher Moulton, L. J., delivered a dissentient judgment and it has been strongly pressed by Sir Benode Mitter on behalf of the Defendant that I should follow the judgment of Fletcher Moulton, L. J., as representing the law applicable to this case in preference to the judgment of the Court.

The learned late Lord Justice's judgment depends upon his interpretation of that portion of section 18 of the Gaming Act, 1845, which, as in the following terms:—

"All contracts or agreements whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

This it will be observed, is in language almost identical with sec 30 of the Indian Contract Act. The learned late Lord Justice's views are expressed, among others, in the following passages:—

"In my opinion too little attention has been paid to the distinction between the two parts of this enactment, and the second part has been treated as being in effect merely a repetition of the first part. I cannot accept such an interpretation."

... The language of the later provision is in my opinion much wider. It provides with complete generality that no action shall be brought to recover anything alleged to be won upon any wager, without in any way limiting the application of the provision to the wagering contract itself. In other words, it provides that "wherever the obligation under a contract is or includes the payment of money won upon a wager, the Courts shall not be used to enforce the performance of that part of the obligation."

This case is not unlike *Bubb v. Yelverton* (2) referred to in the judgments of the learned L. J.'s in *Hyams v. Stuart King* (1) and that case Lord Justice Fletcher Moulton dealt with, apart from its special circumstances, as they appeared to him, by the observation that the bond constituted an agreement to pay money on wagers, and by sec 18 of the Gaming Act an action could be brought upon it. In the cases of this kind in which the Plaintiffs have succeeded, it has been alleged that the sum is not "won on any wager" but due in respect of another consideration. The sum may be, and it would be affectation to pretend that it is not, fixed with reference to the amount of a lost wager, but where at the desire of the promisor the promisee promises to do or to abstain from doing something [Contract Act, sec. 2 (d)], the sum of money which the promisor reciprocally promises to pay, whatever it may be and however it may be determined, is a good consideration for the promise of the promisee. To say that because that sum is fixed with reference to a lost bet the amount of the lost bet, therefore, is the consideration for the promise of the promisor, seems to me to involve a lacuna in the logical sequence of

(1) [1908] 2 K. B. 686.

(2) L. R. 9 Eq. 471 (1870).

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the argument. Farwell, L. J., puts with the utmost lucidity what I have endeavoured to express in terms of the Indian Contract Act :—

“Here the agreement sued on is an agreement to pay a sum of money in consideration of forbearance to post the Defendant as a defaulter : the sum of money may be equal to or less than the lost bet, but it is not payment of the bet, because that was payable on settling day, and non-payment on that day made the loser a defaulter and liable to be posted. The day of payment is most material, for non-payment may involve the winner in a similar default, the contract not to post is a new contract quite distinct from the contract of wager and is sufficient to support a promise to pay money, which, though equal to the amount of the bet, is not in fact the bet, but is compensation for its non-payment, and the action cannot be said to be brought for recovering any sum alleged to have been won on any wager within 8 and 9 Vict., c. 109.”

Apart from the contentions based on the dissentient judgment in that case, it was contended that the effect of secs 30 and 23 of the Indian Contract Act is to make agreements by way of wager illegal. But this point is covered by authority, for so long ago as in 1883, in *Juggernath Sew Bux v. Ram Dayal* (3), it was decided in the briefest but clearest possible language by two very distinguished Judges of this Court that a contract by way of wagering and gaming is void and not illegal.

There is a very material distinction between the facts of *Hyams v. Stuart King* (1) and this case, a distinction which adds to the strength of the case before me. In that case the cheque sued upon had been admittedly given in payment of a bet, and

it was held that the forbearance of the Plaintiff to sue coupled with his forbearance to declare the Defendant a defaulter constituted a good consideration for a fresh agreement and that the Plaintiff was entitled to recover on the cheque. Here the Hundi was not given till the agreement of the 20th December was made ; there is no question of a new agreement and a new consideration for a Hundi given in the first instance in circumstances which would prevent its being sued upon in the absence of a new agreement. This disposes of much of the argument that the real consideration was the bet itself. It is true that the Plaintiff himself said that the Hundi represented the amount of the Defendant's losses, a statement on which reliance has been placed. But the terms of the agreement are in writing and though the actual sum may represent the amount of the losses, it does not follow that the consideration for the Hundi was the amount of the lost bets.

Another contention based on the evidence, to which I must refer, is that as the matter had passed out of the hands of the Plaintiff and it was discretionary with the controlling authority, the Royal Calcutta Turf Club, whether or not the Defendant should be relieved from the penalties stated in the Secretary's letter, there was no consideration, or that it failed. To this, I think, the answer is that the letter shows what the Plaintiff had to do. The Plaintiff says that he could have the name withdrawn by going and explaining the reasons to the Secretary. He does not say in so many words that he did so, but I infer that that was what he did, and nothing else has been suggested, for the Defendant said that since his name had been withdrawn he had been to the races and made bets. The Plaintiff did all that it lay in his power to do, and the relief

(1) [1906] 2 K. B. 696.

(3) I. L. R. 9 Cal. 791, 796 (1883).

LEICESTER & Co. v. S. P. MULLICK.

from the penalties which the Defendant has since enjoyed is in my judgment the result of what the Plaintiff did in that behalf.

I find that the consideration for the Hundi in suit was the Plaintiff's promise to withdraw the Defendant's name from the Royal Calcutta Turf Club in order to prevent the latter from being posted as a defaulter, which, in fact, I find that he did with that result. I also find that such consideration was legal consideration. I also find that the Hundi was not executed by the Defendant by reason of undue influence exerted by the Plaintiff firm.

The only other point that has been argued is that since the Plaintiff firm is a firm of book-makers, the Plaintiff cannot sue as a firm since the business of book-makers is not one which the law will recognise.

For this proposition the authorities cited are the judgment of Lord Justice Fletcher Moulton in *Hyams v. Stuart King* (1) and *O'Connor and Ould v. Ralston* (4). In the former the learned Lord Justice said: "In my opinion no such partnership is possible under English law. Without considering any other grounds of objection to its existence, the language of the Gaming Act, 1892, appears to me to be sufficient to establish this proposition." I need not go further, for considerations based upon the Gaming Act, 1892, can have no application in this country where the legislature has not only not passed any similar Statute, but there are decisions founded upon legal conditions to alter which in England that Act was passed.

In so far as the Gaming Act, 1892, was relied upon by Darling, J., in the second of the two cases cited in support of the

proposition, the point is not thereby advanced. But the observation—"Persons associating in such a business as this cannot come into a Court of law and claim that money is due to the firm on a transaction of this kind. The inclination of the law is not to favour but to discourage betting. True it does so in a partial, confused and illogical fashion, but the law upon this point is correctly stated by Fletcher, L. J."—supports the contention that since the law discourages betting, persons whose partnership business is to bet cannot come into a Court of law as a firm. Lord Justice Farwell on this point observed that he was not prepared to overrule the decision of Chitty, J., in *Thwaites v. Coulthwaite* (5). That was an action the object of which was to obtain the usual partnership account of profits of a book-maker's business, and the learned Judge holding that it had not been made out that the Plaintiff intended that the business should be carried on illegally, by which he meant in contravention of the Betting Act, 1853, directed an account.

I have stated all the provisions of the law applicable to the case. Sec. 30 of the Contract Act makes agreements by way of wager void and not illegal. It was pointed out by the learned President in *Hyams v. Stuart King* (1) that nothing prohibited was done by the parties and the cheque and the bets were merely unenforceable. It would, he said, probably have been different if the bets were illegal and the giving of the cheque was an illegal act. There is nothing illegal in the agreements which it is the business of the partnership to make, nor are such agreements prohibited by law. Under the Bengal Public Gambling Act, 1913, not only are bets on horse races no longer

(1) [1908] 2 K. B. 696.

(4) [1920] 3 K. B. 451.

(1) [1908] 2 K. B. 696.

(5) [1896] 1 Ch. 496.

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penalised in the circumstances stated in the Act, but the local Government has been given power by the legislature to sanction an enclosure to be set apart for the purpose by the stewards of controlling races in which betting on races may take place on the days on which the races are to be run.

General propositions as to what the law discourages in England have to be taken with reserve when they are sought to be applied in this country, of which the law as to champerty is an instance. The law of England whereby betting is discouraged is the Statute law. As Fletcher Moulton, L. J., observed in his judgment in *Hyams v. Stuart King* (1), "By Common law wagers were not illegal, and the nature of a wager is such that from the point of view of jurisprudence there is ample consideration for a valid contract. The distinction which English law makes between wagering contracts and others is therefore entirely the creation of Statute." This disposes of any argument based upon the provisions of the law of England.

I am not prepared to say that the Statutes in force in Calcutta to which I have referred, discourage betting. The Public Gambling Act at least recognises it. Nor am I prepared to hold that persons who enter into a partnership for the purpose of making agreements not forbidden but recognised by the law, though unenforceable at law, are persons who conduct a business, the very nature of which disentitles them to have recourse to Courts of law to recover claims otherwise sustainable. For these reasons I hold that the suit is maintainable.

There is no question as to the amount which the Plaintiff firm, if successful upon the issues other than the last, should recover, and I give judgment for Rs. 8,500

(1) [1908] 2 K. B. 698.

with costs, and reserved costs, if any, on Scale No. 2.

Messrs Walkins & Co., Solicitors for the Plaintiff Co.

Babu Monmotha Nath Dutt, Solicitor for the Defendant

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1949 OF 1920.

MOHESH CHANDRA
MISSRA, Plaintiff,
Appellant,

v.

SM. NISTARINI DASSYA
and anr., Defendants,
Respondents.

MOOKERJEE, J.
CHOTZNER, J.
1922,
22, June.

Specific Relief Act (I of 1877), sec. 42—Denial of title—Cause of action—Suit for declaration—Previous decree between third parties—Plaintiff not a party—Suit to declare decree and the sale thereunder fraudulent and not binding on Plaintiff, if maintainable without prayer for consequential relief—Injunction—Defect of party.

N obtained an ex parte decree for rent against B, and at the sale in execution of that decree S purchased the tenancy. Plaintiff who was no party to the said proceedings instituted the present suit for a declaration that the aforesaid decree and sale were fraudulent, and not binding on him, who held the tenancy in question and was in possession of the same under certain persons holding under N. Both the Courts below held that the decree and the sale were fraudulent. The suit was decreed by the Court of first instance. The Court of Appeal below held that the suit was barred under sec. 42 of the Specific Relief Act, and dismissed the suit:

Held—That the suit was maintainable under sec. 42 of the Specific Relief Act, and that a prayer for an injunction to protect the Plaintiff's possession was un-

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necessary. The Plaintiff was not bound to wait till he was dispossessed by the auction-purchaser. As soon as his title was denied he was entitled to bring the suit.

SHIV RAM v. JIVU (10), GENDLA PEDDA NAGANNA v. SIVANAPPA (11), HARENDRA LAL ROY GHOWDHURY v. NAWAB SALIM-ULLA BAHADUR (9) and GOBINDA PROSAD TEWARI v. UDAI CHAND (7) *relied on*.

Held also—That upon the facts found the absence of the representatives of B could not entitle N to defeat the Plaintiff's suit

This was an appeal against the decree of Grish Chandra Sen, Esq., District Judge of Zillah Bankura, dated the 10th of June 1920, reversing the decree of Babu Gour Krishna Bose, Munsif, 2nd Court at Bankura, dated the 24th of January 1920.

The facts of the case material to this report are as follows:—

The Defendant No. 1 Nistarini Dassya sued the Defendant No. 3 Brinda Dassya for arrears of rent (Rent Suit No. 301 of 1916) in respect of a *jama* of Rs. 13 per year in the Munsif's Court at Bankura. The suit was decreed *ex parte*. In execution of this decree the *jama* was sold and purchased by the Defendant No. 2 Sachindra Missra in June 1916.

The Plaintiff brought this suit in February 1918 under sec. 42 of the Specific Relief Act for a declaration that the aforesaid decree and the sale thereunder were fraudulent and collusive and not binding on him. The Plaintiff's case was that the Defendant No. 3 never held the *jama* of Rs. 13 under the Defendant No. 1, that the Plaintiff held the said *jama* under the

Deys and Biswasas within the raiyati at fixed rent of Rs. 24 which the said Deys and Biswasas held under the Defendant No. 1, and that the aforesaid decree against the Defendant No. 2 in Rent Suit No. 301 of 1916 was fraudulently obtained to deprive the Plaintiff of the lands of his holding.

Defendant No. 1 alone contested the suit, and his defence, *inter alia*, was that the decree and the sale were not fraudulent affairs, that the aforesaid rent suit was for just debt and against the real tenant, that the suit as framed was not maintainable, and the Plaintiff had no cause of action, that the sale took place with the Plaintiff's knowledge and that it was he who purchased the *jama* at the sale in the *benami* of his relative, the Defendant No. 2.

The following paragraphs of the plaint will be found material:—

"That there has been an apprehension of the Plaintiff's right in the said *jama* of Rs. 13 on account of the land as per schedule below being prejudiced in future by the said decree and auction sale. The said cloud on title is fit to be removed and is required to be removed.

"That this is a suit for holding and declaring that the decree in Rent Suit No. 301 of 1916 of this Court and the sale held in Rent Execution Case No. 955 of 1916 of that Court are fraudulent and collusive and that the same are not prejudicial to the Plaintiff's said land and *jama* of Rs. 13, and that the said decree and auction sale are not at all binding and operative on the Plaintiff.

"That the cause of action has accrued within the jurisdiction of this Court from the 15th June 1916, the date of the said decree and auction sale, and from the 6th January 1918 when the information about the decree and auction sale was obtained."

(7) 6 B. L. R. 320 (1870).

(9) 12 C. L. J. 336 (1910).

(10) 1. L. R. 13 Bom. 34 (1888).

1. L. R. 88 Mad. 1162 (1914).

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Plaintiff prayed for the following reliefs :—

“(Ka) That the decree in Rent Suit No. 801 of 1916 of this Court as also the sale held in Rent Execution Case No. 955 of 1916 of that Court may be declared as fraudulent and collusive.

“(Kha) That it may be declared that the said decree and auction sale are not prejudicial in respect of the Plaintiff's said land and *jama* of Rs 13 and are not at all binding and operative against the Plaintiff.

“(Ga) That other or additional reliefs which the Plaintiff be found entitled to according to the justice of the Court may also be awarded.”

The Court of first instance decreed the suit.

The following extracts from its judgment will be found material :—

“The Plaintiff has brought this suit for a declaration only that the decree obtained by the Defendant No. 1 and the sale thereunder are fraudulent, collusive and inoperative without any other consequential relief. The Defendants' contention seems to be that the Plaintiff ought to have prayed for an order setting aside the decree and sale, and that without such a prayer the present suit is not maintainable. I do not, however, see why the Plaintiff should pray for such an order when the declaration prayed for by him seems to be quite sufficient for his purpose. . . .

“I find that Defendant No. 3 had no right to the *jama* of Rs. 13 at the time of the suit for rent brought by Defendant No. 1 against her and that the decree passed in that suit was obtained by fraud and collusion. The sale in execution of the decree also appears to have been fraudulently brought about to defeat Plaintiff's right.

“The suit will be decreed and the Plaintiff will get the declaration sought. Ordered that the suit is accordingly decreed with costs. The decree and the sale complained of are declared fraudulent and collusive and inoperative as against the present Plaintiff. The Defendant No. 3 having died since the institution of this suit and nobody having been substituted in her place as heir the suit must be dismissed against her.”

On appeal by the Defendant No 1, the learned District Judge allowed the appeal and dismissed the suit. The following portions of his judgment will be found material :—

“On the whole I am disposed to hold that the decree in the Rent Suit of 1916 and the sale thereunder were fraudulent and collusive affairs. . . .

“As the suit of 1916 was against an imaginary tenant and was for an imaginary debt and as the Defendant No. 3 did not object to the suit and as the evident intention in securing the decree could only be a foul one, I agree with the lower Court in thinking that the decree and the sale complained of were mere collusive and fraudulent affairs.”

“But I think the appeal should succeed on other grounds. It seems to me that in a suit for a declaration that a certain decree is fraudulent, the parties to the decree are essentially necessary parties. In the present case the judgment-debtor died during the pendency of the suit. Her heirs who were absolutely necessary parties were not brought on the record. Their absence was fatal to the suit and the suit should have been dismissed on account of their absence from the record.

“I should further think that the Plaintiff had no cause of action. As the Plaintiff was not a party in the rent suit the

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decree in the suit cannot bind him. The auction-purchaser has not taken possession of the land and has not yet tried to get into possession of the same though a sufficiently long time has elapsed since the decree and the sale Plaintiff's title to the land has not been endangered. This is not a suit for declaration of title to the land. It is only sought to have a declaration that the decree is not binding on him. Such a suit is not contemplated by sec 42 of the Specific Relief Act. I find that the Plaintiff has no cause of action and that this suit was premature. In the result the appeal is allowed. The suit out of which the appeal arose would stand dismissed."

Against the aforesaid decision of the learned District Judge the Plaintiff preferred this second appeal to the High Court.

Babu Monmatha Nath Roy for the Appellant—I submit that the Court of appeal below has wrongly held that sec 42 of the Specific Relief Act is a bar to the present suit. The suit as framed is maintainable. The finding is that the Plaintiff holds the tenancy in question, and that the decree and the sale complained of were fraudulent. The decree in question denies the Plaintiff's title to the property. Plaintiff is therefore entitled to have his right to the property declared, and to obtain a declaration that the decree and sale were fraudulent and not binding on him. As Plaintiff is in possession it was not necessary to ask for any other relief. Plaintiff was not a party to the rent suit, and hence he is not required to ask for the setting aside of the decree and the sale. The effect of the decree and the sale has been that a cloud has been cast upon the Plaintiff's title and so he is entitled to seek the aid of the Court to dispel that cloud. Plaintiff is not bound to wait till

he actually finds himself in jeopardy. Refers to *Harendra Lal Roy Chowdhury v Nawab Salimulla Bahadur* (9). The action of the Defendant is itself injurious as the Plaintiff can scarcely make any use of his title in the market after the decision in favour of the Defendant denying Plaintiff's title. In this way the Plaintiff is affected, and the declaration of the Court will be in itself a relief. Refers to *Gobinda Prosad Tewari v Udai Chand Rana* (7) and *Gendla Pedda v Swanappa* (11). Plaintiff is not bound to wait till he is dispossessed by the auction-purchaser. As soon as his title is denied he is entitled to bring the suit. Refers to *Shiv Ram v. Jivu* (10).

The absence of the heirs of the Defendant No. 3 is not fatal to the suit.

Babu Hemendra Chandra Sen for the Defendant No. 1, Respondent.—My submission is that the Court of Appeal below was right in dismissing the suit.

Firstly, the suit as framed is not maintainable under sec 42 of the Specific Relief Act. It is only for a declaration that the decree and the sale are fraudulent and not binding on the Plaintiff. Such a suit is beyond the scope of sec. 42 of the Specific Relief Act. It is not a suit for a declaration of Plaintiff's title. The Court of Appeal below also finds that. Reads the prayers in the plaint. None of them, I submit, relates to a declaration of Plaintiff's right to the lands in suit.

[MOOKERJEE, J.—Does not the prayer (*kha*) relate to a declaration of Plaintiff's right to the property?]

It may be that such a declaration is in some measure indirectly involved in the said prayer, but I submit that is not what

(7) 6 B. L. R. 320 (1870).

(9) 12 C. L. J. 336 (1910).

(10) I. L. R. 13 Bom. 34 (1888).

(11) I. L. R. 38 Mad. 1162 (1914).

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is sanctioned by sec. 42 of the Specific Relief Act. Refers to *Deokali Koer v. Kedar Nath* (6). I may point out in this connection that the Court of first instance has not passed a decree declaring Plaintiff's title to the property.

The cases cited by the Appellant are distinguishable. In all those cases there was a prayer for declaration of title; the facts also were different.

Plaintiff not being a party to the rent suit the decree and the sale cannot bind him. He cannot therefore ask the Court to grant a bootless declaration in respect of a matter which is self-evident. Plaintiff is in possession. The auction-purchaser has not up to the date of the institution of the suit attempted to take possession of the property. How is Plaintiff's right infringed, and what is the present danger to be averted by the declaration asked for? It has been said that a cloud has been cast on Plaintiff's title and hence the present suit. The short answer is that Plaintiff's title has not been and cannot be affected in the least by the proceedings to which he was no party. If there is any cloud it is quite invisible and imaginary, and there is nothing to remove. As has been truly observed it is not the function of the Court to enunciate abstract truisms of law, and the Court should not lend itself to the task of declaring what is obviously indisputable. A declaration cannot be asked on merely speculative grounds. If Plaintiff's title is not interfered with the mere apprehension that complications may arise in future is no ground for granting a declaratory decree. Refers to *Jamna Prasad v Jagdeo* (8). Upon the facts found I submit the Plaintiff has no cause of action and the suit is premature.

Secondly, my submission is that the proviso to sec. 42 of the Specific Relief Act is a bar to the Plaintiff's suit. In this case the Plaintiff is in a position to seek further relief than a mere declaration. Plaintiff should have asked for an injunction by way of consequential relief restraining the auction-purchaser from taking possession of the Plaintiff's land. I submit that this prayer for injunction was absolutely necessary to protect Plaintiff's possession. Refers to *Thakurprasad v. Pankal* (15). The object of the proviso is to avoid multiplicity of suits. If the real object of the suit is to get a declaration which will enable the Plaintiff hereafter to seek further relief to which the Plaintiff is at present entitled the Court will not grant the declaration. Refers to *Sheolotan Ray v Bhirgun Ray* (16).

Thirdly, I submit that upon the death of the third Defendant during the pendency of the suit in the Court of first instance her representatives not having been brought on the record the suit must be deemed not to have been properly constituted and the whole suit should have been dismissed on that ground alone. In a suit for a declaration that a certain decree is fraudulent the parties to the decree are essentially necessary parties, and their absence is fatal to the suit.

Babu Manmatha Nath Roy in reply.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Plaintiff in a suit for declaratory relief, instituted under sec. 42 of the Specific Relief Act. The case for the Plaintiff is that he holds a tenancy at a rent of Rs. 13 a year in respect of the disputed land under the Biswases and the Deys who hold under

(6) 1 L. R. 39 Cal. 704 at p. 709 (1912).

(8) 6 All. L. J. 11 (1908).

(15) 8 C. L. J. 485 (1907).

(16) 2 P. L. J. 481 (1917).

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the first Defendant, and that the first Defendant ignored the interest of the Biswases and the Deys as also his own interest in the property and fraudulently instituted a rent suit against the third Defendant as if the third Defendant was his tenant in respect of the disputed land at a rent of Rs 13 a year. This suit was decreed *ex parte* on the 15th June 1916, and at the sale which followed the second Defendant became the purchaser of the tenancy on the 14th November 1916. On the 20th February 1918 the Plaintiff instituted the present suit for declaration that the disputed tenancy was held by him under the Biswases and the Deys and not by the third Defendant under the first Defendant. He further prayed for a declaration that the decree obtained by the first Defendant against the third Defendant and the sale in consequence thereof were fraudulent and collusive. The Courts below have concurrently found that the allegations made by the Plaintiff are substantiated by the evidence on the record. The District Judge has come to the conclusion that the suit for rent was instituted against an imaginary tenant for recovery of an imaginary debt and that the said decree and the subsequent sale were collusive and fraudulent. But while the Court of first instance held that the present suit was maintainable, the District Judge held that the suit was barred under the provisions of sec 42 of the Specific Relief Act. We are consequently called upon to decide, whether upon the facts found the Plaintiff is entitled to the declaratory relief he seeks.

There can be no question that the claim for rent, the suit for rent and the sale for arrears of rent were all fraudulent and collusive and that the entire proceedings taken by the first Defendant against the

third Defendant fulfilled the requirement of a collusive and fraudulent proceedings so graphically described by Lord Brougham in the case of *Earl of Bandon v. Beechen* (1) and applied in *Surendra Nath v. Kali Gopal* (2), *Akhil Pradhan v. Manmatha Nath* (3), *Radha Madhab v. Kalpataru* (4) and *Rajab Ali v. Hedayat Ali* (5). But notwithstanding this the first Defendant has strenuously contended that the Plaintiff should not have instituted this suit, and that if he did institute this suit he should have asked for an injunction by way of consequential relief. He has further urged that as upon the death of the third Defendant, the imaginary tenant, as the District Judge described, her representatives were not brought upon the record, the suit must be deemed not to have been properly constituted and should have been dismissed on that ground alone. We are of opinion that there is no foundation whatever for these contentions.

Sec 42 of the Specific Relief Act provides that any person entitled to any legal character or to any right to any property may institute a suit against any person denying or interested to deny his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled and the Plaintiff need not, in such circumstances, ask for any further relief, provided that no Court shall make any such declaration where the Plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. There can be no question that the Plaintiff is a person entitled to a right in the disputed property,

(1) 3 Cl. & F 479, 511 (1835).

(2) 26 C. L. J. 339 (1917).

(3) 18 C. L. J. 616 (1913).

(4) 17 C. L. J. 209 (1912).

(5) 22 C. L. J. 197 (1915).

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namely, he is entitled to the tenancy in respect of the disputed land held on payment of an annual rent of Rs 13. There is also no question that the first Defendant is a person who has denied and whose interest it is to deny the title of the Plaintiff to such right. It is, consequently, difficult to appreciate how sec 12 is a bar to the suit.

Reliance has been placed on behalf of the Respondent upon the judgment of Sir Lawrence Jenkins, C. J., in *Deokali Koer v. Kedar Nath* (6), where sec 12 was analysed, and it was pointed out that a declaration should be made only where the case falls strictly within the scope of that section. In the present case, as we have just indicated, the facts of this litigation render the suit subject to the operation of sec 12, Specific Relief Act. If any authority be needed for this view, reference may be made to the decision in *Gobinda Prasad Tewari v. Uday Chand Rana* (7). In that case it was urged as it has been urged here, that as the Plaintiff was not a party to the previous suit, he was not bound by the decree made therein and that consequently it was needless for him to seek a declaratory relief. The answer was given by Maikby, J., in the following words: "We think the suit will lie. The Defendant has asserted a title to land which is altogether inconsistent with that of the Plaintiff. He has asserted it in a Court of justice and obtained relief upon the strength of it. It is true that the Plaintiff is in one sense not affected by those proceedings, because he was not a party to them, but in another way he is, for he could scarcely make any use of his title in the market after such a decision in favour of the Defendant. This is a case in which the ac-

tion of the Defendant is itself injurious and in which the declaration of the Court will be in itself a relief. We see no reason why the relief should not be granted." The decision in *Jamna Prasad v. Jagdeo* (8), where the document impeached did not cover the property of the Plaintiff, is plainly distinguishable.

It has, however, been insistently urged here, on behalf of the first Defendant, that the Plaintiff need not have been in a hurry to seek the protection of the Court inasmuch as the execution-purchaser had not, up to the date of institution of the suit, attempted to take possession of the property. This is clearly no answer to the suit. The same contention was urged in the case of *Harendra Lal Roy Choudhury v. Nauab Salimulla Bahadur* (9). To adapt the language used in that case to the facts of the present litigation, we may say that it has been suggested that the Plaintiff need not have rushed into Court and might have waited till his title was challenged. But the Plaintiff was not bound to wait till he actually found himself in jeopardy. The allegation of fraud and conspiracy upon which his case rests was dependent for its proof mainly upon oral evidence. If he had waited for 12 years it is not improbable that much of the evidence available might have disappeared.

It would obviously have been an act of inexcusable folly on the part of the Plaintiff had he risked delay. It is perfectly true that to entitle a Plaintiff to maintain a suit for declaration under sec 42, Specific Relief Act, he must prove that he has a present existing interest, and no cause of action accrues to him until there is some infringement or threatened infringement of his right; in other words,

(6) 1 L. R. 39 Cal. 704 (1912).

(7) 6 B. L. R. 320 (1870).

(8) 6 All. L. J. 11 (1908).

(9) 12 C. L. J. 336 (1910).

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the cloud must be cast before he can ask for its removal. He must allege and prove hostility on the part of the Defendant, for no Court will move on purely speculative grounds. But it cannot be suggested here that the Defendant is not interested in denying the title of the Plaintiff nor can it be contended that the Plaintiff had no business to bring him into Court. This view is supported by *Shiv Ram v. Jivu* (10) and was adopted in the case of *Gendla Pedda Naganna v. Sivanappa* (11), where Seshagiri Ayyar, J., observed as follows:—"The object of the section is really to perpetuate and strengthen the testimony regarding the title of the Plaintiff, so that adverse attacks upon it may not weaken it. The policy of the legislature is not only to secure to a wronged party possession of the property taken away from him, but also to see that he is allowed to enjoy that property peacefully. 'In other words, if a cloud is cast upon his title or legal character, he is entitled to seek the aid of the Court to dispel that cloud. What we have to consider in this case is whether the decree obtained by the first Defendant against the second Defendant denies the Plaintiff's title to the property. It has been said that it is not the function of the Court to enunciate abstract truisms of law. Following that reasoning, it may be argued that as the fraudulent decree can in no way affect Plaintiff's rights, the Court should not lend itself to the task of declaring what is obviously indisputable. But although the decree may not affect Plaintiff's rights *in present*, it is evidence which, if allowed to stand, may result at some future time in disturbing Plaintiff's title. I think that is a sufficient grievance which the Court should remedy under

sec 42, Specific Relief Act." A similar view had been taken in the case of *Brij Mohan Singh v. Collector of Allahabad* (12), where Sir Robert Stuart, C. J., held that a suit for declaration was maintainable by the lessor. This conclusion was adopted on the ground that the denial of the title of the lessee might ultimately throw doubt upon the title of the lessor himself; see also *Bromley v. Holland* (13) and *Kenaram v. Dino Nath* (14).

It has finally been urged that the suit is barred under the proviso to sec. 42, Specific Relief Act, and that the Plaintiff should have asked for an injunction; *Thakurprasad v. Pankal Singh* (15). This was clearly unnecessary. The Plaintiff is not bound by the decree. If the purchaser attempts to take possession in execution, he may be successfully stopped, if the Plaintiff takes recourse to the procedure prescribed in Or. 21, r 99, C. P. C. The Plaintiff cannot be defeated in this action on the plea that he should have asked for an injunction, when it is not necessary for him to ask for an injunction to protect his possession.

As a last result, it has been contended that the suit is not properly constituted, because the representatives of the imaginary tenant are not before the Court. There is manifestly no substance in this contention. The fictitious tenant, set up by the first Defendant, has never appeared either in the previous litigation or in the present suit. She has taken no interest whatsoever, for the reason that she has no interest in the land. The decree which may be made in this litigation would not bind her or her representatives,

(10) I. L. R. 13 Bom. 34 (1888).

(11) I. L. R. 38 Mad. 1162 (1914).

(12) I. L. R. 4 All. 102, 112 (1881).

(13) 7 Ves. Jr. 3; 6 R. R. 58 (1804).

(14) 9 W. R. 325 (1868).

(15) 8 C. L. J. 485 (1907).

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and the absence of her representatives cannot entitle the first Defendant, who has been at the root of this fraudulent procedure, to defeat the action of the Plaintiff.

The result is that this appeal is allowed and the decree made by the District Judge set aside. It will be declared that the Plaintiff is a tenant in respect of the disputed land under the Biswases and the Deys, and that the tenancy in the third Defendant set up by the first Defendant has no existence whatsoever. It will further be declared that the decree which was obtained by the first Defendant against the third Defendant and the consequent sale were fraudulent and collusive and did not in any way affect the title of the Plaintiff. The Plaintiff is entitled to his costs in all the Courts as against the first Defendant.

H. C. S. Appeal allowed

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 139 of 1916.

CHATTERJEA, J.

WALMSLEY, J.

1917,

Heard, 3 and

5, December.

Judgment,

18, December.

RUPCHAND GHOSH,
Plaintiff, Appellant,

v.

SM. KSHIRODAMAYI DAS
and ors., Defendants,
Respondents.

Court Fees Act (VII of 1870), sec. 7, cl. iv (c)—Suit for declaration of right, administration of state and appointment of Receiver, whether one for declaration where consequential relief prayed—If ad valorem court-fee payable—Value of reliefs sought whether same as market value of property where possession not prayed for.

In a suit the Plaintiff prayed inter alia for declaration of his right, administration of the estate and for the appointment of a Receiver:

Held—That the suit was one for declaration where consequential relief was

prayed for, and ad valorem court-fee was payable under sec. 7, cl. iv (c) of the Court Fees Act.

Held, further—That the market value of the property cannot be taken to be the value of the reliefs sought where the Plaintiff did not seek possession of the property.

Held also—That the valuation of the relief sought in cases coming under sec. 7, cl. iv rests with the Plaintiff and not with the Court.

This was an appeal against the decree of the Second Subordinate Judge of the 24-Pergannahs, dated the 29th April 1916.

The facts of the case will appear from the judgment.

Messrs. Langford James and Arabindo Roy and Babu Satish Chandra Mukherjee for the Appellant.

The Senior Government Pleader (Babu Ram Charan Mitra) was heard *amicus curiæ*.

The JUDGMENT OF THE COURT was as follows:—

CHATTERJEA, J.—The only point for consideration in this appeal relates to the question of court-fee payable on the plaint in the suit out of which this appeal arises.

The prayers in the plaint are as follows:—

(Ka) That the Court may be pleased to declare that the Plaintiff's purchase of the paternal right inherited by Defendant No. 2 in the properties described in Schs. (ka) and (kha) below is valid and binding on the Defendant under the circumstances stated above

(Kha) That the Court may be pleased to declare, after a true construction of the Will of the deceased, Poran Chandra Mahata, that the estate left by him was fully administered at the time the probate was taken and that the executrices to his

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estate were not competent to retain possession of his estate as executrices and that the said probate is now only an inoperative instrument.

(Ga) That the Court may be pleased to declare that the Defendants, by their conduct and acts and deeds, are estopped from claiming any sort of title against the Plaintiff to the properties mentioned below which have been purchased by the Plaintiff.

(Gha) That if in the judgment of the Court any portion of the said estate is yet unadministered, it may be ordered by the Court that arrangements may be made for keeping the Plaintiff's purchased right therein unaffected and that a Receiver may be appointed by the Court for that purpose.

(Una) That a decree may be passed against the Defendants for all the costs of the present suit.

(Cha) That the Court may be pleased to grant any other relief to the Plaintiff to which he may be found entitled in the judgment of the Court.

The first prayer is for declaration of Plaintiff's right, but in the fourth prayer the Plaintiff prays for administration of the estate (if in the judgment of the Court any portion of it is yet unadministered) and for the appointment of a Receiver. The suit is therefore one for declaratory decree where consequential relief is prayed, and the Court below is right in holding that it is such a suit. The learned Subordinate Judge, however, fixed the value of the properties purchased by the Plaintiff at Rs 30,000 and held that the Plaintiff must pay *ad valorem* court-fee on that sum, viz., Rs 975 minus Rs. 30 already paid by him.

But the market value of the property cannot be taken to be the value of the relief sought as the Plaintiff does not seek

possession of the property. The Plaintiff says that he is in possession, and there is nothing in the plaint to show that he is suing for possession. That being so, the case does not come under sec 7, cl iv. A suit for a declaratory decree where consequential relief is prayed falls under sec. 7, cl iv (c) of the Court Fees Act. Cl. iv provides that in suits to "obtain a declaratory decree or order where consequential relief is prayed" or in a suit for "accounts" the amount of fee shall be computed "according to the amount at which the relief is valued in the plaint or memorandum of appeal" and that in all such suits the Plaintiff shall state the amount at which he values the relief sought. The valuation of the relief sought in cases coming under sec 7, cl iv, therefore, rests with the Plaintiff and not the Court. The Plaintiff valued the claim in the present case as follows Rs 1,500 for declaration, Rs 1,500 for construction, and Rs 1,500 for administration. The learned Counsel for the Appellant contended that if *ad valorem* court-fee is to be paid at all it should be paid only on the amount at which the relief sought for in the fourth prayer of the plaint (that is, for administration) was valued, as a suit for accounts under sec. 7, cl iv (f), and that the first three prayers are merely for declaration and therefore a court-fee of ten rupees only is payable. It is unnecessary to consider whether the second and third prayers are merely for declaration as contended for the Plaintiff or involve consequential reliefs, though in form for mere declaration, as contended by the learned Senior Government Pleader (who was asked to appear in this case), because a court-fee of Rs. 10 is payable (under Sch II, cl. 17) on a plaint in a suit to obtain a declaratory decree only where no consequential relief is prayed. In the

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present case, consequential relief having been prayed in the fourth prayer, Sch. II, cl. 17 cannot apply, and *ad valorem* court-fee is payable as laid down in sec. 7, cl. iv. In the case cited before us, the only relief which was valued was that relating to administration. In the present case, the Plaintiff himself, as stated above, valued the suit at Rs. 1,500 for administration, Rs. 1,500 for construction, and Rs. 1,500 for declaration and paid court-fee of Rs. 30 at Rs. 10 for "each claim," the fee, however, under cl. iv must be computed according to the amount at which the relief sought is valued in the plaint. That being so, the Plaintiff must pay *ad valorem* court-fee on "each claim" of Rs. 1,500. The court-fee payable is Rs. 300 out of which only Rs. 30 has been paid. The Plaintiff must, therefore, pay the balance, viz., Rs. 270 on the plaint. He must also pay a similar sum on the memorandum of appeal.

We accordingly direct that on the Plaintiff paying the balance of the court-fee, viz., Rs. 270 on the plaint and Rs. 270 on the memorandum of appeal, on or before the 15th January 1918, the order of the Court below rejecting the plaint and the decree passed upon the said order will be set aside, and the case will be remanded to the Court below to be tried according to law.

We make no order as to costs of the appeal.

WALMSLEY, J —I agree

Appeal allowed;

S. C. C.

Case remanded.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 968 OF 1922.

NEWBOULD, J.	KIRAN CHANDRA CHOW-
SUHRWARDY, J.	DHURY, 1st party,
1923,	Petitioner,
Heard, 30 and	v.
31, January.	RAMESH CHANDRA
Judgment,	CHOWDHURY and ors.,
31, January.	Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 137, order of Magistrate under, if can be declared illegal by his successor in office—Sec 140 (2), Magistrate's discretion.—Power to order clearing of tank or filling it up.

In order for removing certain nuisance from a tank was made absolute under sec. 137, Cr. P. C., by a Sub-Divisional Magistrate. The order was not obeyed and the Petitioner applied to his successor in office to enforce that order. That application was refused on the ground that the order passed under sec. 137, Cr. P. C., was an illegal order.

Held—That the Magistrate was not justified in going behind the order of his predecessor and coming to a decision as to its illegality.

That the discretion of the Magistrate under sec. 140 (2) must be a judicial discretion and no Magistrate has judicial discretion to sit as a Court of appeal and decide whether an order passed by a Magistrate of concurrent jurisdiction was a proper order or not.

The previous Magistrate had jurisdiction to pass the order under sec. 133 and make it absolute under sec. 137, Cr. P. C., for the removal of certain nuisance from a tank either by re-excavating or clearing it or by filling it up.

Re : BISTOO CHUNDER CHUCKERBUTTY (1) and INDRA NATH BANERJEE v. QUEEN-EMPRESS (2) followed.

(1) 10 W. R. Cr. 27 (1868).

(2) I. L. R. 25 Cal. 425 (1897).

KIRAN CHANDRA CHOWDHURY v. RAMESH CHANDRA CHOWDHURY.

THIS was a Rule against an order of the Additional Sub-Divisional Magistrate of Chittagong (Mr. S. C. Sinha), dated the 5th September 1922, refusing to enforce the order of his predecessor, dated the 2nd February 1921, directing the chairman of the District Board (Mr. R. Mukerjee), to arrange for the clearing of the tank in question by removing the *jungles* and water weeds therefrom and recover the costs of the same by the sale of all bamboos on its sides belonging to the Opposite Party, under sec. 140 (2), Cr. P. C.

The facts of the case are briefly as follows—On the 29th October 1920, the then Sub-Divisional Magistrate of Chittagong made an order absolute directing the Opposite Party to remove the nuisance from a tank either by re-excavating or by filling it up or by clearing the water weeds and giving other directions. This order was not obeyed and on the 14th July 1922, the Petitioner applied to the present Sub-Divisional Officer to enforce the order. That application was refused on the ground that the order under sec. 137, Cr. P. C., was an illegal order.

The following is the material portion of the order passed by the Sub-Divisional Officer :—

“This is an application under sec. 140 (2), Cr. P. C. My predecessor in office ordered the Opposite Party under sec. 133, Cr. P. C., to remove the public nuisance consisting of weeds, *jungles* growing in the tank known as the Kedar Dighi which has been in possession of the Opposite Party. As the Opposite Party has not complied with the Magistrate's order, within the prescribed time, I am now required by the Petitioner to cause it to be performed and to recover cost thereof in the manner prescribed by the law.

“It struck me at the very outset as to

how sec. 133, Cr. P. C., could be applied to a class of public nuisance for the removal of which sec. 133, Cr. P. C., makes no provision. It has been laid down in the case of *Shah Soojaut Hossein* (3) that ‘a Magistrate's power under this section is confined to the instances specially mentioned therein, which does not confer general power upon a Magistrate to pass any orders he may consider necessary for the protection of public health’.

“My predecessor relied on the case-law in *Re Bistoo Chunder Chuckerbutty* (1) in holding that a Magistrate's power is not limited to have a tank fenced in order to prevent accidents but that he can treat it as a public nuisance where it is proved to be injurious to the health and comfort of the community and can cause it to be filled up

* * * * *

To my mind it seems that sec. 133, Cr. P. C., is confined to the specific public nuisance set out in the section and does not vest me with unlimited jurisdiction to combat with any form of public nuisances that may arise.

“In this view of the law, I do not see my way to give effect to the order by enforcing it under sec. 140 (2). Besides, the power conferred on a Magistrate by sec. 140 (2) is discretionary and not mandatory. In view of the conflict of the view expressed in different case-laws and also in view of my own doubts as to the applicability of sec. 133, Cr. P. C. to the present case, I think I must stay hands and decline to set my powers under sec. 140 (2) in motion in the manner prayed for by the Petitioner.

“The application is rejected.”

Against the above order the Petitioner

(1) 10 W. R. Cr. 27 (1868).

(3) 22 W. R. Cr. 19 (1874).

KIRAN CHANDRA CHOWDHURY v. RAMESH CHANDRA CHOWDHURY.

moved the High Court and obtained the present Rule.

Babus Dasarathi Sanyal, Bir Bhusan Dutt and Santosh Kumar Bose for the Petitioner.

Babu Narendra Kumar Das for the Opposite Parties Nos. 4, 7, 10, 11 and 13.

Babus Chandra Sekhar Sen and Paresh Chandra Sen for the Opposite Party No. 1.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against an order of the Additional Sub-Divisional Magistrate of Chittagong refusing to enforce an order passed by his predecessor under sec. 137, Cr. P. C. On the 29th October 1920, the then Sub-Divisional Magistrate of Chittagong made an order absolute directing the Opposite Party in this Rule to remove the nuisance from a tank either by re-excavating or by filling it up or by clearing the water weeds and giving other directions. This order was not obeyed. It is not necessary to set out all the events that happened, but on the 14th July 1922, the Petitioner who has obtained this Rule applied to the present Sub-Divisional Officer to enforce the order. That application was refused on the ground that the order passed under sec. 137, Cr. P. C., was an illegal order. We hold that the Magistrate was not justified in going behind the order of his predecessor and coming to a decision as to its legality.

It is pointed out that under sec. 140 (2), Cr. P. C., the Magistrate has discretion, but this discretion must be a judicial discretion and no Magistrate has judicial discretion to sit as a Court of appeal and decide whether an order passed by a Magistrate of concurrent jurisdiction was a proper order or not. For these reasons we hold that the Magistrate exceeded his powers and acted without jurisdiction.

We have also considered whether or not the original order passed by the first Sub-Divisional Magistrate was legal or not, and we hold that on the findings arrived at by the Magistrate he had jurisdiction to pass the order which he did pass under sec. 133, Cr. P. C., and make it absolute under sec. 137, Cr. P. C. The learned Sub-Divisional Magistrate who doubted the correctness of this order has referred to Rulings of other High Courts. It is unnecessary to discuss these though we do not agree that they cannot be reconciled with the decisions of this Court. The decisions in the case of *Bistoo Chunder Chuckerbutty* (1) and in the case of *Indra Nath Banerjee v. Queen-Empress* (2) show that the Magistrate has power to act under sec. 133, Cr. P. C., in a case like the present.

We accordingly make the Rule absolute and set aside the order of the Additional Sub-Divisional Magistrate of Chittagong, dated the 5th September 1922, rejecting the application of the Petitioner under sec. 140 (2), Cr. P. C., and we direct that the Magistrate do pass orders in that application according to law.

J. N. R. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD PHILLIMORE. DAMODAR NARAYAN
LORD CARSON. CHAUDHURY and ors.,
SIR JOHN EDGE. Appellants,

1922, v.

Heard, 8, May. S. A. MILLER and
Judgment, 25, May. ors., Respondents.

Ejectment, suit for, against transferee of occupancy holding without landlord's permission—Estoppel

In a suit by proprietors of land to eject

(1) 10 W. R. Cr. 27 (1888).

(2) I. L. R. 25 Cal. 425 (1897).

DAMODAR NARAYAN CHAUDHURY v. S. A. MILLER.

one D, who came upon the land as a tenant, the High Court found that the latter, being a rayat, could not be ejected without notice to quit. Pending an appeal by the proprietors from the decree of the High Court to the Privy Council, the tenant died and his administrator sold the lands to M and C, whereupon the proprietors being notified of the sale by petition stated that though they did not admit the validity of the sale to M and C, they were advised that they should be added as Respondents, and on their prayer M and C were so added. In a suit by the proprietors to eject M and C, on the ground that the lands being those of a non-transferable occupancy holding, M and C had acquired no title by their purchase and were trespassers, the Courts in India held that the proprietors were estopped by their presentation of the petition referred to above and the statements therein made from denying that M and C had acquired title to the lands as tenants:

Held—That there was no estoppel, the position of the proprietors then and afterwards having all along been that M and C were trespassers without any title to the possession of, or interest in, the lands.

This was an appeal from a decree of the High Court at Patna, dated the 25th June 1917, affirming a decree made by the Subordinate Judge of Darbhanga, dated the 8th July 1914.

The suit was brought by the Appellants as Plaintiffs to recover possession of certain properties in the village of Bullipur, Pursuram, on the ground that the Defendants who alleged themselves to be transferees of the occupancy rights were in reality mere trespassers.

The Defendants in their written statement alleged that the lands in suit were

lands held by the proprietor of an indigo factory for the purposes of his factory, and as such, were by local usage and custom, transferable with the right of occupancy and had been so transferred. This contention was negatived by both the Courts in India and is not material to this appeal. The main question for the determination of the Judicial Committee was whether the Appellants had not recognised the Respondents as transferees of the occupancy rights and so estopped themselves from denying the Respondents' title.

The third Respondent who alone appeared had acquired the interest of the first Respondent.

The facts are fully set out in the judgment of the Board.

Messrs DeGruyther, K. C. and H. N. Sen for the Appellants.—Dalgleish the predecessor in title of the Respondents was admittedly an occupancy tenant but he had a permanent tenancy and no power of transfer.

(Bengal Tenancy Act, VIII of 1885, secs 19, 26, 116.)

On his death the estate was sold by his administrator and transferred by two separate conveyances. This amounted to a splitting up of the holding and made the transferees liable to ejection as trespassers.

All that was held in *Damodar Narain Chowdhuri v. Dalgliesh* (1) was that Dalgliesh could continue to hold as an occupancy tenant after the termination of his lease.

The Appellants have never admitted any title in the Respondents, they have moreover refused to receive rent from them—merely having them brought on the record was no admission of title but a

(1) L. R. 25 I. A. 65, s. c. I. L. R. 38 Cal. 432; 15 C. W. N. 845 (1911).

DAMODAR NARAIAN CHAUDEURY v. S. A. MILLER.

necessary precaution so that they should have full knowledge of the litigation.

The circumstances do not constitute an estoppel by conduct as defined in *Dutton v. Sneyd Bycards Coy Ltd* (2)

Mr A. M. Dunne, K. C. (with him Mr. S. A. Kyffin) for the third Respondent — In the petition to the Subordinate Judge there is a distinct statement that the Respondents are purchasers from Dalglish and that they have taken his place.

It was in the nature of gamble on the part of the Appellants. Their intention was to bring the Respondents on to the record so that in the event of their appeal being successful the Respondents as assignees would be liable as well as their assignors. Having failed in the major portion of that appeal they are wrongly endeavouring to resile from their earlier position but are estopped from doing so.

The Appellants did not reply.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Plaintiffs from a decree, dated the 26th June 1917, of the High Court at Patna, which affirmed a decree, dated the 6th July 1914, of the Subordinate Judge of Darbhanga, which had dismissed the suit.

The Plaintiffs are proprietors of lands in Mouza Bullipur, Pursuram, in the District of Darbhanga, which bear the Touzi Nos. 2864, 10807, 10808 and 10809, and the suit was brought on the 20th February 1912, in the Court of the Subordinate Judge of Darbhanga to eject the Defendants, S. A. Miller and Mrs. E. G. Coventry, from those lands on the ground that they were trespassers, and a decree for mesne profits as against them was

claimed. S. A. Miller and Mrs. E. G. Coventry are Respondents to this appeal. E. Dalglish and W. H. Dalglish were also Defendants to the suit, but they had ceased to be interested in the lands in question in 1911, and no relief as against them was claimed, and they are not parties to this appeal. Bernard Coventry, who claimed to be interested in the lands in question under a conveyance of the 26th July 1918, from S. A. Miller, was, on his own application to the High Court at Patna, added as a Respondent to this appeal.

The defences of S. A. Miller and Mrs. E. G. Coventry to the suit, so far as they need be referred to, were that H. B. Dalglish had in his life-time a right of occupancy in the lands in question, which, being lands held by a proprietor of an indigo factory, for the purposes of the factory, were by a local custom transferable with the right of occupancy to a stranger without the consent of the proprietor of such rayati lands, and that E. Dalglish, as the administrator of H. B. Dalglish, had on the 1st March 1909, by a conveyance transferred the lands and that right of occupancy to them. They further alleged that the Plaintiffs were estopped from denying that they held the lands as the tenants of the Plaintiffs and with a right of occupancy in them. It is not necessary now to consider the defence based on the alleged custom, as there are concurrent findings of the Courts below that the alleged custom was not proved.

The facts upon which the defence of estoppel depends are as follows:—The Plaintiffs, or those whom they represent, let the lands in question to H. B. Dalglish, the then proprietor of the Bandhar Indigo Factory, for a term of years, which expired in 1901. On the 30th November

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1901, after the said term had determined, the Plaintiffs, or those whom they represent, brought a suit against H. B. Dalgleish and others for possession of the lands in question. The Subordinate Judge who tried that suit gave, on the 18th September 1903, the Plaintiffs a decree for possession. From that decree H. B. Dalgleish appealed to the High Court at Calcutta. The High Court at Calcutta came to the conclusion that H. B. Dalgleish was a riyat of the lands in question and as a riyat was, under the Bengal Tenancy Act, 1885, entitled to a notice to quit, and as no notice to quit had been given to him the High Court, on the 17th May 1905, allowed the appeal and by its decree dismissed the suit. From that decree the Plaintiffs, on the 5th March 1907, appealed to His Majesty in Council. During the pendency of that appeal H. B. Dalgleish died on the 15th September 1907. On the 1st March 1909, Edward Dalgleish, as the administrator of H. B. Dalgleish, sold to S. A. Miller and Mrs. E. G. Coventry such interest as H. B. Dalgleish had in the lands in question, and on the 11th March 1909, the administrator served upon the Plaintiffs a notice of such sale. Thereupon, on the 26th April 1909, the Plaintiffs presented to the High Court at Calcutta a petition stating that notice of such sale had been served upon them, and that though they did not admit the validity of such sale, they were advised that S. A. Miller and "Mr. E. G. Caruling" (Mrs. E. G. Coventry) should be added as Respondents to the appeal to His Majesty in Council, and they prayed that they should be added. In accordance with that petition S. A. Miller and Mrs. E. G. Coventry were added as Respondents to that appeal. On the 1st February 1911, the Board, by their judgment [*Damodar*

Narain v Dalghesh (1)] advised His Majesty, so far as the appeal related to the lands now in question, that in their opinion the learned Judges of the High Court had correctly apprehended the law applicable to the matter, and their Lordships saw no ground for doubting the soundness of the conclusion of fact arrived at by the learned Judges to the effect that the larger area (the lands now in question) was not the proprietors' private land, with the consequence that there was nothing in sec. 116 of the Bengal Tenancy Act, 1885, to preclude the acquisition by H. B. Dalgleish of occupancy rights, and that such rights had accordingly been acquired, and further advised that the appeal so far as it related to the lands now in question should be dismissed.

The Subordinate Judge who tried this suit being of opinion that the Plaintiffs, not having asserted in the petition of the 26th April 1909, that S. A. Miller and Mrs. E. G. Coventry had acquired no title to the lands in question, by the transfer to them by E. Dalgleish of the 1st March 1909, had by filing that petition admitted that S. A. Miller and Mrs. E. G. Coventry had succeeded to the interest of H. B. Dalgleish as an occupancy riyat and were estopped from asserting that S. A. Miller and Mrs. E. G. Coventry had not any right to the lands and were trespassers, and by his decree of the 8th July 1914, dismissed the suit of the Plaintiffs.

From that decree of the Subordinate Judge the Plaintiffs appealed to the High Court at Calcutta. That appeal came on to be heard by the High Court at Patna. Mr. Justice Roe after considering the petition of the 26th April 1909, and two other petitions, which that learned Judge apparently was unaware had no relation to the

(1) *L. B. 38 I. A. 65; a. c. Y. L. B. 38 Cal. 432; 15 C. W. N. 845 (1911).*

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lands in question, concluded that the effect of the three petitions read together was a recognition by the Plaintiffs of a tenancy in the lands in question "acquired by Miller and Mrs. Coventry from the Dalglish Defendants," and was a recognition by Plaintiffs of an occupancy right in S. A. Miller and Mrs. E. G. Coventry. Mr. Justice Roe did not explain how the right of occupancy which H. B. Dalglish had in the lands in question had vested in the administrator and W. H. Dalglish, or how, if that right had vested in them, they could have transferred it to strangers without the consent of the proprietors of the lands. Mr. Justice Mulhek considered that the petition of the 26th April 1909, was a clear representation by the Plaintiffs to S. A. Miller and Mrs. E. G. Coventry, that the transfers of the 1st March 1909, were recognised by the Plaintiffs and that on the faith of that representation S. A. Miller and Mrs. E. G. Coventry changed their position by rendering themselves liable for the costs of the litigation. The High Court at Patna by its decree of the 26th June 1917, dismissed the appeal of the Plaintiffs. From that decree this appeal to His Majesty in Council has been brought.

Their Lordships are unable to find anything, even remotely, of the nature of an estoppel in this case. The Plaintiffs neither in the petition of the 26th April 1909, nor in the presenting of it, made any representation that S. A. Miller and Mrs. E. G. Coventry had acquired any title to the lands in question or were tenants of those lands either with or without a right of occupancy. The position of the Plaintiffs then was and still is that S. A. Miller and Mrs. E. G. Coventry were trespassers without any title to the possession of, or interest in, the lands in question. The Plaintiffs having had notice of

the transfers from the administrator of H. B. Dalglish, prudently took the precaution of applying to have S. A. Miller and Mrs. E. G. Coventry added as Respondents, so that they might in their appeal defend the interests, if any, which they had in the lands in question. They were obviously added with the object of further litigation after the determination of that appeal to His Majesty in Council being, if possible, avoided. S. A. Miller and Mrs. E. G. Coventry in their own interest accepted the position of added Respondents to the appeal and did not disclaim all interest in the litigation and in the lands in question.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the Subordinate Judge and of the High Court at Patna should be set aside with costs in each Court, and that the claims of the Plaintiffs to a decree for possession and for mesne profits should be granted, the mesne profits to be ascertained by the High Court, or by the Court of the Subordinate Judge, as the High Court may direct.

Solicitors: *Messrs. Pugh & Co.* for the Appellants.

Solicitors: *Messrs. Sanderson, Atkin, Lee and Tennant* for the Respondent Bernard Coventry.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 96 of 1922.

NIRODE NATH BANNER-

JEE and anr., Defen-
dants, Appellants,

v.

AMULLYA DHONE
BANNERJEE and anr.,

Respondents.

WOODROFFE, J.
SUHRAWARDY, J.

1922,

24, August

Suit for partition—Disputes referred to arbitration—Award made directing sale of property and certain payments out of sale-proceeds—Property sold by the Registrar under order of Court, whether such sale is in execution of a decree and may be set aside under Or. 21, r. 89 of Civil Procedure Code (Act V of 1908).

In a suit for partition instituted in the High Court, matters in dispute between the parties were referred to arbitration by an order of Court. The arbitrators made their award directing the sale of one of the properties, subject-matter of the suit, and the payment out of the sale-proceeds of the ancestral debts as well as of certain sums to the Plaintiff. A decree was passed on the award and the property was sold by the Registrar under an order of Court. The Defendants then applied, with the consent of the Plaintiff, for setting aside the sale under Or. 21, r. 89 of the Civil Procedure Code :

Held—That the property was sold in execution of a decree and that Or. 21, r. 89 of the Civil Procedure Code was applicable.

VIJIBUN DASS & BISSESSWAR LAL (1) referred to.

This was an appeal preferred on the 18th July 1922 against an order of Mr. Justice Greaves, dated the 19th June 1922, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case are as follows:—

On the 24th February 1909 this suit was instituted by the Plaintiff for a declaration that he was entitled to a quarter share in, among others, the premises No. 127, Baitakhana Road, and the Defendants to the remaining three-quarters' share therein, for partition thereof and allotment of the Plaintiff's share to him and for the usual reliefs in a partition suit. By an order of Court all matters in difference in this suit between the parties were referred to two arbitrators. The arbitrators on the 13th January 1912 made and published their award whereby *inter alia* they found that the Plaintiff was entitled to a quarter share in the said premises No. 127, Baitakhana Road, and the Defendants to the remaining three-quarters' share therein and they directed that the said premises No. 127, Baitakhana Road should be sold and after payment of (a) the costs of the sale, (b) the debts left by the father of the Defendants to whom the said property belonged, (c) Rs 1,500 for the marriage expenses of a sister of the Defendants, (d) Rs. 100 and Rs. 200 to the Plaintiff for his share of the mesne profits and his share of the moveables, the balance of the sale-proceeds should be divided between the Plaintiff and the Defendants in proportion of one-fourth to three-fourths. By a decree of Court made on the 26th January 1912 it was declared that the said award should be carried into effect and the same was ordered and decreed accordingly. On the 11th August 1920 it was ordered that the said premises should be sold by the Registrar of the Court by public auction, the Court being of opinion it would be for the benefit of one of the Defendants, a minor. Prior to the 20th May 1922 it was agreed between the Plaintiff and the Defendants that on the latter paying to the Plaintiff

(1) I. L. R. 49 Cal. 69; s. c. 24 C. W. N. 1032 (1920).

NIRODE NATH BANNERJEE v. AMULLYA D BONE BANNERJEE.

the sum of Rs. 5,000 by 2 P.M. on Friday the 19th May 1922, the Plaintiff would accept the same in lieu of his one-quarter share in the said premises and agree to the sale being abandoned. The Defendants could not pay the said sum of Rs. 5,000 and on the 20th May 1922 the Registrar sold the said premises No 127, Baitakhana Road to Hem Chandra Mullick for the sum of Rs. 30,000. It was then agreed between the Plaintiff and the Defendants that the Plaintiff would accept Rs. 5,250 in lieu of his quarter share in the said premises and Rs. 500 the costs of the sale, amounting to Rs. 5,750 in the aggregate, and convey such quarter share to the Defendants should this Court set aside the sale—the Defendants discharging all the liabilities mentioned in the said award and the said sum was paid to the Plaintiff on the 15th June 1922 and he had no further claim. The Defendants then applied for setting aside the sale under Or. 21, r. 89 of the Civil Procedure Code. The purchaser opposed. Mr. Justice Greaves dismissed the application. Hence the appeal.

Sir Binode Mitter and Mr. B. C. Ghose, Counsel, for the Appellants.

Mr. N. N. Sarkar and Mr. S. M. Bose, Counsel, for the Respondents.

THE JUDGMENT OF THE COURT was as follows.—

WOODROFFE, J.—The point before us is whether the application to set aside the sale falls within the terms of Or. 21, r. 89. Mr. Justice Greaves was of opinion that this was not a sale in execution of a decree because it was a sale by consent and the mere fact that the Court was invited to carry out the sale did not make it a sale in execution of a decree. The decision is however not sought to be supported on this ground. As a matter of

fact there could be no consent because infants were concerned in the orders of 26th January 1912 and 11th August 1920. In the first mentioned order it is recited that the Defendants did not appear either in person or by Counsel and on the second occasion the attorney for the Defendants stated that he had received no instructions from his clients. Further the award was not in my opinion by consent. The award recited a consent to the sale of the dwelling-house which was one of the motives or reasons actuating the arbitrators in making the award in the terms in which it was given.

The objection before us is that there cannot be said to be a decree-holder and judgment-debtor within the meaning of the section and that the amount must be specified in the proclamation of sale as that for the recovery of which the sale was ordered. This, it is said, is not the case here. The case of *Viribun Dass v. Bissessar Lal* (1) supports, it is claimed, the Appellants so far as it goes. That is true so far as it holds that a decree is executed where the order for sale is contained in the judgment itself where there is no attachment as also that r. 89 applies in a case where there has been no proclamation of sale but a notification* at a Registrar's sale. There is here a decree and in a partition suit after decree all share-holders are decree-holders and judgment-debtors as against one another. It must, I think, be taken that the sale was ordered for the recovery of the sums payable by the award to the Plaintiff and the making over to each of the parties of their share of the sale-proceeds in terms of the award. It is conceded that the section would apply in the case of a sale in execution of a partition decree awarding

(1) I. L. R. 48 Cal. 69; s. c. 24 C. W. N. 1032 (1920).

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compensation to one sharer and enforcing payment of such compensation against the share of another sharer. Does it then make any difference that in the present case that the money payable to the Plaintiff is to come out of the whole estate in which both the Plaintiff and the Defendants are interested? I think not, and that we ought not to take a narrow view of the section. Though the Plaintiff's money is to be recovered from the total sale-proceeds in which he has a share, in substance the transaction is one in which the Plaintiff's rights under the award are enforced—for execution means that. I am of opinion then that Or. 21, r. 89 applies to the present case.

But then the objection is taken that if that be so, an application under this section is only maintainable on the applicant first depositing in Court the amount payable to the purchaser. The facts upon this point are contested and have not been dealt with in the judgment under appeal, possibly because having regard to the view that the learned Judge took of the law, *viz.*, that the section was not applicable, it was not necessary to decide whether its conditions had been carried out.

Therefore the case must be remanded for the determination of the issue whether the provisions of Or. 21, r. 89 as regards the deposit of the money payable to the purchaser have been complied with.

As the Appellant has succeeded on the question whether the order and rule were or were not applicable, I think, he is entitled to costs of this appeal. As regards the costs in the Original Court I think that the order which we should make is that they do follow the result of the hearing on remand.

SUKRAWARDY, J.—I should like to proceed on the facts of this particular case

for it is conceivable that there may be a sale by or through the agency of Court to which the provisions of r. 89, Or. 21, C. P. C., may not apply. In this case the facts are that in 1909 the Plaintiff brought a suit for partition which was with the consent of the parties referred to arbitration. The arbitrators made an award in 1912 by which they directed *inter alia* that the family dwelling-house of parties, premises No 127, Boitakhana Road, should be sold by private treaty, and if not sold privately within a year, by the Court and that out of the sale-proceeds a sum of Rs. 100 was to be paid to Plaintiff for his share in the moveables and Rs. 200 by way of mesne profits and the balance should be divided into four parts one of which should go to the Plaintiff and the remaining three to the Defendants-Appellants. That award was confirmed by a decree of the Court, dated the 26th January 1912. In 1920, the Plaintiff took out a master's summons and an order was passed by Greaves, J., in the following terms:—

"It is ordered that the premises No. 127, Boitakhana Road be sold by the Registrar of this Court by public auction to the best purchaser or purchasers that can be got for the same and the money to arise by such sale be paid to the said Registrar. And it is further ordered that the said Registrar do after deducting from the said sale-proceeds his own commission, pay the balance to the Controller of Currency for the time being of the Government of India and the Secretary and Treasurer for the time being of the Bank of Bengal with the privity of the Accountant-General of this Court to be by them placed to the credit of this suit subject to the further order of this Court."

The property was accordingly sold by

NIRODE NATH BANNERJEE v AMULLYA DHONE BANNERJEE.

the Registrar and knocked down to the Respondent Hem Chandra Mullick. Subsequently and within the statutory period the Appellants applied to have the sale set aside on their depositing a certain sum which the Plaintiff had agreed to take in full acquittance of his claim. That application was made under r. 89 of Or. 21, C. P. C. The learned Judge from whose judgment this appeal is made was of opinion that as the sale was "by consent" or "which had been agreed to by the consent of the parties," r. 89 did not apply. That point of view has not been placed before us by the learned Counsel for the Respondent and for obvious reasons.

The only ground on which the order of the lower Court is defended is that the sale was not held "in execution of a decree" and hence r. 89 is not applicable, and I propose to examine that question on the facts of this case as above set forth and which are not disputed.

The decree passed by Fletcher, J., on 6th January 1912 is described as a decree in suit No. 183 of 1909 and I am of opinion that it is a decree of Court for all intents and purposes giving effect to the award of the arbitrators and it is the final decree in the suit. It was on the application of one of the parties that this decree was enforced or in other words executed. If this view is correct, it follows that r. 89, Or. 21 is applicable to this case. But it is argued that as the execution is not sought on the forms prescribed by the C. P. C., or as there was no sale proclamation with reference to which the amount to be deposited is to be calculated it was not a sale under the Act. Apart from the authority referred to by my learned brother, it seems to me that any defect or irregularity in the procedure or the act of the Court in not

issuing proper processes should not destroy the right of any party to adopt any of the courses provided by the Civil Procedure Code for setting aside a sale held by Court. To hold otherwise would be to defeat the right of a party to set aside a sale even on the ground of fraud or irregularity by omitting to observe the procedure laid down by the Code. The crux of the matter is whether the property is sold in execution of a decree. From the statement of facts as above, I have no doubt that the property was sold "in execution of a decree" and that r. 89, Or. 21 is applicable. The result is that the order of the learned Judge so far as it holds that the Appellants are not entitled to apply under r. 89, Or. 21, C. P. C., for setting aside the sale must therefore be set aside.

I agree with my learned brother in his reasonings and conclusions and in the order he has proposed to pass remanding the case and as to costs.

Messrs. Chatterjee & Co., Solicitors for the Defendants Appellants.

Babu Suresh Chandra Mukherjee, Solicitor for the Plaintiff-Respondent.

Babu Barendra Nath Mitter, Solicitor for the Purchaser-Respondent.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1746 of 1920.

MIRZA, DILBAR HOSSAIN

and ors., Defendants

Nos. 1 to 3, Appellants,

v.

SADARUDDIN CHOW-

DHURY, Plaintiff, and

ors., Respondents.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 45 (ii) — Suit for compensation for removal of trees, if exempted from jurisdiction of

MIRZA DILBAR HOSSAIN v. SADARUDDIN CHOWDHURY.

Small Cause Court—Suit of a nature cognisable by Court of Small Causes—Civil Procedure Code (Act V of 1908), sec. 102—Second appeal.

Where the Plaintiffs sued the Defendants in the Civil Court for recovery of money on account of the price of trees alleged to have been wrongfully cut and misappropriated by the Defendants from land claimed to be Plaintiffs' property and in their possession, and it was found that the Defendants had right to some portion of the trees, and the suit was partly decreed, and the Defendants preferred a second appeal.

Held:—That the suit did not come within Art. 35 (n) of the Second Schedule of the Small Cause Courts Act, and it was one of a nature cognisable by a Small Cause Court, and that the value of the suit being not over Rs. 500, no second appeal lay under the provisions of sec. 102 of the Code of Civil Procedure.

This was an appeal preferred on the 5th of July 1920, against the decree of Babu Satis Chandra Basu, Additional Subordinate Judge of Zillah Malda, dated the 22nd of March 1920, reversing the decree of Babu Kuan Chandra Mitra, Munsif, 2nd Court at Malda, dated the 5th of August 1919.

The facts of the case material to the report are as follows—

Plaintiffs brought a suit in the Court of the Munsif at Malda for compensation against the Defendants Nos. 1 to 4 claiming Rs. 25, being the price of trees cut by the latter from a piece of land which they claimed absolutely by right of purchase in 1325 B. S. from the *pro formâ* Defendants Nos. 5 to 7. The allegation made in para. 2 of the plaint runs thus—“Defendants Nos. 2 to 4 cut five *Nim* trees and one *Simool* tree from the northern part of the land under orders of the Defendant No. 1 on the 9th

Falgun 1325 B. S. The Defendants have no right, title and interest and also possession in respect of the land or trees, and accordingly by cutting away and misappropriating those trees in that way the Defendants have committed an offence of theft under sec. 379 of the Indian Penal Code.”

The Defendants Nos. 1 and 2 admitted cutting of the trees but contested the suit denying the alleged title of the Plaintiffs and asserting that they got an *amalnâma* from the *pro formâ* Defendant No. 5, Fuda Bibi, who purchased the land in question during the life-time of her husband in 1290 B. S. The Defendants therefore asserted that they were in possession of the land as tenants under Fuda Bibi paying an annual rent of Rs. 3, that they executed a *kabulyat* in favour of Fuda Bibi in 1321 B. S. and that they purchased the trees for a consideration of Rs. 11 from Fuda Bibi.

The suit for damages was not filed in the Small Cause Court. The trial Court found that the land had been all along in the possession of the Defendants Nos. 1 and 2 and hence dismissed the suit, holding that Fuda Bibi, *pro formâ* Defendant No. 5, was *primâ facie* the owner and not her daughters, as the *kobala* of 1290 B. S. showed Fuda Bibi to be the only purchaser, and he further held that the rights of the daughters, if any, could be only decided in a properly framed title suit and not in the present suit for damages. The Plaintiffs appealed and on appeal the learned Additional Subordinate Judge of Malda held that the Defendants had all along been in the possession of the land and that they purchased the trees from *pro formâ* Defendant No. 5, Fuda Bibi, but he entered into the question whether the land belonged to Fuda Bibi alone or to her and her daughters and

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held on the evidence, "at least for the purpose of this suit that the Defendant No. 5 was not the full owner. As it is not known that there was any other heir of her husband than herself and the two daughters, one-eighth share would belong to Defendant No. 5 and the remainder to Defendants Nos. 6 and 7." He accordingly set aside the decision of the Munsif and decreed the suit in part awarding damages to the Plaintiffs to the extent of 7/8th share.

The Defendants Nos. 1 to 3 thereupon preferred this second appeal.

Dr. Jadunath Kamplal for the Respondents raised a preliminary objection that no second appeal would lie under sec. 102 of the Civil Procedure Code. The suit for damages although not filed in the Small Cause Court was one which was cognisable in the Court of Small Causes. Both the Courts below found that the Defendant Nos. 1 and 2 were in possession of the land as tenants under Fuda Bibi and therefore no criminal offence was committed by their cutting the trees which they purchased from Fuda Bibi. As a matter of fact the criminal prosecution of the Defendants failed before the institution of the present suit. The Subordinate Judge found that Fuda Bibi was not the sole owner, but her two daughters were also owners and they are entitled to their share of the value of the trees.

Babu Santimay Majumdar for the Appellants.—The suit as framed was not cognisable by the Small Cause Court in view of Art. 35, cl. (ii) of the Second Schedule of the Provincial Small Cause Courts Act. The suit was one for compensation for an act which amounted to an offence punishable under Chap. XVII of the Penal Code. It is only allegation made in the pleadings that decide the forum, and here the direct allegation

in the plaint that the Defendants by their action committed theft brings the case within cl. (ii) of Art. 35 of the Second Schedule of the Provincial Small Cause Courts Act. The findings finally arrived at by the Courts below do not matter at all, nor does the result of the criminal case. The mere allegations made in the plaint must decide whether any particular suit is or is not excepted from the jurisdiction of Small Cause Court.

Refers to *Ram Prosad Pramanik v. Sri-charan Mondal* (1) and *Helaludda Mollah v. Abdul Gafur* (2).

All doubts have been cleared by the Amending Act of 1914. The later rulings do shew that if the act attributed to the Defendants be punishable under Chap. XVII of the Penal Code, then the suit for compensation for that act is not triable by the Small Cause Court. The Plaintiffs by making that allegation in the plaint succeeded in getting their suit tried in the Civil Court and consequently got the right of appeal. They should not therefore be allowed to say now that the suit was as a matter of fact triable by Small Cause Court. The question of intention for the act attributed to the Defendants does not and cannot arise at all in view of the plain wording of cl. (ii) of Art. 35 of that Act.

The JUDGMENT OF THE COURT was as follows:—

In the suit out of which this appeal has arisen the Plaintiffs sued for recovery of Rs. 25 on account of the price of trees which they alleged have been wrongfully cut away by the Defendants Nos. 1 to 4 from a plot of land in their possession and which they had recently purchased from

(1) 21 C. W. N. 1109 s. o. 27 C. L. J. 594 (1917)

(2) 41 Ind. Cas. 936 (1917).

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the *pro formâ* Defendants Nos. 5 to 7. The Defendants Nos 1 and 2 contested the suit and their case was that the land belonged to Defendant No. 5 alone, the Defendants Nos 6 and 7 had no concern with the land, that they had taken lease of this land from Defendant No. 5 and were in possession of the land as tenants, and further that they had purchased the trees alleged to have been cut from Defendant No 5 for Rs 11. The trial Court dismissed the Plaintiffs' suit. On appeal the lower Appellate Court found that Defendants Nos 6 and 7 had interest in the land in suit, that the interest of Defendant No. 5 was not that of a sole owner, and that therefore the Defendant No 5 had no right to sell the entire trees to Defendants Nos 1 to 4. He decreed the Plaintiffs' suit for Rs 8-12 annas.

The Defendants Nos 1 to 3 appeal. A preliminary objection has been raised by the Respondent that in accordance with the provisions of sec 102 of the Code of Civil Procedure no appeal lies in the present case. His contention is that the present suit is a suit of the nature cognizable by a Court of Small Causes as the amount of the subject-matter does not exceed Rs 500. The Appellants, on the other hand, contend that the suit is one coming within the provisions of Art 55 (ii) of the Second Schedule of the Provincial Small Cause Courts Act. This article runs as follows. — For an act which is, or save for the provisions of Chap. IV of the Indian Penal Code would be, an offence punishable under Chap. XVII of the said Code. It appears that the Defendant was prosecuted by the Plaintiffs for the cutting of these trees and acquitted. Now it has been found that the Defendants had right to some portion of the trees. The mere taking of the trees by the Defendants would not of itself

amount to theft or criminal misappropriation unless this was done with dishonest intention. The criminality of the act of the Defendants will therefore depend on the intention with which this act was done and not whether the particular act is saved by the provisions of Chap IV. We are of opinion that the present case does not come within Art 35 (ii) of the Second Schedule of the Provincial Small Cause Courts Act and therefore no second appeal lies.

The appeal is accordingly dismissed with costs.

H. C. S.

Appeal dismissed

CIVIL REVISIONAL JURISDICTION.]

RULE No. 196 OF 1922.

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Petitioner,
v.
1922,
15, June. RAJ KUMAR MUKHERJEE
and ors., Opposite
Party.

General Provident Fund Rules, if apply to State Railway Provident Fund—State Railway Open Line Code, Vol II, App I, r. 30 and r. 22, money standing to the credit of a retired State Railway officer in the State Railway Provident Fund, if attachable in execution of a decree—"Compulsory deposits," significance of—"Discharged," meaning of—Civil Procedure Code (Act V of 1908), sec. 60 (1) (k) and Provident Funds Act (IX of 1897), sec. 4, sub-sec. (1), if exempt "compulsory deposits" in Railway Provident Funds from liability to attachment.

A sum standing in a State Railway Provident Fund to the credit of a person who was formerly in the employ of a State Railway but had left the service of the Railway, was sought to be attached in execution of a money decree:

Held—That the Rules regulating the General Provident Fund do not apply to the State Railway Provident Institution,

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RAJ KUMAR MUKHERJEE

which is governed by the Rules contained in the State Railway Open Line Code, Vol. II, App. I. The amount at the credit of the aforesaid officer which consisted entirely of deposits which when they were made were "compulsory deposits" within the meaning of r. 30 of the latter Rules and of the Provident Funds Act, was exempted from liability to attachment under the said r. 30, read with sec. 60 (1) (k) of the Civil Procedure Code and sec. 1, sub-sec. (1) of the Provident Funds Act.

That the fact that the deposits became repayable to the officer when he left the service did not remove them from the category of compulsory deposits.

Per RICHARDSON, J. - A compulsory deposit is a deposit which goes into the fund as a compulsory deposit and is at that date received and classified as such, and there is no ground for a different classification of such deposits or a different description being applied to them after the officer's death or retirement. As long as the deposits subsist in the fund, so long, at any rate, both as matter of legal construction and in the common and ordinary way of speaking, they are properly and correctly described as compulsory deposits. In this respect no distinction exists between the deposits made by the depositor himself on the one hand and the contributions in respect of those deposits and the interest or increment accrued on them on the other.

VEERCHAND *v.* B. B. & C. 1 Ry. (1) and MILLER *v.* B. B. & C. 1 Ry. (2) followed.

SETH MANNA LAL PARRUCK *v.* JAIN

(3) and HINDLEY *v.* JOY NARAIN (4) referred to.

The word "discharged" in r. 30 does not necessarily mean "dismissed." It is wide enough to include the case of a servant who has been permitted to retire on take his discharge.

Per B. B. GHOSE, J. - The deposit did not become "payable on demand" by reason of the fact that it became payable under the rules on one of certain events happening afterwards.

This was a Rule obtained on behalf of the Secretary of State for India in Council in pursuance of an order of the High Court made on the 26th January 1922 in the matter of an execution case of the Court of Small Causes, Sealdah.

The facts of the case are briefly as follows. One Raj Kumar Mukherjee obtained a decree for money against one Mr. Godfrey in the Court of Small Causes at Sealdah. Mr. Godfrey was formerly in the employ of the Eastern Bengal State Railway but had left the service of the Railway. There was a sum standing to his credit in the Railway Provident Fund and at the instance of the decree-holder the Small Cause Court Judge caused this sum to be attached in execution. Subsequently, the learned Judge made an order withdrawing the attachment on the ground that under the Provident Funds Act money in the Fund was not attachable. Thereupon the decree-holder moved the High Court against the said order and obtained a Rule (No. 515 of 1921). Mr. Godfrey, the judgment-debtor, did not appear at the hearing of the Rule. Then Lordships Mr. Justice Richardson and Mr.

(3) I. L. R. 35 Cal. 641 s. c. 12 C. W. N. 633 (1908).

(4) I. L. R. 40 Cal. 962 s. c. 24 C. W. N. 288 (1919).

(1) I. L. R. 29 Bom. 259 (1904).

(2) 5 Bom. L. R. 454 (1903).

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Justice B. B. Ghose in making the Rule absolute on 26th January 1922 passed the following order :—

“The Petitioner obtained a decree for money against the Opposite Party in the Court of Small Causes at Sealdah. It appears that the Opposite Party was formerly in the employ of the Eastern Bengal State Railway but has now left the service of the Railway. It further appears that there is a sum standing to his credit in the Railway Provident Fund, a Fund governed by the provisions of the Provident Funds Act, 1897. At the Petitioner's instance the Small Cause Court Judge caused this sum to be attached in execution. Subsequently, however, on the 22nd July 1921, the learned Judge made an order withdrawing the attachment on the ground that under the Act money in the Fund was not attachable.

Thereupon the Petitioner applied to this Court and this Rule was issued calling upon the Opposite Party to show cause why the order of the 22nd July should not be set aside and the attachment maintained.

The learned Judges before whom the Rule first came directed that the papers should be laid before the senior Government Pleader with a request that he should obtain for the Court a copy of the Rules of the Fund and information as to a statement made by the Petitioner in his petition in reference to r. 10 of the Rules.

Accordingly when the Rule came on for hearing before us, the senior Government Pleader appeared and supplied us with a copy of the Rules of the Fund. He further confirmed the Petitioner's statement as to the terms of the present r. 10. The learned Vakil, however, also said that he had merely obtained this information in compliance with the request of

the Court and that he was not in a position to offer any assistance to the Court as to the effect of the Provident Funds Act one way or the other.

The Opposite Party did not appear either in person or by any learned Vakil.

The result is that while the Petitioner's case was presented to us, we have not had the advantage of hearing argument on the other side.

R. 10, it seems, was modified in 1919. The Rule is headed ‘Withdrawals on retirement’ and as it now stands runs as follows :—

‘The amount which accumulates to the credit of a subscriber in permanent employ will, when he quits the service, become his property and will be handed over to him, unless the Account Officer has received notice of an attachment, assignment, or encumbrance affecting the disposal of the amount or any portion of it. Should such notice have been received, the Account Officer will hand over to the subscriber only that portion of the amount which is not affected by the attachment, assignment, or encumbrance and shall obtain the orders of the Comptroller and Auditor-General, as administrator of the Fund, regarding the disposal of the balance.’

“The question whether money standing to the credit of a depositor after his retirement can be attached before withdrawal seems to depend on the true meaning of the expression ‘compulsory deposit’ as defined in the Act. No formal notice of the Rule before us has been given to the Comptroller and Auditor-General in his capacity as administrator of this Fund, and in our opinion it is undesirable that we should decide an important question of law without giving that officer an opportunity of being heard, if he so

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAJ KUMAR MUKHERJEE.

On the other hand r. 10 of the Rules of the Fund, as it stands, seems to be so far as it goes, in the Petitioner's favour and the Opposite Party has not appeared to show cause.

On consideration, our order in the circumstances is that the Rule before us be made absolute and the attachment originally issued be maintained or if it has been withdrawn, be re-issued, subject, however, to liberty being reserved to the Comptroller and Auditor-General, as administrator of the Fund, to move this Court to discharge the present order and to make such other or further order as it may think fit.

The Petitioner is entitled to his costs. We assess the hearing-fee at gold mohurs.

Let the order be sent down without delay."

[In pursuance of the liberty reserved in the above order, the present Rule was obtained on behalf of the Secretary of State for India against the order for attachment.]

Mr. Gibbons, Advocate-General and Babus Dwarka Nath Chakravarty and Surendra Nath Guha for the Petitioner.

Babus Mohendra Nath Ray and Rupendra Kumar Mitter for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

RICHARDSON, J.—By our order dated 26th January 1922, Rule No 515 of 1921 was made absolute on the footing that the amount standing to the credit of W. J. Godfrey in the State Railway Provident Institution was attachable at the instance of the then Petitioner Raj Kumar Mukherjee, in execution of a decree for money which he had obtained against Godfrey in the Sealdah Court of Small Causes. Inasmuch, however, as the Rule was un-

opposed, there being no appearance for Godfrey and the Administrator of the Fund, to whom no notice of the Rule had been given, not being represented, liberty was expressly reserved to the latter to come in and move to have the order discharged. In pursuance of the liberty so reserved, the present Rule was obtained on behalf of the Secretary of State for India. At the hearing, the learned Advocate-General appeared for the present Petitioner, the Secretary of State, and the learned Yakil, Mr. Mohendra Nath Roy, for the creditor.

There is no dispute that the amount standing in the Fund to Godfrey's credit was not attachable so long as he was employed as a servant of a State Railway. The question is whether the amount became attachable on his retirement from such service.

It now appears that the Rules regulating the General Provident Fund to which we were referred on the former occasion, do not apply to the State Railway Provident Institution, which is governed by the Rules contained in the State Railway Open Line Code, Vol. II, App. 1. R. 10 of the General Fund Rules is therefore out of the way. The corresponding r. 30 of the relevant Rules is otherwise framed and in the view we take gives rise to no difficulty. It is in these terms :—

"Neither compulsory deposits, nor bonuses, &c., money added by Government to compulsory deposits, nor the interest thereon standing at the credit of a depositor, whether in actual service, discharged, or deceased, can be attached by a Court of law, but voluntary deposits and the interest thereon standing at the credit of a depositor on any given date are free to attachment on that date."

It is conceded that the amount at Godfrey's credit consists entirely of de-

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posits which, when they were made, were 'compulsory deposits' within the meaning of this Rule and of the Provident Funds Act. There is no question of any voluntary deposits.

As to the word 'discharged' it does not necessarily mean 'dismissed.' It is wide enough to include the case of a servant who has been permitted to retire or take his discharge.

The question is whether r 30 is in accordance with the law on the subject.

The Civil Procedure Code, sec. 60 (1) (k) exempts from liability to attachment "all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment."

That leaves the matter to be controlled by the Provident Funds Act and r. 30 seems merely to express the draftsman's view of the result of sub-sec (1) of sec. 1 of that Act (Act IX of 1897 as amended by Act IV of 1903). The question turns on that sub-section, the meaning of which, apart from any difficulty as to the term 'compulsory deposits,' is clear enough. "Compulsory deposits," it says, "in any Government or Railway Provident Fund shall not be liable to any attachment under any decree or order of a Court of justice in respect of any debt or liability incurred by a subscriber to, or depositor of, any such Fund and neither the Official Assignee nor a Receiver appointed under Chap. XX of the Code of Civil Procedure shall be entitled to, or have any claim on, any such compulsory deposit." The words are quite plain and general. No "compulsory deposits" are attachable.

But then it is argued that these deposits with which we are concerned, though

they were compulsory deposits when they were made and so long as Godfrey continued in the Railway service, ceased to be compulsory deposits when he retired. The argument is based on the definition in sec. 2 (2) of the Act and on r. 22 of the Rules.

As defined in the Act " 'compulsory deposit' means a subscription or deposit which is not repayable on the demand, or at the option of the subscriber or depositor, and includes any contribution which may have been credited in respect of, and any interest or increment which may have accrued on, such subscription or deposit under the Rules of the Fund "

R. 22, so far as it is material, is as follows:—

"Saving with the particular sanction of the Government of India no compulsory deposit or bonus shall be withdrawn excepting,

- (i) on the decease of the depositor,
- (ii) on his leaving the public service."

The contention is that if the Act and r. 22 be read together, Godfrey's deposits became repayable on his demand when he left the public service and thereupon were automatically removed from the category of compulsory deposits.

In my opinion that is a mistaken construction of the statutory definition. The definition speaks with reference to some Fund in which the deposit is made, and as it seems to me it crystallizes the nature of the deposit at the time at which it is made. A compulsory deposit is a deposit which goes into the Fund as a compulsory deposit and is at that date received and classified as such. It is conceivable that the Rules of a Fund might subject the general right of withdrawal conferred by such a rule as r. 22 to restriction or condition so that the whole amount at a depositor's credit might never become freely

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payable or repayable on his demand. But quite apart from that, a depositor presumably continues to make compulsory deposits till he dies in service or retires and I can see no ground for a different classification of such deposits or a different description being applied to them after his death or retirement. In other words, as long as the deposits subsist in the Fund, so long, at any rate, both as matter of legal construction and in the common and ordinary way of speaking, they are properly and correctly described as compulsory deposits. If that be so, under sec. 4 of the Act, they are not liable to attachment.

Though there is no decision binding on us, the question is not free from authority and the view I have expressed is supported by the judgment of Sir Lawrence Jenkins, C. J., in *Veerchand v. B. B. & C. I. Railway* (1), the facts of which are on all fours with the facts of the present case. The case of *Miller v. B. B. & C. I. Railway* (2), on which reliance has been placed for the creditor, was there cited but was not followed. I am content to adopt the brief statement of the learned Chief Justice. "The deposit," he said, "when it was made was not repayable on demand and therefore at that time was a 'compulsory deposit' and having once acquired that character with its attendant consequences, it continued (in my opinion) to retain it."

I have dealt with the case on the footing that no distinction exists between the deposits made by the depositor himself on the one hand and the contributions in respect of those deposits and the interest or increment accrued on them on the other. I have assumed that there is a sense in which these accretions to the

original deposits can be said to be 'repayable' or 'not repayable' on the demand of the depositor. I do not forget, however, that Sir Lawrence Jenkins, C. J., founds an argument on the frame of the statutory definition. If a word be interpreted as meaning one thing and including another and a different thing, the meaning of the word as first defined would seem to be enlarged so as to include the second thing. It is as if the Legislature had said the word shall mean and include (1) the first thing and (2) the second thing. In the view suggested for the creditor, therefore, on the depositor's death or retirement a distinction might have to be drawn between the deposits made by the depositor himself then repayable on his demand and the additions to those deposits, to which the limitation of not being repayable on his demand was never applicable or essential and which must therefore be understood as coming otherwise within the meaning of the term "compulsory deposit." The learned Chief Justice concluded—"I do not suppose it was ever intended that the Fund should as to part be, and as to part not be, a 'Compulsory Deposit'."

As to the cases in this Court, in *Seth Manna Lal Parruck v. Jainsford* (3), the main question decided was that the fund there in question, which had been established by the Corporation of Calcutta, was subject to the Provident Funds Act. It is not clear whether the subscriber whose deposits it was sought to attach was or was not at the time in the employ of the Corporation.

In *Hindley v. Joy Narain Marwari* (4), the Provident Fund was that of the East

(3) I. L. R. 25 Cal. 641 : a. c. 12 C. W. N. 633 (1908).

(4) I. L. R. 46 Cal. 932 : a. c. 24 C. W. N. 288 (1919).

(1) I. L. R. 29 Bom. 259 (1904).

(2) 5 Bom. L. R. 454 (1903).

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Indian Railway. The depositor had died and a decree for money had been obtained against his father as his legal representative. An attempt made in the course of executing the decree to attach the amount standing to the credit of the deceased in the Fund, was frustrated by Rankin, J. "Whether," said the learned Judge, "the employee is in the service or out of the service, whether he be alive or dead, his share is unattachable in the hands of the institution." That decision is in point and the general observations which the learned Judge makes on the nature of these Funds may also be usefully referred to. For if there be any doubt as to the meaning of the Act, it is permissible to have regard to the state of things to which the Act was intended to apply, the conditions in which it would operate, and the class of persons which it was intended to benefit.

In the result this Rule must, in my opinion, be made absolute. Our order dated 26th January 1922, in Civil Rule No 515 of 1921 should be discharged, and if the amount standing to the credit of W. J. Godfrey in the Railway Provident Institution has been attached or re-attached by the Sealdah Court of Small Causes, the attachment should be withdrawn.

B. B. GHOSE, J.—I am of the same opinion. The Provident Funds Act seems to be an instance of fragmentary legislation as it does not provide for all the circumstances under which the sums standing to the credit of depositors are payable and complications have arisen in the decision of the case on account of the Rules framed from time to time for the administration of the Fund and the resolution of the 29th of July 1919, to which our attention was drawn. R. 10 with reference to which we had decided the case at the previous hearing has now been

shown to have been excluded in its operation as regards subscribers to the State Railways Provident Fund. R. 30 which is applicable to servants employed on State Railways has been relied on by the learned Advocate-General. Under this Rule the money in deposit is not liable to attachment. It is contended on behalf of the creditor by Babu Mohendra Nath Roy that this Rule is *ultra vires* of the Act. His main contention is that the money was not a compulsory deposit when it was sought to be attached and reference was made to r. 22 which provides, amongst other things, that no compulsory deposit or bonus shall be withdrawn except on the depositor leaving the public service. It is urged that when the money is payable on the employee leaving the service, it is payable on his demand and it therefore ceases to be a compulsory deposit within the definition in sec 2 (4) of the Act and is consequently liable to attachment. The observations of Russel, J., in *Miller v B. B. & C. I. Railway Co.* (2) are relied on in support of this argument and it is contended that the case of *Veerchand v. B. B. & C. I. Railway Co.* (1), which is a decision on the question in controversy, was wrongly decided and ought not to be followed. It may be observed in passing that there was an appeal from the decision of Russel, J., but the Court of appeal apparently refrained from expressing any opinion on this question [see *Veerchand v. B. B. & C. I. Railway Co.* (1)].

It seems to me that the money in deposit is included within the definition of "compulsory deposit" in the Act. The deposit was not repayable on the demand or option of the subscriber, but was payable only under certain circumstances.

(1) 11 L. B. 29 Bom. 229 at p. 261 (1904).

(2) 5 Bom. L. B. 454 at p. 458 (1903).

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAJ KUMAR MUKHERJEE.

In my opinion it cannot be said that the deposit was payable on demand by reason of the fact that it became payable under the rules on one of the events happening afterwards, and that the character of the deposit that it was not repayable on demand remains unaltered. Hence it is not excluded from the definition of compulsory deposit. The money, therefore, is not liable to attachment under the provisions of sec 4 (1) of the Provident Funds Act. In this view I should follow the decision of Jenkins, C. J., in *Veerchand v. B. B. & C. I. Railway Co* (1) and I need not refer further to the Rules or to the policy of the Act on which arguments were addressed to us.

I agree in the order proposed by my learned brother

J. N. R. Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1022 OF 1922.

BUCKLAND, J.

1923,

Heard, 7, February.

Judgment,

15, February.

PRIYANATH GURTA,
Accused, Petitioner,

v.

LAL JHI CHOWKIDAR,

NEWBOULD, J.

SUHWARDY, J.

1923,

24, January.

Complainant,

Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 503, service of notice on a person by a self-constituted Arbitration Court that an ex parte decree would be passed against him, if he did not attend the Court and answer the claim, whether amounts to criminal intimidation.—Incompetency to execute the threat, if material.—Sec. 44, "injury," meaning of.

A certain President of a self-constituted Arbitration Court caused a notice to be issued over his signature to a certain person requesting the latter to be present on

(1) I. L. R. 29 Bom 259 (1904).

a given date and arrange for amicable settlement of a certain claim. The notice concluded with the statement that if the Defendant did not give an answer (or file written statement) on that date, the suit would be decreed ex parte:

Held, per BUCKLAND, J.—*That a threat of a decree is a threat of harm to an individual in his person, reputation or property. That the tribunal is incompetent to execute its decree is immaterial. Sec. 503, I. P. C., says nothing about the capacity of the person making the threat to carry it into execution. Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial. Under sec. 44, I. P. C., injury denotes harm illegally caused. By no legal process or means could this tribunal make or give effect to such a decree as it was the intention of the notice to cause the complainant to believe would be made if he failed to comply with it. Therefore in that the notice threatened the complainant with such a decree, it threatened the complainant with harm to be caused illegally. The Petitioner, therefore, committed the offence of criminal intimidation.*

This was a Rule against an order of the Sub-Divisional Magistrate of Manikganj (Mr. R. H. Hutchins), dated the 12th day of August 1922, convicting the Petitioner under sec. 506, I. P. C. and sentencing him to pay a fine of Rs. 200, or, in default to suffer simple imprisonment for six months; an appeal from which order was dismissed by the Sessions Judge of Dacca (Mr. P. C. De), on the 16th September 1922.

The facts of the case are briefly as follows:—The Petitioner Priya Nath

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Gupta, as President of what is known as the Arbitration Court of Gandhi Maharaj at Manikganj in the District of Dacca, issued over his signature a notice on one Lalji, a village chowkidar, stating that one Gobin had filed a claim for Rs. 2,499 against him before the Arbitration Assembly and as recourse to Court would be ruinous to both sides, he should be present on a given date and arrange for amicable settlement. Then followed the words :—"Be it known that if the Defendant does not give an answer (or file written statement) on that date, the suit will be decreed on that date on Plaintiff's proof. Afterwards no objection will be accepted." Lalji on receiving the notice consulted the *panchayet* who reported the facts to the Magistrate. The Petitioner, Priya Nath Gupta was, thereupon, put upon trial on a charge of criminal intimidation and convicted by the Sub-Divisional Magistrate of Manikganj and the conviction was upheld on appeal by the Additional Sessions Judge of Dacca. The Petitioner, thereupon, moved the High Court and obtained the present Rule.

The Rule came on for hearing in the first instance before Newbould and Suhrawardy, JJ.

The following dissentient judgments were delivered by their Lordships :—

NEWBOULD, J.—The Petitioner Priyanath Gupta was convicted by the Sub-Divisional Magistrate of Manikganj of an offence punishable under sec. 506, I. P. C., and sentenced to pay a fine of Rs. 200 or in default to undergo six months' simple imprisonment. This conviction and sentence were confirmed on appeal by the Sessions Judge of Dacca. The Petitioner has obtained a Rule calling on the District Magistrate to show cause why the conviction and sentence

should not be set aside on the following two grounds only.

1. For that the facts proved and found cannot legally constitute the offence of criminal intimidation.

2. For that the prosecution having neither alleged nor adduced any evidence to show that any decree passed by the Arbitration Court was ever sought to be enforced against the will of the person against whom the same was passed by any means whatever, the Courts below should have held that an *ex parte* decree of the said Arbitration Court against the Opposite Party would be perfectly innocuous and that as such the possibility of such a decree could not constitute a threat of injury within the meaning of sec. 503, I. P. C.

These two grounds are really one and the same, the second ground setting out in detail the argument on which the first ground is based.

The following are the facts proved and found in this case. The Petitioner is the President of what is known as the Arbitration Court or Gandhi Maharajke Court at Manikganj. A notice Ex. 1 partly printed and partly written signed by the Petitioner and issued under his authority as President of this Court was served on the complainant Lalji, a village chowkidar. In this notice it is stated that one Gobin Bhar has filed a claim for Rs. 2,499 against Lalji who is informed that he should appear before the Court and settle the claim. The notice concludes with the two following statements :—"If the Defendant do not answer the claim on the date fixed, the claim will be decreed *ex parte* on the evidence of the Plaintiff. No objections will be entertained after the passing of such an *ex parte* decree." Lalji was frightened by

PRIYANATH GUPTA v. LAL JHI CHOWKIDAR.

this notice and consulted the *panchayet* who reported the facts to the Magistrate.

Criminal intimidation which is punishable under sec. 506 is defined in sec. 503, I. P. C., as follows:—"Whoever threatens another with any injury to his person, reputation or property . . . with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat commits criminal intimidation."

The only question of any difficulty in this case is whether the concluding portion of Ex 1 was a threat of injury to the property of Lalji. If it was such a threat there can be no doubt that the criminal intent which is the other ingredient of the offence of criminal intimidation has been established. It is found as a fact that this notice did cause alarm to Lalji. Such a result is a natural consequence of a threat which the person who threatened must be presumed to have intended. I also hold that the inference has been rightly drawn that it was the intention of the Petitioner to cause Lalji to do an act which he was not legally bound to do, namely, to appear before the Arbitration Court, as the means of avoiding the execution of the threat (if it is held to be a threat) that an *ex parte* decree would be passed against him. On a full consideration I hold that the lower Courts were right in deciding that the statement that a claim for Rs. 2,499 would be decreed *ex parte* against Lalji, if he did not answer the claim on the date fixed, amounted to a threat of injury to his property. The learned Sessions Judge has compared the Petitioner's action to that of a bully who threatens to shoot a person though he has no license to carry fire arms. To my mind a better comparison would be that

of a person who holds an unloaded pistol at the head of another. The fact that the pistol was unloaded would be no defence to a charge of criminal intimidation if the person threatened was ignorant of this fact. The use of the word decree in the notice implies that an order passed by the Arbitration Court would be enforced. Though the Court had no legal power to enforce its decree, a person in the position of Lalji would naturally fear that it would be enforced by illegal methods. I can see no force in the contention based on the fact that no *ex parte* decree of the Arbitration Court has ever been enforced. Evidence was taken about two months after the issue of the notice. The omission to take any action to enforce *ex parte* decrees during that period may have been due to this prosecution or other causes. It has not been shown that at the time the notice was issued Lalji had reason to believe that no steps would be taken to enforce a so-called decree against him.

I would, therefore, hold that the facts proved and found legally constitute the offence of criminal intimidation and would discharge this Rule.

SUHRWARDY, J.—I regret that I am unable to agree with my learned brother. The case will be submitted to the Chief Justice for the appointment of another Judge under sec. 429 read with sec. 439, Cr. P. C.

The accused has been convicted in this case under sec. 506, Indian Penal Code and sentenced to pay a fine of Rs. 200, in default six months' simple imprisonment. The charge against him is that as President of a self-constituted Arbitration Court styled in the notice referred to hereafter as Manikganj Arbitration Assembly the accused caused a notice to be issued over

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his signature to the complainant and thereby committed an offence under sec. 506, Indian Penal Code. The notice complained of states that a certain person (name given) has laid a claim against the complainant for Rs. 2,499—here follow details of the claim—before the Arbitration Assembly and as recourse to Court would be ruinous to both sides, he is requested to be present on a given date and arrange for amicable settlement. These words are in print. Then follow the words in manuscript which are said to be the offending words constituting criminal intimidation. They are—"Be it known that if the Defendant (meaning the complainant in this case) does not give an answer (or file written statement) on that date the suit will be decreed on that date on Plaintiff's (i.e., accused's) proof. Afterwards no objection will be accepted."

The accused has obtained this Rule on the ground that the facts proved and found do not legally constitute the offence of criminal intimidation. The Crown does not appear to support the conviction but the trial Magistrate has submitted a full explanation.

It, therefore, remains to be considered if the words in writing quoted above make out the offence of which the accused has been convicted, for it is evident that the printed portion of the notice is wholly innocuous.

The charge framed is in these words:—That you caused a written notice to be served on one Lalji Chowkidar of Gheor and thereby caused him alarm for his property intending thereby to cause him to appear before you on a certain date and place which you had no right to do and which he was not legally bound to obey and thereby committed an offence punishable under sec. 506, &c., &c. I

think, this charge is bad. Sec. 503, Indian Penal Code defines criminal intimidation thus:—(I quote so much of the section as is necessary for our present purpose). Whoever threatens another with any injury to his property with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, as the means of avoiding such threat, commits criminal intimidation.

It is clear from this definition that the elements constituting the offence are first, threat of injury to the property of the complainant and secondly, the intention to cause alarm, etc.

As to the first element it is said by the learned Additional Sessions Judge who heard the appeal that the expression that if the complainant did not appear on the day fixed, an *ex parte* decree will be passed against him, is threat to his property. I am unable to agree in this view. Injury is defined in sec. 44, Indian Penal Code as "denoting any harm whatever illegally caused to any person in property." Hence the threat must be of causing harm to property. I cannot persuade myself that the threat to pass an *ex parte* decree for a certain sum by an unauthorised person or body is threat to property. This apparently strained construction of the plain wording of the law is sought to be vindicated by suggesting that the accused or the body to which he belongs might thereafter proceed to touch the complainant's property on the strength of that decree. This is mere conjecture. Had there been any evidence that the accused ever proceeded against another's property under colour of a so-called decree, it might be urged—I do not decide, rightly—that the threat involved subsequent injury to property. The evidence is just the other way for P. W. 3

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Ch. Mohun Majumdar says:—"I have never seen any decree of the Arbitration Court being executed." As I read sec. 503, Indian Penal Code, the threat must be a direct threat to cause harm to a person in property and not by way of insinuation of possibility or even probability of such harm.

As regards the second ingredient of the offence, the accused is not charged with having the intention to cause alarm to the complainant, nor is there any such finding. The learned Additional Sessions Judge finds that the complainant, a "person of ordinary intelligence and education was in fact frightened." This is not enough. The mental condition of the complainant does not determine the offence. It is the mental attitude of the accused or *mens rea* that ordinarily makes an act criminal. It may be said that the accused intended to cause the complainant to do an act which he was not legally bound to do, *viz.*, to file an answer, but the threat must be to cause injury to property in the event of non-compliance.

For all these reasons I hold that the conviction is bad and must be set aside and the accused acquitted.

[The learned Judges having differed, the case was referred to Mr. Justice Buckland under sec. 429 read with sec. 439, Cr. P. C.]

Babus Narendra Kumar Bose and Bimal Chandra Das Gupta for the Petitioner.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

BUCKLAND, J.—The Petitioner Priyanath Gupta who was convicted by the Sub-Divisional Magistrate, Manikganj, of the offence of criminal intimidation and sentenced to pay a fine of rupees two

hundred or in default to undergo six months' simple imprisonment appealed to the Sessions Judge of Dacca by whom the conviction and sentence were confirmed and has now obtained a Rule from this Court to show cause why the conviction and sentence should not be set aside. The case has been laid before me under secs. 429/439 of the Code of Criminal Procedure.

The complainant is one Lalji Koeri, a chowkidar. There was served on him by a peon a document in the following terms:—

Notice for decision of suit. Before the (Body of) Arbitrators at Manikganj, District Dacca.

Civil Suit No. 595 of 1328-29. Claim laid at Rs. 2,499.

To

Lalji Koeri, father's name not known of Gheor Bazar. . . . Defendant. Whereas the Plaintiff Gabin Bhar, son of the late Jhiguri Bhar of Pochar Kandarhat, Thana Gheor, has brought a suit against you on the allegation that the Defendants Nos. 2 to 6 have kept confined the Plaintiff's married wife, Parbati and the other Defendants are in collusion with them, that the Plaintiff at the time of his going to Benares had entrusted the Defendants, with the charge of his shop and that the Defendants have misappropriated many articles of the said shop and has prayed for the recovery of possession of those articles and of his wife under the decision of *Salisi Nispatti Mandali* (Body of Arbitrators) at Manikganj and whereas if a case be brought in Court in respect of the said matters there is likelihood of a heavy loss being suffered by both the parties, you are hereby informed that you will appear before me at 10 A.M., on Thursday the 11th Jaistha next and make arrangement for an amicable settlement

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thereof, otherwise you will be put to loss for nothing.

Be it mentioned here, that if the Defendants do not put in an answer on the aforesaid date, the suit will be decreed on the evidence of the Plaintiff and no objection will be allowed thereafter

Manikganj	File	Privanath Gupta,
Salisi Bichar	1	President
Mandali	(Initials)	Salisi Nispatti
Rastriya Samiti	23-6	Mandali

on the back

List of Property.

1 Har Magan Bhadaï	Cash Rs.	64
2 Taken by Gabari	Cash Rs	500
3. On accounts of ornaments	Cash Rs. .	30
4. Mangal Karmakar Ghatak	Cash Rs.	1,000
5 'Gold Mohur 1	Rs.	30
6. Gobin Bhar on account of shop	Cash Rs	425
7. Guru Prosad on account of shop	Cash Rs	450

Total—Rs. 2,499

Portions of this document are in print, the remainder is in manuscript, in particular the last paragraph from the words "Be it mentioned" to "allowed thereafter." The Petitioner whose signature it bears is the President of what is known as the *Salisi Nispatti Bichar Mandali* at Manikganj, and the charge is that by causing it to be served upon the complainant he committed the offence of which he was convicted.

Two points have been argued upon the hearing of the Rule. The first is that there is no evidence to support the findings of the lower Courts that the last paragraph in manuscript was there when the Petitioner signed the notice as to which I am not prepared to hold that there is no evidence to support the inference which

the lower Courts have drawn in this respect.

The other point which is more substantial is that this notice cannot constitute the offence charged.

Excluding immaterial portions of the section, criminal intimidation is defined as follows :—Whoever threatens another with any injury to his person, reputation or property with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat commits criminal intimidation.

That the notice in question conforms in many respects to the forms used by Courts established by law does not admit of dispute. Expressions used are similar, the word "suit" is employed to specify the proceedings before this Tribunal which was self-constituted and had no legal sanction, and the complainant is required to put in an answer which he was not legally bound to do, as the means of avoiding that "the suit will be decreed on the evidence of the Plaintiff's" which fulfils the requirements of the section as regards intent.

The question then arises whether that which according to the notice the complainant could so avoid was injury threatened to his person, reputation or property. That a decree of a Civil Court harms an individual against whom it is made in his person, reputation or property is a proposition which was not controverted when I put the questions to the learned Vakil for the applicant in the course of argument and in my opinion he rightly accepted it as correct, though it might be more strictly accurate to say that the harm is caused by the probable legal consequences of a decree. Consequently a threat of a decree is a threat of harm to

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an individual in his person, reputation or property.

But it is submitted, that this notice cannot be construed as a threat of such harm as the Tribunal was incompetent to execute its decree. That in my judgment is immaterial. The section says nothing about the capacity of the person making the threat to carry it into execution. Were such capacity essential, the threat implied in the presentation of an unloaded pistol at the head of another would not further the commission of the offence of criminal intimidation unless the act was accompanied by threatening words, which would reduce the section to an absurdity. Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial.

Looking at the notice as a whole the only inference to be drawn is that it was the intention of the Petitioner to cause the complainant to think or believe that unless he did what the notice required him to do, a decree as ordinarily understood would be passed against him and he would become liable to those penalties which are the sanctions for decrees made by Courts of justice duly constituted by law. No other intention can be attributed to the use of the forms of expression and words employed. The Petitioner therefore threatened the complainant with harm in his person, reputation or property by threatening him with a decree. Under sec. 44 of the Indian Penal Code injury denotes harm illegally caused. By no legal process or means could this Tribunal make or give effect to such a decree, as it was the intention of the notice to cause the complainant to believe would be made if he failed to comply with it. Therefore in that the Petitioner threatened the com-

plainant with such decree, he threatened the complainant with harm to be caused illegally.

Upon the facts found by the lower Courts I hold that the Petitioner committed the offence of criminal intimidation. The conviction and sentence are affirmed and the Rule discharged.

J N. R.

Rule discharged.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD BUCKMASTER.

LORD ATKINSON.

LORD SUMNER.

LORD CARSON.

SIR JOHN EDGE.

1922,

Heard, 30, June.

Judgment, 30, June.

RAM GOPAL LAL,

Appellant,

v.

MUSAMMAT AIPNA

KUNWAB,

Respondent.

Will, proof of—Standard of proof, as to formalities and as to signature—Inference of genuineness of signature from general resemblance, when witnesses to signature kept back—Importance of evidence of when and how Will found.

A Will is one of the most solemn documents known to the law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law.

Where under the law no formalities are essential and proof of the testator's signature is all that is needed, justice requires, in case of doubt or dispute, that the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect.

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When witnesses are available to prove that a man actually made a signature, any evidence of a general nature to the effect that the signature appears to be genuine is of little worth in the absence of the material witnesses.

The history of a Will, e.g., when it was found, where and by whom, and if it was kept back when it should have been produced why it was so kept back, is of the most material importance for the purpose of determining its validity.

This was an appeal from a judgment and decree, dated the 28th April 1919, of the High Court of Judicature at Allahabad, which reversed a judgment and decree, dated the 11th March 1916, of the District Judge of Azamgarh.

The main question on the present appeal was whether a Will, dated the 25th January 1915, propounded by the Respondent, Musammat Aipna Kunwar, was the last Will and testament of her husband, Babu Bijai Singh, who died on the 3rd March 1915. The District Judge, who heard and saw the witnesses, found "that the applicant has entirely failed to prove that the Will was executed by Bijai Singh," but the High Court took the opposite view, and granted probate of the Will in question.

The said Babu Bijai Singh owned considerable house and zamindari properties and resided in the village of Nizamabad in the District of Azamgarh. He was about seventy-four or seventy-five years of age at the time of his death. He had become extremely weak during the last three years of his life on account of an attack of paralysis and carbuncle. His agnatic relations on the paternal side, that is, the Appellant and his brothers, lived with him in different portions of one and the same house, and looked after

him and managed his properties. One Ram Bharos, in particular, was his general attorney for nearly forty years, and managed his estate up to the date of his death. He had no child, and his only other relations were the sons of his sister, namely, Jagarnath Singh, Jit Singh, Kishen Singh and Baj Bahadur Singh. The first (i.e., Jagarnath Singh) alone resided in the village of Nizamabad, but the others had long left their native village—Jit Singh went off to Patna where he worked as a *pujari* in a Sikh temple managed by Baba Makund Singh; Kishen Singh had been in Government service for over twenty years; and Baj Bahadur Singh kept a druggist's shop at Lucknow for over twenty years.

In the winter of 1915 plague broke out in the village of Nizamabad, and the residents sought shelter in neighbouring villages. In January 1915, the said Babu Bijai Singh went over to his village, Kharanti, where he died on the 3rd March 1915. The patwari of the village made the report required by the law on the 22nd March 1915, and a claim to mutation of name in respect of her husband's estate was made on behalf of the Respondent, Aipna Kunwar, on the ground of inheritance according to the Hindu law. Her claim was signed on her behalf "by the pen of Baj Bahadur Singh, sister's son and *karpardaz*." The Respondent's claim to mutation was opposed by the Appellant and his brothers on the ground that the said Babu Bijai Singh had made an oral Will in their favour shortly before his death.

The mutation case was tried by the Sub-Divisional Officer of Azamgarh, and the issue between the Respondent on the one hand and the Appellant and his brothers on the other, was whether Babu Bijai Singh died having made an oral

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Will or not. The three sons of Babu Bijai Singh's sister, namely, Jagarnath Singh, Jit Singh and Kishen Singh, also filed a petition of objections in the mutation case on the 20th April 1915, in which they stated that the Respondent was in possession of the property of her late husband, and that "in case of non-entry of the name of the widow of the deceased, the names of these objectors may be entered with reference to their preferential right." The Respondent examined witnesses to prove that she was in possession of her husband's estate. The Appellant on the other hand examined witnesses in support of the oral Will of Babu Bijai Singh.

On the 7th May 1915, the said Baj Bahadur Singh was examined in the mutation case, and in cross-examination he for the first time stated that Babu Bijai Singh had executed a written Will in January 1915, but he did not give any material particulars of the alleged Will, nor was the Will produced in Court. The mutation case was decided in favour of the Respondent on the ground of inheritance, and the order was affirmed on appeal by the Commissioner and the Board of Revenue, but throughout these proceedings the alleged Will was never produced.

On the 20th September 1915, the present application for grant of probate of the alleged Will, dated the 25th January 1915, was made by the Respondent or on her behalf by the said Baj Bahadur Singh, in the Court of the District Judge of Azamgarh.

It was stated in the application that "before his death the said Babu Bijai Singh executed a Will, dated 25th January 1915," and the Will was filed in the Court.

The Will was not registered. It was

attested by seven witnesses, one of whom, namely, Maheshri Dut Patak, filed a petition in the Court of the said District Judge of Azamgarh on the 2nd October 1915, stating as follows:—

"In the above case the Petitioner begs to state that at least about three months ago, Baj Bahadur Singh obtained his attestation on a blank paper. Now the Petitioner has come to know that he (Baj Bahadur) has had a Will drawn up on that paper and filed it in Court. The Petitioner submits that to his knowledge Babu Bijai Singh did not execute any Will nor did the Petitioner sign it."

Three other attesting witnesses, namely, Bachu Singh, Jageshwar and Kali Charan, were not examined. The Respondent herself did not give evidence and one witness Ram Kumar Singh was dead. The witnesses on whom the case for the Respondent rested are: (1) Ram Ratan Lal, the writer of the Will, resident of Nizamabad; (2) Baba Makund Singh, Mahant of Sikh temples, resident of Patna; and (3) Ishar (Parmeshwar?) Singh, servant of the said Baba Makund Singh, resident of Benares.

The alleged Will provided for certain legacies in favour of the temples managed or controlled by the witness Baba Makund Singh. It also contained provisions for establishing a school and dedicating the profits of a certain village in support of it. All the remaining villages, houses and plots belonging to the testator were devised to the Respondent for her life, and on her death to the four sons of the testator's sister in equal shares. The Appellant and his brothers, who were the male reversioners of the testator, and who lived with the testator and looked after him and managed his estate, were completely ignored under the terms of the Will.

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They accordingly filed a caveat contending that the Will propounded by the Respondent was a forgery. The District Judge of Azamgarh delivered judgment on the 11th March 1916, and held "that the applicant has entirely failed to prove that the Will was executed by Bijai Singh." His remarks about the important witnesses called by the Respondent may be summarized as follows:—

(1) Baj Bahadur Singh

"The patwari's report was signed by Baj Bahadur, one of four sister's sons

"Now on Baj Bahadur's own shewing, he knew of the existence of the Will before the death of Bijai Singh and he had seen and read the Will by the middle of March 1915

"He has been guilty of the most gross prevarication in attempting to explain how he came to sign the patwari's report in token of approval of the recommendation therein made. . . . The applicants thought it necessary to set up a fantastic theory of inheritance; but, although the other side was insisting on the existence of an oral Will, thought it unnecessary to take the straightforward plea that Bijai Singh had executed a written Will."

(2) Ram Ratan Lal

"The scribe, Ram Ratan Lal, is nearly related to or being intimate with Baj Bahadur. . . It is clear from the contents of the letters that Ram Ratan Lal is no mere disinterested scribe of a Will but a dangerous intriguer."

(3) Baba Makund Singh and Ishar Singh.

"Makund Singh, the manager of a Sikh temple at Patna, where he ordinarily resides. This man professes to be highly respectable, but a reversal of the judgment, dated the 18th March 1915, passed in connection with the rent

suits instituted by Makund Singh against Ram Narain and others, clearly shows that the man is not above instituting false suits and giving false evidence.

"He took with him Ishar Singh, his servant, who is the seventh and last attesting witness Makund Singh and Ishar Singh are the only two witnesses who have been examined by the applicant."

"There can be no doubt that these men have never been to Bijai Singh's house

"A comparison of the statements of these witnesses regarding the house and its surroundings with the plan filed with the record, shows that their evidence is mere guess work"

The said District Judge therefore made a decree dismissing the application for probate with costs, and from that decree the Respondent appealed to the High Court of Judicature at Allahabad, which delivered judgment on the 28th April 1919.

The learned Judges of the High Court started with the theory that Babu Bijai Singh undoubtedly intended to leave a Will, and that having regard to that fact the reasons given by the learned District Judge for discrediting Ram Ratan Lal and Baba Makund Singh were not sufficiently cogent. They observed as follows:—

"The Respondents themselves have alleged that he (the testator) was anxious to make a Will, but they say that he made an oral Will and not a Will in writing"

With regard to the witnesses in support of the Will they said:—

The first is Ram Ratan who deposes that he wrote out the Will. He does not appear to be a man of very exemplary character, and some of

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not very probable, but we have the fact that he swears to the deceased having dictated the terms of the Will to him and to having signed it after the Will was written out. Two other witnesses were examined, one of whom is Makund Singh who is the manager of a Sikh 'Sanghat' at Patna. . . . The learned Judge disbelieves his evidence mainly on the ground that he had a personal motive in supporting the Will and that he was to gain by the maintenance of the Will. This view of the learned Judge is not strictly accurate. Under the Will, Makund Singh himself had not to gain anything. A grant of Rs 40 a year was made in favour of the 'Sanghat' of which he was the 'Mahant'. This was a very small grant and could not be a sufficient motive for Makund Singh's joining in the fabrication of the Will. We do not think that there is valid reason for holding that Makund Singh is not a true witness."

The learned Judges were of opinion that the evidence of the handwriting expert was not very material because he gave very little weight to the fact that Bijai Singh was suffering from paralysis for nearly 3 years before the date of the Will and concluded :—

"Upon a consideration of all the circumstances we do not feel ourselves justified in holding that the Will is a fabricated document and was not made by Babu Bijai Singh."

The said High Court therefore allowed the appeal, set aside the decree of the District Judge, and made a decree granting probate of the Will with costs, and from that decree the Appellant appealed to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and B. Dubé for the Appellant (ex contended that the District Judge had seen and heard the witnesses had a

better opportunity than the High Court of deciding on a question of pure fact.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—On the 3rd March 1915, Babu Bijai Singh died and on the 13th September 1915, his widow, who is the present Respondent, applied, through Baj Bahadur Singh, as her attorney, for the grant of probate of a document, dated the 25th January 1915, which purported to be the last Will of her deceased husband

Objection was taken to the grant by the Appellant, one of the male agnatic relations of the deceased and one of his reversioners in the event of intestacy, on the ground that the Will put forward was never executed by the deceased but was a fabrication and a forgery. The learned District Judge before whom this issue was heard decided in favour of the Appellant. His judgment was reversed by the High Court at Allahabad, exercising appellate jurisdiction, and hence the present appeal.

The Respondent has not been represented before their Lordships, and they have consequently examined with especial care all the evidence in the case, and considered all the objections that could be taken to the Appellant's argument, but they are of the opinion that the judgment of the High Court cannot be supported for reasons with which they will proceed to deal.

The deceased resided in the village of Nizamabad, in the District of Azamgarh. He was about seventy-four years of age at the time of his death, and had for some short time previously been in weak health and afflicted with paralysis. His male agnatic relations who in the event of intestacy would inherit his property, sub-

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ject to the widow's estate, lived with him in the same compound. He had no children, and his other relations were the four sons of his sister, one of whom was Baj Bahadur Singh who had for some twenty-four years before the testator's death kept a druggist's shop at Lucknow. The earliest piece of evidence bearing upon the present dispute is that of a man called Rameshar Prasad, who is head-master of a school at Hardoi.* He stated that at a date which the High Court fixed at the end of December 1914, though the witness himself does not specify the exact time, he was informed orally by a man named Babu Manohar Lal, who was not called as a witness, that Babu Bijai Singh wanted to start a school to teach English, Hindi, and Mathematics, and asked witness to prepare a scheme. Thus he did, and sent it to the deceased, who appears to have acknowledged it, but nothing further took place. The bearing of this evidence upon the dispute is due to the fact that the document under consideration expresses a desire to establish such a school and makes provision for its expenses; but this amounts to no more than that a portion of the Will complied with what appears to have been a former wish of the deceased, a wish which may well have been known to the people who put forward the document. There is no further evidence at all with regard to the matter until the date when the Will was prepared and purports to have been executed. The drawing up of the document was undoubtedly done by one Ram Ratan Lal, and his evidence is that it was prepared on the 25th January. It is stated, however, that it was executed on the following day—the 26th—and it purports to bear the signature of the deceased affixed in the presence of seven witnesses. It is a Will of substantial length. It contains

no reference whatever to the male agnatic relations of the deceased, but begins by a eulogy of his sister's sons. It then provides that a 12-anna share in mauza Khairauti, yielding Rs. 500 a year after payment of the Government revenue, should be dedicated "for meeting the religious expenses incurred in connection with Bari Sanghat situate at Nizamabad, Durbar of Sri Harmandirji situate in the city of Patna, and Bari Sanghat Risham Katra situate in the city of Benares, and the temple at Nizamabad which has been built by my paternal grand-mother." The next provision is for the expenses of a school where education is to be given in English, in the vernacular of the Province, and in the Gurmukhi, by dedicating to this object a mauza yielding a profit of Rs. 1,200 a year. It then declares that the rest of the property should remain in the possession of the widow, with a direction that she should keep any of the nephews—meaning no doubt, those already named—on whom she relies to look after her and the property—and give him one-fourth of the property for his services, the remaining property after her death to be divided equally among the other three nephews, and it concludes with a very specific and detailed account of fifteen items of property. Ram Ratan Lal alleges that no draft was ever made of this Will, but that it was dictated to him by the deceased at one interview beginning at four o'clock on the 25th January, in the presence of Kali Charan and Jageshar, whose names appear as witnesses. There is no erasure or alteration of any kind from beginning to end of the whole document. This is in itself a remarkable fact—that a man stricken with illness, as the deceased was, should have been able to dictate in clear, logical, and even legal form, a complete

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and consecutive account of all his wishes, divided into separate paragraphs, including a specific enumeration of his whole estate, without one single error from beginning to end, is a matter which arrests attention and provokes comment. The proceedings that follow show, in their Lordships' mind, quite clearly that that comment is only too well justified.

According to the Respondent's case, there was no manner of concealment about the Will. It was executed on the morning of the 26th January, in the presence of many people, and attested by seven. It would therefore appear there was every reason why, upon the death of Babu Bijai, the Will would have been found and instantly put forward for probate; but no such proceeding took place. The first step that was taken was an application for the mutation of names with regard to the real estate made on behalf of the widow by Baj Bahadur Singh, who appears throughout as the representative of the widow and who, if the disputed document were genuine, would doubtless be the selected nephew who took one-third of the estate. He asked on her behalf that the property should be changed from the name of the deceased to that of his widow who claimed by inheritance, and he signed the patwari's report, dated 22nd March 1915, which stated that the nature of the transfer was inheritance. To this objection was taken on behalf of the male agnatic relations, who alleged that there was an oral Will, and upon this dispute witnesses were examined. The first witness, who was a grandson of the deceased, supported the widow's application, and said that Babu Bijai died intestate, and that he would have expected to have known had a Will been made. So also did another grandson named Hanuman Prasad. Ram

Ratan Lal was not a witness, but he was aware of the mutation proceedings, and made no reference to the Will; and it was only on the 7th May, when Baj Bahadur Singh was examined, that the Will was, for the first time, mentioned. He then states in cross-examination that the deceased had made a written Will, and bequeathed the whole of the property to his widow. His evidence as then given is as follows:—

"The Musammat has a right on account of her being the widow of the deceased. Babu Bijai Singh has also bequeathed the whole of his property to Musammat Aipna Kunwar under a Will ('wasiat bhī kar daya hai'). I do not know if (this fact) is known to witnesses also. The Will is a written one. It has not been produced. It is not here. It is with the Musammat. The Will was executed in January last. It was executed at Nizamabad, at the house of Bijai Singh. I do not know exactly as to who were present there. I say everything from hearsay. I have been told this by the Musammat. I was not present (at the time of execution of the Will). I have had a cursory view of the Will. I do not know as to who the scribe is; nor do I know the names of the witnesses."

If the Will was, in fact, in existence at this date, and had been seen by Baj Bahadur Singh, it is certainly a most extraordinary fact that he never mentioned it until the hearing; and that then, having seen it (though, as he says, only cursorily), he asserted that it conveyed the whole of the property to the widow, when in truth he was an important beneficiary under its terms.

The Will was not produced in Court, and the mutation proceedings ended by mutation being granted to the widow on the ground of inheritance. An appeal was taken unsuccessfully to the Commissioner of the Board of Revenue, but still the Will was not forthcoming.

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On the 13th September 1915, the Will is for the first time introduced to public notice, on the application then made by Baj Bahadur Singh on behalf of the widow for its admission to probate.

Their Lordships pause here in the recital of the facts, for the purpose of pointing out what is required for proof of a Will. A Will is one of the most solemn documents known to the law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law. In the present instance, no formalities are essential. Proof of the testator's signature is all that is needed; but, in case of doubt or dispute, justice requires that the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect. In the present case, as has been stated, seven witnesses purported to have attested the testator's signature. Their signatures as found on the document are these :—

Ram Kumar Singh.

Bechu Singh.

Ishar Singh, manager of Bari San-ghat, Benares.

Sri Mahant, manager of Makund Singh Akali Sri Harmidar Tukht, Patna.

Jageshar, resident of Surahi.

Mareshri Dut Patak, resident of Jamalpur.

Kali Charan Lonia, resident of Surahi.

One of these—Ram Kumar Singh—is dead. Mareshri was not called; and, indeed, he filed a petition protesting

he had not attested. As he gave no evidence on oath, the statement in his petition cannot be considered, but his absence is serious. Of the three other witnesses, Bechu Singh, Jageshar and Kali Charan, no one was called, and no adequate explanation offered of their absence, although Ram Ratan Lal declared the Will was actually prepared in the presence of the last two, who were consequently the most important witnesses to the alleged transaction, and one of them, Kali Charan, actually supported the application for probate with a statement that he was one of the attesting witnesses. The three witnesses placed before the Court were Ram Ratan Lal, Baba Makund Singh, and Ishar or Parmeshar Singh, the servant of Baba Makund Singh. Ram Ratan Lal's statement has already been mentioned, and to it, it is only necessary to add that, three or four days before the appeal from the Collector's order in the mutation case was to come up for hearing, he wrote a letter in which he sought the good offices of Munshi Bihari Lal, who was one of the officials in the Board of Revenue, in favour of Baj Bahadur Singh, whom he described as his near friend and patriot. The explanation that he gave of these letters is stated by the learned District Judge to be a gross absurdity, and with that criticism their Lordships agree. Although the learned District Judge who tried the case did not say in so many words that he disbelieved Ram Ratan Lal, his judgment can, of course, only have proceeded on the fact that he believed him to be lying, and their Lordships see no reason to differ with this conclusion.

The remaining evidence consists of the two witnesses that have been mentioned, and their introduction into the story is

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certainly remarkable. Nobody knew they were coming, and they had no reason whatever to give of their presence, except that Baba Makund said he had been asked by a letter not produced and by a man since dead to go to the deceased who wished to consult him about a "*wakf*." This was twenty or twenty-five days before the 25th January. They were due at Benares on the 25th January 1915, but they were occupied in Court that day, and it was, therefore, impossible to put them forward for witnesses of a Will executed on the 25th. They say that they attended on the morning of the 26th. They state that they arrived early, they waited in a room facing a *verandah* with other people and affixed their signatures. Baba Makund says that some of the other people there present also affixed their signatures. Parmeshar Singh says no one affixed a signature in his presence except Baba Makund; he adds, however, that Ram Ratan Lal read out the Will but this is not corroborated by Baba Makund, who says the deceased read it, and makes no mention of its being read out by anybody.

The learned Judge who saw them said that he is quite satisfied that these men never were at Bijai Singh's house at all—in other words, he thinks they were telling untruths; and if their evidence is not to be trusted, there was no evidence at all before the Court on which reliance could be placed to prove the execution of the Will. Finally, Baj Bahadur Singh is called, and he gives evidence totally different from that given by him on the mutation proceedings. He asserts that the deceased told him all the conditions of the Will; that shortly after the death, the widow showed him the Will and he read it all through and saw the names of the witnesses, and took the Will from

her on the day of his examination in the mutation proceedings. His explanation is that the earlier evidence was wrongly transcribed by putting the widow's name in place of the deceased as his informant. But comparison of the two statements shows that this explanation is useless as a reason for the discrepancy. This concludes the evidence for the Respondent, and the District Judge rejected it. The High Court in differing from his judgment based their opinion, first on the statement with regard to the proposed establishment of a scheme for a school; and, secondly, on the fact that the applicant widow who put forward the Will was injured by its provisions.

Those considerations lead but a little way towards determining whether the signature was or was not the signature of the dead man; the point about the scheme has been already mentioned, while, so far as the widow's position is concerned, it should be remembered that the whole of the proceedings have been taken on her behalf by Baj Bahadur, who is a beneficiary under the alleged Will, and she has never at any stage of any of the proceedings been personally introduced into the matter. Although Ram Ratan Lal is not regarded by the High Court as a person of character, and his statements are said by them not to be probable, they appear to accept the fact of his oath as to the execution in the face of the disbelief of the Judge who saw the witness. They regard Makund Singh's evidence as trustworthy, and think that the learned Judge disbelieved it on the ground that there was a personal motive involved. That may have influenced the learned Judge, but he was also influenced by the fact that in other proceedings Makund Singh had been guilty of falsehood, and by the inherent improbability of the whole of his

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story, which does not appear to have been sufficiently weighed and considered by the High Court.

The only remaining fact is—and this has caused their Lordships some uneasiness—that the learned Judges of the High Court, one of whom has a knowledge of native writing which their Lordships do not possess, regard the signature as good, having compared it with the undoubted specimens of the testator's writing. The answer to this, however, is, that no forgery is of the least value, unless it closely resembles the real signature, and when witnesses are available to prove that a man actually made a signature, any evidence of a general nature to the effect that the signature appears to be genuine is of little worth in the absence of the material witnesses. Finally, their Lordships are greatly impressed with this fact—that no evidence whatever has been forthcoming to show when this document was found, where it was found, by whom it was found, or why it was that it was kept back until after the claim by the male agnatic relations was made, and the widow's evidence has never been taken nor any explanation offered of her absence. The history of a document such as this is of the most material importance for the purpose of determining its validity, and in the present case this history is a complete blank.

Their Lordships are of opinion that there has been no trustworthy evidence to establish the alleged signature of Babu Bijai Singh. There has been no adequate explanation of why the witnesses were not called who could have proved it, and they are forced to the conclusion that the document is not genuine and that this appeal should be allowed with costs and the judgment of the District

Judge restored. They will humbly advise His Majesty accordingly.

Solicitor: Mr. Edward Delgado for the Appellant.

G. D. M.

Appeal allowed.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

GREAVES, J.

1921,

23, July.

SEWDUTRAI NARSARIA

v.

TATA SONS, LTD.

Indian Arbitration Act (IX of 1899), sec. 10—Power of an umpire to state a special case for opinion of Court, whether compulsory—Interest, if may be awarded, after date of award.

Where in a reference to arbitration under the Indian Arbitration Act, one of the parties asked the umpire to state a special case for the opinion of the Court under sec. 10 of the said Act on the construction of a certain clause in the contract in question and the umpire refused to do so and made his award:

Held—That it was in the discretion of the umpire to refuse to state a special case for the opinion of the Court and to decide the point of law himself and that his refusal did not amount to misconduct.

Sec. 7 of the Arbitration Act, 1889, 52 and 53 Vict., c. 49, and Russell on Award and Arbitration, 10th Ed., p. 175, referred to.

Where the umpire awarded damages as also interest thereon until payment:

Held—That he was not entitled to award interest subsequent to the date of the award and that the award should be remitted to him for reconsideration.

In re: MORPHETT (7) followed.

The facts of the case will appear from the judgment.

Mr. B. L. Mitter and Mr. S. N. Banerjee, Counsel, appeared for Sewdutra Narsaria.

(7) 14 L. J. Q. B. 250 (1845).

SEWDUTRAI NARSARIA v. TATA SONS, LTD.

Mr. N. N. Sarkar and Mr. S. M. Bose,
Counsel, appeared for Tata Sons, Ltd

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an application on behalf of Sewdutra Narsaria to set aside an award of an umpire, dated the 11th June 1921, awarding that Messrs. Sewdutra Narsaria should pay to Messrs. Tata Sons a sum of Rs 16,320 together with interest at 8 per cent per annum from the 13th November 1920 until date of payment.

Various grounds are set out in the notice of motion but the following only were urged before me, namely, (1) that the umpire was guilty of misconduct in acting as he did and in refusing to hear evidence and in refusing to state a case for the opinion of the Court, (2) in awarding interest on damages.

So far as (1) is concerned, the real question turns on whether the umpire was bound at the request of Sewdutra Narsaria to state a case for the opinion of the Court on the construction of cl 3 of the contract between the parties. If he was not so bound, then it was open to him to construe the clause for himself and in the view he took of the clause the evidence which the applicants desired to adduce was inadmissible. The submission to arbitration is contained in cl. 17 of the contract and thereby any dispute was to be settled by arbitration as therein mentioned. The power of an umpire under the Indian Arbitration Act to state a special case is contained in sec. 10 of the Act, whereby it is provided that an umpire shall, unless a different intention is expressed, have power to state a special case for the opinion of the Court on any question of law involved. Sec. 7

of the English Act is practically the same and in Russell on Arbitration and Award, 10th Ed, p. 175 it is stated that this power is merely permissive and enabling and not compulsory, and reference is made to two cases—*Halloway v. Francis* (1) and *Gibbon v. Parker* (2), decided under sec. 4 of the Common Law Procedure Act, 1854. In *Wood v. Hotham* (3), it was held that a clause giving an arbitrator liberty, at the request of the parties, to raise any point of law for the opinion of the Court was merely enabling and not compulsory and that it did not involve the obligation to state a case *Miller v. Shuttleworth* (4) is to the same effect as also *Baguley v. Markwick* (5). The English Act contains a section (sec. 19) which is not in the Indian Act, empowering an arbitrator or umpire at any stage of the proceeding to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference and the section further provides that he shall do so if directed by the Court. Under this section if the umpire, when asked by a party to the reference to state a special case, refuses, he is bound at the request of the party asking for the special case to be stated to give time to enable the party to apply to the Court and if he refuses to do so, he is guilty of misconduct. In the absence of such a clause as cl. 19, the party, who asks the umpire to state a special case and is refused, should on such refusal apply to the Court forthwith to revoke the submission. If he does not do this, it is, I think, too late to come to the

(1) 9 C. B. N. S. 559 (1861)

(2) 5 L. T. 584 (1862).

(3) 5 M. & W. 874 (1839).

(4) 7 C. B. 105 (1849).

(5) 30 L. J. C. P. 342 (1861).

SEWDUTRAI NARSARIA v. TATA SONS, LTD.

Court when the reference is concluded and an award has been made against him.

In the result I think under the circumstances it was in the discretion of the umpire to refuse to state a special case and to decide the point of law himself, and his refusal does not amount to misconduct.

So far as the award is concerned, there is, I think, on this point no error of law on the face of the award which would justify the interference of the Court.

So far as the second point is concerned, it is stated in Russell *ut supra*, p. 450 that interest may be allowed by an arbitrator in cases where the Court would not give it and reference is made to *In re. Badger* (6), but in *In re. Morphett* (7), it was held that an arbitrator cannot award the payment of interest subsequent to the date of the award unless the submission expressly gave him power to do so. In the present case the arbitrator has awarded Rs. 16,320 as damages together with interest at 8 per cent. from the 13th November 1920 (the date of the breach) until payment. He could of course have awarded as part of the damages an additional sum representing according to computation the interest from 13th November 1920 to the date of his award, treating this as part of the damages although it is not usual to award interest on damages; but thus he has not done and in any case I do not think that he was entitled to award interest after the date of his award, so I remit the matter to the arbitrator in order that he may reconsider his award in the light of these remarks.

No order as to the costs of the motion.

Messrs. Pugh & Co., Solicitors for
Sewdutraï Narsaria

(6) 2 B. & A. 691 (1819).

(7) 14 L. J. Q. B. 259 (1845).

Messrs. Fox and Mondal, Solicitors for
Tata Sons, Ltd.

P. K. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2430 OF 1920.

MOOKERJEE, J.

CHOTZNER, J.

1922,

Heard, 12, July.

Judgment,

13, July.

ANNADA CHARAN SIL

and anr., Defendants,

Appellants,

v.

HARGOBINDA SIL and

ors., Plaintiffs,

Respondents.

Evidence Act (I of 1872), sec. 92, oral evidence to show that the consideration for a conveyance was more than the sum recited in the deed, admissibility of—A party, if competent to prove that he had committed a fraud—A party, if can be permitted to establish a case which is contrary to his pleadings.

In a mortgage suit the Plaintiffs set up a conveyance, the consideration for which was stated in the plaint to be Rs. 3,000. The Defendants alleged that the sale had been effected not for Rs. 3,000 but for Rs. 2,000, and the conveyance, when produced, showed that the consideration was Rs. 2,000. The Plaintiffs thereupon asked for leave to amend the plaint, which being refused, they adduced oral evidence to show that although the conveyance recited the consideration as Rs. 2,000, the actual consideration was Rs. 3,000:

Held—That while want or failure or difference in kind of the consideration may be proved, evidence to vary the amount of consideration in a registered sale-deed is inadmissible. If such a course were permissible the protection afforded by sec. 92 of the Evidence Act would be completely nullified.

ADITYAM JYER v. RAMA KRISHNA JYER
(10) followed.

(10) 1. L. R. 38 Mad. 514 (1913).

ANNADA CHARAN SIL *v.* HARGOBINDA SIL.

AQHAI RAM *v.* RAJA KAZIM HOSSAIN KHAN (11), HANIFUNNISSA *v.* FAIZUNNISSA (12) and GOPAL SINGH *v.* LALOO LALL (13) referred to.

That the Plaintiff could not be permitted to contradict the statement in the conveyance, as thereby he would be permitted to prove that he had violated the law and committed a fraud upon the revenues of the country. A party cannot come into Court with fraud on his lips and ask for a relief, as to such the Courts of justice are not open.

GREGORY *v.* HAWORTH (14) referred to.

Held further—*That the parties should not be permitted to depart from their deeds and to establish a case which is contrary to their pleadings. A recovery, if had, must be secundum allegata and must be grounded upon facts which are averred in the complaint and not upon those which are denied. The determination in a case should be founded upon a case either to be found in the pleadings or intimated in and consistent with the case thereby made.*

ESHEN CHANDRA SINGH *v.* SHAMA CHURN BHUTTO (1), MYLAPORE JYASAWMY MOODLIAR *v.* YEO KAY (2), MALRAJU LAKSHMI VENKAYAMMA ROW *v.* VENKATADRI APPIA ROW (3), NABADIPENDRA MUKERJEE *v.* MADHU SUDAN MANDAL (4) and other cases referred to.

This was an appeal from a decision of W. A. Seaton, Esq., District Judge,

(1) 11 M. L. A. 7 (1906)

(2) L. R. 14 I. A. 168 s. c. I. L. R. 14 Cal. 801 (1887)

(3) 25 C. W. N. 654 s. c. 33 C. L. J. 171 (P. C.) (1920).

(4) 18 C. W. N. 473 (1912)

(11) L. R. 32 I. A. 113; s. c. I. L. R. 27 All. 271; 9 C. W. N. 477 (1906).

(12) I. L. R. 33 All. 340; s. c. 15 C. W. N. 531 (P. C.) (1911).

(13) 10 C. L. J. 27 (1909).

(14) 25 California 622 at p. 657.

Chittagonga dated the 8th September 1920, reversing that of Babu Narayan Chandra Ghose, Munsil, Chittagong, dated the 29th November 1919.

The material facts of the case are as follows—The Plaintiffs and the Defendants were partners in a paddy business at Akyab. The plaint stated that the Defendants purchased the shares of the Plaintiffs for Rs. 3,000, of which Rs. 1,500 was paid in cash, Rs. 400 by a boat and for the balance two bonds for Rs. 300 and Rs. 800 were executed. Plaintiffs brought the present suit to enforce the mortgage bond for Rs. 800. The Defendants pleaded that the debt had been satisfied and that the sale had been effected not for Rs. 3,000, but for Rs. 2,000. The conveyance, when produced, showed that the consideration for the sale was Rs. 2,000 as alleged by the Defendants and not Rs. 3,000 as alleged by the Plaintiffs. Thereupon the Plaintiffs asked for leave to amend the plaint, which was, however, refused. When the Plaintiffs failed to obtain an amendment of the plaint, so as to bring their case into harmony with the statement in the conveyance, they adduced evidence in contradiction to the statement in the conveyance, namely, to show by oral evidence that although the conveyance recited the consideration as Rs. 2,000 the actual consideration was Rs. 3,000, and that it was deliberately stated to be Rs. 2,000, because they were unable to procure a stamp-paper of the proper value. The Court of first instance dismissed the suit. Upon appeal the District Judge reversed that decision and decreed the claim in full. Against this decree the Defendants preferred the present second appeal to the High Court.

Babu Chandra Sekhar Sen (with Babus Dwarkanath Ghakrabarty and Pramatha

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Nath Banerjee) for the Appellants.— I submit three questions of law arise in this appeal. *Firstly*, the Plaintiffs ought not to have been permitted to prove a new case at the trial inconsistent with the pleadings. Plaintiffs' case was based on the allegation that the consideration for the sale-deed was Rs. 3,000 but during trial they wanted to prove something else. Refers to *Eshen Chandra Singh v Shama Churn Bhutto* (1). *Secondly*, the Plaintiffs are not entitled to prove by oral evidence that the consideration for the sale-deed was not the amount of Rs. 2,000 as stated in the said deed, but Rs. 3,000. Sec. 92 of the Evidence Act is a bar. No oral evidence is admissible to vary the terms of a registered contract. The price specified in the sale-deed is one of its essential terms. Refers to *Adityam Iyer v. Rama Krishna Iyer* (10). The cases of *Lala Achal Ram v Raja Kazim Hossain Khan* (11) and *Gopal Singh v Laloo Lall* (13) are distinguishable. The last case relates to mode of satisfaction of a debt. The lower Appellate Court erred in law in relying on evidence admitted in contravention of the provisions of sec. 92 of the Evidence Act. *Thirdly*, on the Plaintiffs' own shewing they committed a fraud upon the revenue of the country. A suit based on fraud is not maintainable.

Babu Sarat Chandra Roy Chowdhury (with *Babu Nripendra Nath Das*) for the Respondents.—This appeal is concluded by findings of fact arrived at by the Court of Appeal below. The question raised before the District Judge was as to whether there was payment or not.

The District Judge disbelieved the plea of payment, and that is a finding of fact. The District Judge's decision on the other point was *obiter dictum* and as such no question of law arises in this appeal.

I submit that oral evidence is admissible to explain the terms of a registered contract. The consideration stated in the sale-deed was not the real consideration. This can be proved by oral evidence. Sec. 92 of the Evidence Act is not a bar. Refers to *Gopal Singh v. Laloo Lall* (13). 'If it is permissible to shew that the actual consideration is different from what is mentioned in the deed, I submit oral evidence is permissible to prove what really was the amount of consideration for the sale deed.'

There has been no variance between pleading and proof. Plaintiffs' case at the trial was not inconsistent with the case set up in the plaint. If anyone committed fraud it was the Defendant because generally the stamp duty is paid by the vendee.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in a suit to enforce a mortgage executed by them on the 22nd December 1916 in favour of the Plaintiffs to secure a loan of Rs. 800. The Plaintiffs alleged that nothing had been paid on the mortgage and according to the terms thereof they claimed Rs. 1,071. The Defendants pleaded that the debt had been satisfied and the claim was unfounded. The Court of first instance dismissed the suit, upon appeal the District Judge reversed that decision and decreed the claim in full with interest from the date of suit to the date of judgment. In their plaint

(1) 11 M. I. A. 7 (1885).

(10) I. L. R. 38 Mad. 514 (1913).

(11) L. R. 32 I. A. 113 : s. c. I. L. R. 37 All. 271; 9 C. W. N. 477 (1906).

(13) 10 C. L. J. 27 (1909).

(13) 10 C. L. J. 27 (1909).

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the Plaintiffs allege that the mortgage bond was part of a transaction which took place between the parties on the 22nd December 1916. The Plaintiffs and the Defendants were partners in a paddy business at Akyab. The Defendants, it is alleged, fixed the price of the share of the Plaintiff in the business at Rs. 3,000 and purchased that share for the sum. The Defendants paid Rs. 1,500 in cash, Rs. 400 by a boat and for the balance of Rs. 1,100 executed two bonds for Rs. 300 and Rs. 800 respectively. According to the Plaintiffs, the bond for Rs. 300 has been satisfied, but nothing has been paid on the bond for Rs. 800. The Defendants alleged that the sale had been effected not for Rs. 3,000 but Rs. 2,000, that Rs. 500 had been paid in cash and that for the balance two bonds had been executed for Rs. 300 and Rs. 800 respectively. They further pleaded that both the bonds had been satisfied. The conveyance, when produced, showed that the consideration for the sale was Rs. 2,000 as alleged by the Defendants and not Rs. 3,000 as alleged by the Plaintiffs. Thus placed the Plaintiffs in a situation of considerable embarrassment and they asked for leave to amend the plaint. This application was refused. There was consequently an obvious variance between the pleadings and the proof. If in these circumstances, the Plaintiffs proceeded with their case on the basis mentioned in the plaint, they would contravene a well-known rule of law repeatedly affirmed by the Judicial Committee, by Lord Westbury in *Eshen Chandra Singh v. Shama Churn Bhutto* (1), by Sir Barnes Peacock in *Mylapore Jyasarany Moodhar v. Yeo Kay* (2) and

by Sir Lawrence Jenkins in *Malraju Lakshmi Venkayamma Row v. Venkata-dri Appa Row* (3). The principle is well established, namely, that the determinations in a case should be founded upon a case either to be found in the pleadings or involved in and consistent with the case thereby made; and it has been applied recently in this Court in the case of *Nabadipendra Mukerjee v. Madhusudan Mandal* (4), *W. J. Rees v. John Young* (5), *Gopal Krishna Sil v. Abdul Samad* (6) and *Salish Ch. Ghose v. Kalidasi Das* (7). No doubt, as explained by Viscount Haldane in *Haji Umar Abdur Rahman v. Gustadi Umederi Cooper* (8) and by Lord Dunedin in *Motabhoy Mulla Essabhoy v. Mulp Haridas* (9), the rule should not be applied in an abstract way regardless of the circumstances of the case. But, when the Plaintiffs had failed to obtain an amendment of the plaint so as to bring their case into harmony with the statement in the conveyance, the only course open to them was to make an attempt to adduce evidence in contradiction to the statement in the conveyance, namely, to show by oral evidence that although the conveyance recited the considerations as Rs. 2,000 the actual consideration was Rs. 3,000. Thus they did notwithstanding the protest of the Defendants. Consequently two questions arise, namely, first, whether it was permissible to the Plaintiffs in view of the provisions of

(3) 25 O. W. N. 654: s. c. 83 O. L. J. 171 (P. C.), 1920.

(4) 18 O. W. N. 473 (1912)

(5) 34 O. L. J. 178 (1921)

(6) 34 O. L. J. 319 (1921)

(7) 34 O. L. J. 529 (1921).

(8) 20 O. W. N. 297 (P. C.) (1915).

(9) L. R. 42 I. A. 108: s. c. L. R. 89 Bom. 389; 119 C. W. N. 719 (1915).

(1) 11 M. I. A. 7 (1866).

(2) L. R. 14 I. A. 168: s. c. I. L. R. 14 Cal. 301 (1837).

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sec. 92 of the Evidence Act to contradict the terms of the conveyance, and, secondly, whether it was competent to them to prove that they had committed a fraud upon the revenues of the country.

As regards the first point, it has been pointed out by the Madras High Court in *Adityam Iyer v. Rama Krishna Iyer* (10) that while want or failure or difference in kind of the consideration may be proved, evidence to vary the amount of consideration in a registered sale-deed is inadmissible. This position is not inconsistent with the decisions of the Judicial Committee in *Lala Achal Ram v. Raja Kazim Hossain Khan* (11) and *Hanifunissa v. Faizunissa* (12), which affirmed the proposition that it is open to the parties to prove by oral evidence that the actual consideration was different from what was mentioned in the deed or that there was no consideration for the deed. This view was approved by this Court in the case of *Gopal Singh v. Laloo Lall* (13). There can be little doubt that the view taken by the Madras High Court in *Adityam Iyer v. Rama Krishna* (10) is well-founded on principle. To take an illustration, suppose a mortgage bond had been executed for Rs. 1,000. Would it be competent to the mortgagee who instituted a suit to enforce the security for Rs. 1,000 to prove by oral evidence that the real consideration was not Rs. 1,000 as stated in the bond but Rs. 5,000? If such a course were permissible the protection intended by the legislature to be afforded by the adoption of the rule embodied in sec. 92

of the Evidence Act would be completely nullified.

As regards the second point, there can be no doubt that if the Plaintiffs are permitted to prove their allegation that the conveyance was not for Rs. 2,000 but for Rs. 3,000, they will have to establish that they have committed a fraud upon the revenues of the country. If the conveyance had been for Rs. 3,000, the stamp duty payable would have been Rs. 30. Their allegation is that although the consideration was Rs. 3,000 it was deliberately stated to be Rs. 2,000 because they were unable to procure a stamp-paper of the proper value. This story has been disbelieved by both the Courts below. In such circumstances, if they are now permitted to contradict the statement in the conveyance they would only be permitted to allege that they have violated the law. Under these circumstances the principle applies that a party cannot come into Court with fraud on his lips and ask for a relief, as to such the Courts of justice are not open; see the observations of Sanderson, C. J., in *Gregory v. Haworth* (14), where a similar attempt was made. In the same case, it was pointed out that the parties should not be permitted to depart from these deeds and to establish a case which is contrary to their pleadings. This cannot be allowed without a gross violation of the rule which requires that the allegations of the complaint, the evidence and the findings should correspond in legal intent. The averment, the proof and the finding should harmonise and proceed upon the same theory, each pointing with logical distinctness to the same result. A recovery, if had, must be *secundum allegata* and must be grounded upon facts which are averred in

(10) I. L. R. 38 Mad. 514 (1913).

(11) L. R. 32 I. A. 113; s. c. I. L. R. 27 All. 271; 9 C. W. N. 477 (1905).

(12) I. L. R. 33 All. 340; s. c. 15 C. W. N. 521 (P. C.) (1911).

(13) 10 C. L. J. 27 (1909).

(14) 25 California 622 at p. 667.

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the complaint and not upon those which are denied.

We are consequently of opinion that the case has not been approached from the right point of view by the District Judge. The rights of the parties must be determined on the assumption that the statements in the conveyance are true. The result is that this appeal is allowed, the decree of the District Judge set aside and the case remitted to him for reconsideration. The costs of this appeal will abide the result.

Appeal allowed.

J. N. R.

Case remanded.

H. C. S.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1974 of 1920

C. C. GHOSH, J PANTON, J. 1923, 16, January	SURENDRA NATH SOME and ors., Plain- tiffs, Appellants, v. RAGHUNATH DUTT and ors., Defendants, Respondents.
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Civil Procedure Code (Act V of 1908), Or. 41, rr. 11, 31—Judgment of lower Appellate Court dismissing appeal summarily, what it should contain.

The dismissal of an appeal under Or. 41, r. 11 of the Civil Procedure Code, by a Court whose decision may be subject of an appeal does not relieve the Appellate Court from the necessity of writing a judgment which, however, need not be a long one. But the judgment, whatever it is, should show the points raised, the decision upon those points and the reasons for the decision.

RANI DEKA v. BRAJA NATH SAIKIA (1),
RAKHAI CHUNDER TEWARI v. SATINDRA

(1) I. L. R. 25 Cal. 97 (1897).

DEB RAI (2) and PACHI DASSI v. BALA DAS (3) referred to.

This was an appeal preferred on the 4th of August 1920 against the decree of J. W. Nelson, Esq., Additional District Judge of Howrah in Zillah Hoogly, dated the 28th of July 1920, affirming the decree of Babu Natabehari Ghosh, Munsif, 2nd Court at Howrah, dated the 17th of June 1920.

In the suit out of which this appeal arose, the Plaintiffs alleged that they were the owners of a market and they alleged various acts, by the principal Defendants who had set up a rival market on a neighbouring piece of land and the other Defendants who were assisting them, of interference with and besetting of persons who wanted to come to the Plaintiffs' market for sale of articles of various kinds, thus causing damage to the Plaintiffs who in consequence prayed for damages and injunction. The suit having been dismissed by the trial Court, the Plaintiffs preferred an appeal which was put up by the District Judge for hearing under Or. 41, r. 11 and summarily dismissed. Hence this second appeal.

Babus Ram Chandra Majumdar and Nagendra Nath Ghosh for the Appellants.

Babus Braja Lal Chakrabarty, Harendra Nath Sarbadhikari and Gour Mohan Dutt for the Respondents.

The JUDGMENT OF THE COURT was as follows.—

The judgment of the lower Appellate Court in this case runs as follows:—
“Heard Vakil. The appeal is summarily dismissed.” Although we have heard a brave and courageous argument in support of this judgment, we have no hesitation in coming to the conclusion that the

(2) 5 C. L. J. 349 (1906).

(3) 13 C. W. N. 1031 (1909).

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terms of the judgment are not in accordance with the interpretation which has been placed on Or. 41, r. 11, C. P. C., by this Court [see in this connection the cases of *Rani Deka v. Braja Nath Saikia* (1) and *Rakhal Chunder Tewari v. Satindra Deb Rai* (2) and the judgment of Mr. Justice Richardson in the case of *Pachi Dass v. Balu Das* (3)]. As has been pointed out in these cases the dismissal of an appeal under Or. 41, r. 11, C. P. C., by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment which, however, need not be a long one. But the judgment, whatever it is, should show the points raised, the decision upon those points and the reasons for the decision. In the circumstances, which have happened in this case, we must set aside the decision of the lower Appellate Court, dated the 28th July 1920, and remand the case in order that the appeal before the lower Appellate Court may be disposed of properly and in accordance with law.

Our attention has been drawn to the fact that the appeal to this Court has been abandoned as against Defendant No. 8. The learned Vakil for the Respondents also draws our attention to the fact that Defendants Nos. 3 and 7 are dead. It will be open to the Defendants to take such objections, as they may be advised, when the appeal is re-heard by the lower Appellate Court.

The appeal is allowed and the Appellants are entitled to the costs of this appeal.

N. G.

(1) 1 L. R. 25 Cal. 97 (1897).

(2) 5 C. L. J. 248 (1906).

(3) 18 C. W. N. 1081 (1909).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2929 OF 1920.

CHATTERJEA, J.

CUMING, J.

1922,

Heard, 12 and

13, December.

Judgment,

13, December

ANANDAMOYEE DEBI
and ors., Plaintiffs,
Appellants,

v.

SAUDAMINI DEBYA,
Defendant, Respondent.

Interest at unusual and exorbitant rate under a kabuliyat executed before the passing of the Bengal Tenancy Act, if allowable—Exorbitant interest, if one of the ordinary incidents of tenancy.

In a kabuliyat executed by a raiyat in 1882 before the passing of the Bengal Tenancy Act, there was a stipulation for payment of interest at the rate of 75 per cent. per annum on overdue instalments of rent. The holding was sold for arrears of rent but the sale proclamation did not specify the interest payable on rents in arrears.

Held—That the kabuliyat having been executed before the passing of the Bengal Tenancy Act, the provisions of sec. 67 are not applicable to the case and, as a purchaser at the rent sale, the Defendant purchased it with the ordinary incidents of a tenancy. But a stipulation for payment of interest at an unusual and exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent.

KALI NATH SEN v. TROILAKHYA NATH RAY (1) and DEENDAYAL PRAMANICK v. JUGGESHUR ROY (2) and several other cases referred to.

This was an appeal preferred on the 2nd December 1920 against a decree of M. C. Ghosh, Esq., District Judge,

(1) 1 L. R. 26 Cal. 315; a. c. 8 C. W. N. 194 (1898).

(2) 1 Marsh. 252; 2 Hay 21 (1863).

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Zillah Buckerganj, dated the 25th September 1920, modifying the decree of Babu Charu Chandra Bose, Additional Munsif of Pirojpur, dated the 30th July 1919

The Plaintiffs-Appellants brought a suit for arrears of rent against the Defendant-Respondent, who was a purchaser of the holding at a sale for arrears of rent held at the instance of the landlord. In the *kabuliyat* executed by the original tenant in 1882 before the passing of the Bengal Tenancy Act, there was a stipulation for payment of interest on overdue instalments at the rate of 75 per cent. per annum, and on the strength of that stipulation the landlord claimed interest at that rate on the arrears of rent. The Court of Appeal below held that interest at 75 per cent. was an unusual and exorbitant rate and that it was an unconscionable bargain at its inception. It accordingly allowed simple interest at 12½ per cent. per annum. The Plaintiff thereupon preferred the present second appeal to the High Court.

Dr. Sarat Ch. Basak and *Babu Bepin Ch. Bose* for the Appellants.

Babus Brojopal Chakrabartty and *Susil Kumar Bose* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

The only question involved in this appeal is whether the Plaintiff landlord is entitled to interest on overdue instalments at the rate of 75 per cent. per annum.

The Court of Appeal below has found that interest at 75 per cent. is an unusual and exorbitant rate and that it was an unconscionable bargain at its inception. It accordingly allowed simple interest at 12½ per cent. per annum.

The Plaintiff has appealed to this Court and it is contended that as the *kabuliyat*

was executed in May 1882 before the passing of the Bengal Tenancy Act, the Defendant is liable to pay interest at the rate stipulated in it.

No doubt, the *kabuliyat* having been executed prior to the passing of the Bengal Tenancy Act, the provisions of sec. 67 are not applicable to the case; but the Defendant purchased the holding at a sale for arrears of rent held at the instance of the landlord, the Plaintiff. As a purchaser at the rent sale, the Defendant purchased it with the ordinary incidents of a tenancy.

It was pointed out by Banerji, J., in the case of *Kali Nath Sen v. Trolakhya Nath Ray* (1) that "a stipulation for the payment of interest at an unusual and exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent," and again "the distinction between usual and unusual terms of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy notwithstanding its sale for arrears of rent, and it is a distinction which has been given effect to by this Court in certain cases of which I may refer to the following, namely, *Deendayal Pramanick v. Juggeshur Roy* (2) and *Alim v. Satis Chandra Chaturdhuri* (3) "

On behalf of the Appellant, we have been referred to the case of *Raj Narain Mitter v. Panna Chand Singh* (4), where the auction-purchaser of a *durputni* tenure was held to be bound by the stipulation contained in the *durputni* lease as to the

(1) I. L. R. 26 Cal. 315 at p. 318; s. c. 8 C. W. N. 194 (1899).

(2) 1 Marsh. 252; 2 Hay 21 (1863).

(3) I. L. R. 24 Cal. 37 (1896).

(4) I. L. R. 30 Cal. 213; s. c. 7 C. W. N. 203 (1902).

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payment of interest on arrears of rent, such a stipulation when there is nothing unusual in it being part of an ordinary incident of a tenure. It was also held that the auction sale of a tenancy does not involve any new contract between the auction-purchaser and the landlord—a question upon which an opinion was expressed by one of the Judges (Rampini, J.) in the case of *Kali Nath Sen v. Troilakhya Nath Ray* (1), the other Judge, Banerji, J., expressing no opinion on the point. As stated above, however, in the case of *Raj Narain Mitter v. Panna Chand Singh* (4), the tenancy was a *durputni*, i.e., a permanent tenure and not a raiyati holding and it was upon that ground that Banerji, J., distinguished the cases, *Him v. Satis Chandra Chuturdhurin* (3) and *Kali Nath Sen v. Troilakhya Nath Ray* (1).

It is unnecessary to refer to cases relating to permanent tenures, because the holders of a permanent lease may not be entitled to the indulgent consideration which might be extended to a raiyat. So far as cases governed by the Bengal Tenancy Act are concerned, sec. 179 expressly provides that nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mukarrari* lease on any terms agreed on between him and his tenant.

The learned Pleader for the Appellants also relied upon the cases of *Tiluk Chandra Roy v. Josoda Kumar Roy* (5) and *Madhu Mala v. Alfazuddi Kazi* (6).

These cases no doubt related to raiyati

holdings but the Defendants in both the cases were private purchasers from the original tenant; and apart from the provisions of the Bengal Tenancy Act, they would be bound by the contract in the same way as the original tenant was.

We were also referred to the case of *Abdul Hamud v. Abdul Miji* (7), where the original *kabuliyat* which was executed prior to the passing of the Bengal Tenancy Act provided for interest at the rate of 75 per cent. on overdue instalments and there was subsequently a *solenama* between the landlord and the tenant by which there was some variation of the rent. The question was whether the *solenama* created any new contract of tenancy. It was held that the *solenama* did not create any new contract of tenancy and the Plaintiff was entitled to get interest at the rate stipulated. But there the Defendant was the original tenant and there was no question of a purchase at a sale for arrears of rent at the instance of the landlord.

It is contended by the learned Pleader for the Appellants that no distinction should be drawn between the case of a private purchaser and a purchaser at a rent sale.

But there is a distinction between these two cases. In the case of a private transfer the transferee can and should call for the title deed of the vendor; and if there is a lease providing for interest at a high rate, the purchaser becomes aware of such a contract before his purchase. He therefore purchases with full knowledge of the terms of the lease and he cannot in these circumstances complain that the rate of interest is an exorbitant one. In the case of a rent sale on the other hand the purchaser ordinarily cannot have any knowledge of the terms of

(1) 1 L. R. 26 Cal. 315: s. c. 3 C. W. N. 194 (1899).

(3) 1 L. R. 24 Cal. 87 (1896).

(4) 1 L. R. 30 Cal. 218: s. c. 7 C. W. N. 203 (1902).

(5) 11 C. W. N. 215 (1903).

(6) 18 C. W. N. 982 (1909).

(7) 32 Ind. Cas. 710 (1916).

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the contract between the landlord and the tenant unless the landlord chooses to specify in the sale proclamation any incident of the tenancy or refer to the contract under which the tenancy is held.

In these cases we may observe that there was no such notification by the landlord. Many agricultural tenancies in this country are held without any written contract at all, and if the landlord does not in the sale proclamation refer to any written contract under which, interest at a very high rate is payable, the purchaser has no means of knowing the terms of the contract, and when a holding is put up to sale at the instance of the landlord himself without any such notification, the purchaser may be justified in purchasing the holding on the assumptions that the ordinary rate of interest is payable, interest under the Bengal Tenancy Act being payable at 12½ per cent. and before the passing of the Bengal Tenancy Act at 12 per cent. under Act VIII of 1869.

For reasons stated above we think that the decision of the lower Appellate Court is correct and that the appeal must be dismissed with costs.

J. N. R. *Appeal dismissed with costs.*

(CIVIL) APPELLATE JURISDICTION.

APPEALS FROM ORDERS

Nos. 333 AND 334 OF 1921.

RAJENDRA LAL SAHA,

Decree-holder,

Appellant,

v.

ABDUL KARIM ABU

AHMED GHUZNAVI

CHAUDHURY and ors.,

Judgment-debtors,

Respondents.

CHATTERJEE, J.

CUMING, J.

1922,

18, December.

Limitation Act (IX of 1908), Art. 182—Application for time to cite witnesses, if a step in aid of execution.

The question whether an application is or is not a step in aid of execution must depend upon the circumstances of each case.

Although an application to issue summons or to do some other act necessary for proceeding with the execution case or for removing a bar to the execution proceedings would be a step in aid of execution, an application for time to cite witnesses irrespective of whether the decree-holder does so or not is not a step in aid of execution.

These were appeals against the orders of C. Bartley, Esq., District Judge of Zillah Mymensingh, dated the 30th of July 1921, affirming the orders of Babu Ram Chandra Banerjee, Subordinate Judge, 3rd Court of that District, dated the 21st of February 1921.

The facts of the case will appear from the judgment.

Babus D. N. Chakravarty and Gopal Chandra Das for the Appellant.

Sir B. C. Mitter and Babu Ramgati Sircar for the Respondents.

The JUDGMENT OF THE COURT was as follows.—

These appeals arise out of proceedings in execution of decrees.

The decrees were obtained on the 22nd May 1908 and the 13th June 1908 respectively. It is unnecessary to refer to the previous execution proceedings. The last execution proceedings were started on the 27th November 1916. On the 17th April 1917, the judgment-debtor put in claims which were registered under sec 47, C. P. C. On the next date of hearing (28th April 1917), the decree-holder put in a petition to the following effect:—"Judgment-debtor No. 3 having raised objection to the attachment, it is necessary to

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file written statement and cite witnesses after obtaining copy of the objection. It is accordingly prayed that a month's time may be granted to me, the decree-holder, for adducing evidence against the objections of judgment-debtor No. 3." The case was adjourned to 26th May 1917 along with the miscellaneous cases (the cases under sec 17). On the 26th May 1917, it was again adjourned to 23rd June 1917 and again on that day to 25th June 1917. On the 25th June 1917, the following order was passed:—"The decree-holder's pleader states that he will not prosecute this case any further. The execution case is dismissed for non-prosecution." The miscellaneous cases were dismissed the next day (26th June 1917).

The present application was made on the 26th April 1920 and is *prima facie* barred by limitation. The decree-holder relied upon the petition made by him on the 28th April 1917 for time as constituting a step in aid of execution, and if that is a step in aid of execution, the present application would be in time.

A question was raised whether the application, dated the 28th April 1917 was in the execution cases, or in the objection cases. But both the proceedings were held in the same Court, and the number of both the proceedings appear in the application. The execution cases were ordered to come on for hearing along with the objection cases, and it is accordingly contended that it was necessary to take steps to remove the bar to the execution by adducing evidence to meet the objections raised by the judgment-debtor.

It has been held that an application by the decree-holder to summon witnesses in a proceeding originating in a claimant's application objecting to the attachment of property in execution, is a step in aid of execution. [See *Ali Mohammed v.*

Gur Prosad (1)]. Similarly an application by the decree-holder to summon witnesses for determining the standard of measurement to meet the objections raised by the judgment-debtor to the delivery of possession of certain properties in execution has been held to be a step in aid of execution. [See *Kedar Nath Dey v. Lakhi Kanta Dey* (2)]. It is unnecessary to refer to similar other cases cited before us, because there was no application for adjournment in those cases. The question in this case is whether an application for time to cite witnesses to meet the objections raised by the judgment-debtor, or to do some other act, is a step in aid of execution. The decisions on the point are not uniform. For instance, in the case of *Ibdul Hossain v. Fazlun* (3) an application by the decree-holder stating that he had at the request of the judgment-debtor released some of the properties attached, and asking the Court to postpone the sale, the attachment on the remainder of the property being maintained, was held not to be a step in aid of execution, as the postponement of the sale had the effect of temporarily, at all events, of retarding the execution.

In the case of *Tarak Chandra Sen v. Gyanada Sundari* (4), the learned Judges Petheram, C. J. and Rampini, J., observed as follows:—"The most favourable way in which the position may be described for the decree-holder is to say that the application of the 16th of March 1891 was an application for further time to proceed with the pending execution proceeding, and then the question is whether, if the Court made an order granting the further time asked, such an order is

(1) I. L. R. 5 All. 344 (1888).

(2) 21 C. W. N. 898 (1917).

(3) I. L. R. 20 Cal. 255 (1892).

(4) I. L. R. 25 Cal. 817 (1896).

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a step in aid of execution. It is not necessary to do more than state the proposition to seem that it is not under the Civil Procedure Code. Decrees are executed by the Court on the application of the parties and a step in aid of execution means a step taken by the Court towards executing the decrees. The mere granting of further time to make an application or to deposit money cannot be said to be such a step, as the taking of it does not assist the Court in executing the decree or advance the execution proceeding in any way." In the case of *Kartick Nath Pandey v. Juggernath Ram Marwari* (5), the decree-holder applied for time to procure certain extracts and the next day the Court ordered him to produce the extracts in a day. On the next day, the decree-holder applied for further time which was refused and the execution case was struck off. Subsequently, the decree-holder made an application for review of the order striking off the execution. It was held that the applications for time which did not further the execution of the decree but rather retarded it, were not applications to take steps in aid of execution. The application for review, however, was held to be such an application.

In the case of *Trailakhya Nath Bose v. Jyoti Prokas Nandi* (6), it was held that an application by the decree-holder to postpone a sale not with a view to enable him to bring the property to sale more advantageously for him but upon other grounds is not application to take some steps in aid of execution.

On the other hand, in the case of *Mowar Nursing Doyal Singh v. Mowar Kali Charan Singh* (7), it was held that an ap-

plication for adjournment to enable the decree-holder to adduce evidence of service of notice under sec. 248, C. P. C., is an application made in order to obtain from the Court an order in furtherance of the execution of the decree, and that such an application, even though refused, is a step in aid of execution.

The later cases of this Court which have been cited before us were not cases where any application for time was made and therefore have not much bearing upon the question before us.

In the Bombay High Court, however, in the case of *Haridas v. Vithal Das* (8), an application for time to enable the applicant to obtain copies of decrees and judgment made after presenting a *dar-khast* to execute a decree was held to be a step in aid of execution, dissenting from *Kartick Nath Pandey v. Juggernath Ram Marwari* (5). In *Abdul Kader v. Krishnam* (9), an oral application by decree-holder for an adjournment to enable him to produce records or evidence necessary to effectively conduct the execution proceedings further was held to be an application to get an order in aid of execution.

It will appear therefore that the decisions on the point are not uniform. But we think that the question whether an application is or is not a step in aid of execution, must depend upon the circumstances of each case. In the present case the objections under sec. 47 were filed on the 17th April 1917; and on the 28th April 1917, the decree-holder applied for time for obtaining copies of the objections and citing witnesses. The case was adjourned to 26th May then to the 23rd of June and again to the 25th of June. No written

(5) T. L. R. 27 Cal. 245 (1909)

(6) T. L. R. 30 Cal. 761 (1908)

(7) 14 C. W. N. 436 (1909)

(8) I. L. R. 27 Cal. 335 (1909)

(9) I. L. R. 36 Bom. 1522 (1913)

(9) I. L. R. 36 Mad. 295 (1913)

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statement was necessary to be filed and no witness was, as a matter of fact, cited. On the 25th June, the decree-holder's pleader stated that he would not prosecute the case any further and the execution case was accordingly dismissed for non-prosecution. It became unnecessary therefore to proceed with the objection cases which were disposed of on the next day.

It is not clear whether in the Madras case cited above the decree-holder filed the "encumbrance certificate" for the production of which he applied for adjournment. In the Bombay case the decree-holder did not file the copies for the production of which adjournment was obtained. In the case of *Mowar Nursing Dojral v Mowar Kahi Charan* (7), the application for adjournment to produce evidence of service of notice under sec. 248, C. P. C., was refused by the Court. In all these cases the decree-holder applied for adjournment to produce some evidence which presumably could not be produced at once. In the present case, objections to the execution of the decree were filed on the 17th April, and on the 28th April, the decree-holder filed an application not for summoning witnesses, but for time to cite witnesses.

Although an application to the Court to issue summons or to do some other act necessary for proceeding with the execution case or for removing a bar to the execution proceedings would be a step in aid of execution, we feel some difficulty in holding that an application for time to cite witnesses irrespective of whether the decree-holder does so or not, is a step in aid of execution. It is said that although no witness was cited in the present case the decree-holder on the 28th April intended to do so. The Court of first instance,

however, observed as follows:—"The real object of the decree-holder is to be seen. The decree-holder applied for time but he allowed the execution cases to be dismissed for non-prosecution. So the intention of the decree-holder was to retard the execution and not to take steps in aid of execution as is now argued before us. There was no necessity to file written statement in objection case under sec. 47, C. P. C. Moreover the decree-holders cited no witness and took no steps to produce their witnesses. The result was that the execution cases were dragged for two months more and dismissed for the decree-holders' default.' The lower Appellate Court evidently was also of the same opinion. It says

'In these appeals the application was for time to take copies and to file a statement. Its effect was merely to prolong the proceedings. The decree-holder did not act and was not asking for time to perform an act enjoined either by law or by a specific direction of the Court.'

Without laying down any general rule on the point, we are of opinion having regard to all the circumstances of these cases that the application for time filed by the decree-holder in the present case on the 28th April 1917 did not constitute a step in aid of execution.

It is next contended that the present application should be treated as an application in continuation of the previous application. But this question was not raised in either of the Courts below, and the application in the previous execution case is not before us. Apart from that, in the present application for execution the decree-holder applied not only for attachment and sale of the properties mortgaged, but also for attachment and sale of the other moveable and immovable properties of the judgment-debtor.

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and for the arrest of his person. In these circumstances we are unable to give effect to this contention also.

The appeals must accordingly be dismissed. We make no order as to costs.

S. C. C.

PRIVY COUNCIL.

[APPEAL FROM CHIEF COURT OF THE
PUNJAB.]

LORD DUNEDIN.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

MR. JUSTICE DOFF.

1922,

Heard, 10 and

11, July.

Judgment,

28, July. J

BEHARI LAL-BULAKI

RAM, Appellant,

v.

KUNDAN LAL and

anr., Respondents.

Punjab Courts Act (XIII of 1888), sec. 6—Winding-up of Company incorporated under Act VI of 1882—Assignment of matter by District to Additional District Judge—Additional District Judge's jurisdiction—Costs before the Privy Council.

Where the District Judge of Delhi had assigned to the Additional District Judge of the place all the functions of supervising the liquidation of a Company, the latter acquired under sec. 6 of the Punjab Courts Act, 1888, jurisdiction to pass orders in the matter of the winding-up of the Company.

The successful Appellant was, in the special circumstances of the case, ordered to bear his own costs of the appeal.

This was an appeal from an order of the Chief Court of the Punjab (Shadi Lal, J.), setting aside an order of sale made by the Additional District Judge of Delhi in the winding-up of the Diamond Jubilee Flour Mills.

Under the said order the Appellants were the purchasers of the Flour which they had been in

lessees. The sale of the premises was ordered by the Additional District Judge at a purchase price of Rs. 1,75,000. Objections to the order were made on behalf of creditors on the ground that the price was inadequate.

These objections were overruled by the learned Additional Judge who decided that the price was a fair one having taken into consideration the fact that under the terms of the existing lease no purchaser save the lessees could obtain vacant possession.

From this decision an appeal was made to the Chief Court (Shadi Lal, J.), which set aside the sale order. At the conclusion of his judgment the learned Judge said as follows:—

"Some doubt has been thrown upon the competency of an Additional Judge to exercise the special jurisdiction conferred by the Indian Companies Act, the reason of the doubt being that the statute confers the jurisdiction upon the 'District Court' and does not contemplate an assignment of proceedings by the latter to the Court of an Additional Judge. It is unnecessary to make a pronouncement upon the subject, but it is desirable that the validity of the proceedings should no longer be open to doubt. Accordingly, I order that the proceedings in the liquidation of the Diamond Jubilee Flour Mills Company be hereafter conducted by the District Judge, Delhi."

Mr. L. DeGruyther, K. C. (with him Mr. Abdul Majid) on behalf of the Appellant *ex parte* contended that the sale order was in the interest of all parties and should not have been set aside.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—This is an appeal from an order of the Chief Court of the

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Punjab made in the matter of the winding-up of the Diamond Jubilee Flour Mills Company, and reversing an order of the Additional District Judge at Delhi.

In the course of the proceedings in the Chief Court a point was raised which the Judge thought it unnecessary to decide, but which in their Lordships' view should be decided. It was contended on behalf of the creditor objecting to the order in question, that the Additional District Judge had no jurisdiction; and that all orders made in the winding-up of a Company must be made by the District Judge. Their Lordships think that this is not so.

When this matter began, the Indian Companies Act of 1882 was in force, but as it progressed the existing Act, being the Indian Companies Act, 1913, came into operation. For this purpose, however, the two Acts are so similar that no distinction need be made.

It is not disputed that under the Act the District Court has jurisdiction, the only question is whether that jurisdiction is confined to the District Judge or can be exercised also by an Additional District Judge.

This matter appears to be settled by the Punjab Courts Act, 1888, which by sec. 6 provides as follows:—

“The following sections shall be added to the Punjab Courts Act, 1884, namely:—

75—(1) When the business pending before any Divisional Court consisting of one Judge, or before the Court of any District Judge, requires the aid of an Additional Judge for its speedy disposal, the local Government may appoint to the Court an Additional Divisional Judge or an Additional District Judge, as the case may be.

(2) An Additional Judge so appointed shall discharge any of the functions of a Divisional Judge or District Judge, as the case may be, which the Divisional Judge or District Judge may assign to him, and shall, as regards the discharge of those functions

and subject to the provisions of the next following sub-section, be deemed, for the purposes of this Act, to be a Divisional Judge or District Judge . . .”

There is no doubt that the District Judge had assigned to the Additional District Judge all the functions of supervising this liquidation. He discharged these functions apparently without any objection for a considerable time and made many orders, and no point was taken till this appeal was made at an advanced stage of the liquidation. He had jurisdiction, and the question which remains to be decided is the propriety of the order which he made.

The facts of the case are these. The Company was insolvent, it had as a large secured creditor the Bank of Upper India, which was also in liquidation. The Company was ordered to be wound up on the 31st July 1914. On the 16th September 1916, the official liquidator with the sanction of the Judge let the Mills to the present Appellant, for a term of three years from 1st January 1917, at a rent of Rs. 16,000 per annum. In the lease it was provided that if the lessor at any time proposed to sell he should give a six months' notice, and pay Rs. 5,000 by way of compensation; and if the lessees wanted to put an end to the lease, they could take similar action.

On the 12th June 1917, a notice in accordance with the lease lastly mentioned was given with the sanction of the Court, informing the lessees that it was proposed to sell and giving them notice to quit on the 31st December. When the liquidator of the Bank knew of this, he protested against the action of the liquidator of the Company, who thereupon entered into negotiations with the lessees for a withdrawal of the notice. The latter found themselves in a strong position. Having

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regard to what afterwards happened, it was probably to their interest that the lease should stand. On the other hand, if the lessors were hesitating and did not want to pay the Rs. 5,000 fine, firm action on the part of the lessees might extract very favourable terms. In the end, the liquidator arranged with the lessees that he should be allowed to withdraw the notice upon terms that he gave up his power of terminating the lease, and on certain other terms favourable to the lessees.

The Bank, while welcoming the withdrawal of the notice, protested against any alteration of the terms of the lease; and then the matter came before the Judge. He noted the following order made on the 8th October 1917.—

“It is not my intention to sell the Mills at present. In the present state of the money market it would be a foolish proceeding. Under para 6 of the lease, notice can only be given when there is an intention to sell. There being no intention to sell, the notice already given should be and has to be treated void.”

On the 19th the liquidator of the Company and the lessees came before the Judge, and he, considering the proposal in view of the interests of the Company, agreed with some variation to the terms which the liquidator had provisionally made, the important term being that the liquidator lost his power of putting an end to the lease. For some reason the Judge did not have the order finally drawn up, or the agreement registered, but thought it might wait for a month.

The liquidator of the Bank now changed his view. He had a report from an expert to the effect that no better time than the present could be chosen for the disposal of the property, provided it could be sold free from the incumbrance of occupancy, and he went on to suggest a

sale, and as his suggestion was not accepted, to file a formal petition on 1st January 1918. To this the liquidator of the Company made a reply, and the Judge thereupon made this order on the 21st January —

“I think before I decide definitely as to the sale of the Mills there should be some indication of what price is likely to be realised by the sale of the Mills. Is there likely to be any purchaser? At the same time, I quite realise that the Bank as a secured creditor is not receiving what it should from its security. The income from its security is being diverted to the payment of unsecured creditors, which to me does not appear quite equitable.

“I direct that the official liquidator advertise the sale of the Mills and invite offers. Report in a month.”

The liquidator sent out the advertisement, and various tenders came in, one ultimately going as high as Rs. 2,20,000, but all these tenders were subject to the condition that possession of the Mills should be made over at an early date, and in particular the highest tender required possession within a month “free from all disputes.”

These conditions rendered all the tenders useless. The lessees were under the original lease entitled to six months' notice, under the amended arrangement, they were entitled to stay if they desired till the 1st January 1920. It might be possible to upset the subsequent arrangement as it had never been formally completed, and possibly the order of the Judge, whenever it was drawn up, might be appealed from. But any purchaser wishing to get free from this amended arrangement would see a prospect of certain litigation in front of him.

The business position had either been all along, or had by this time become, different from that which the Judge had conceived it to be, when he put aside the

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idea of a sale altogether. Money might be scarce, but the war had made the importation of machinery into India impracticable, there was a great demand for machinery, and there were likely to be several competitors for the Mills, but only on terms that they could get immediate or early use of the machinery. In this state of things the lessees had got the whip hand. Eventually, the Judge came to this conclusion, which he stated in the judgment of the 28th February as follows :—

“ Looking at the case from all these points of view, I think the best course will be to give the lessees an option of purchase before taking any definite line. Are they prepared to make a reasonable and fair offer for the Mills? If so, I will consider the offer and then decide ”

Thereupon the lessees offered Rs. 1,50,000. The Judge said : “ Make it Rs. 1,75,000,” and they did. Some creditors then said that the property was worth from 2½ to 3 lakhs of rupees, and they would like a public auction. The Judge pointed out that possession could not in any circumstances be given till the expiry of six months, and that it was possible that the possession might be indefinitely postponed if the lessees insisted on their rights, and he adjourned the matter to see whether in that state of things anybody would make a better offer.

On the 15th March he had a further sitting, but no one came forward to make any offer on the terms indicated, and he, therefore, approved and sanctioned the sale to the lessees for Rs. 1,75,000. It is from this order that the appeal was made to the Chief Court.

The learned Judge of the Chief Court in dealing with the case expressed himself in somewhat severe terms as to the unwisdom of the withdrawal of the six months' notice, which would have

enabled a sale at the beginning of 1918, and of the subsequent concession made to the lessees. It was not unreasonable that he should make these comments, but after all, these matters were past cure, and what he had to determine was whether *rebus sic stantibus* the sale to the lessees which the Judge of first instance had effected was the best thing that could be done. He proceeded to complain of the action of the Judge in explaining to possible purchasers the conditions under which they would have to purchase, and said that the mode of explanation was unduly deterrent. But again, in their Lordships' opinion, the learned Judge of the Chief Court failed to face the facts. However unfortunate they were, there they were. No one suggested that it was a mistake to have a sale at all, and if there was to be a sale, it could only be on terms that the purchaser must take the property with all the burdens of the lease, and the further burden of any subsequent rights which the lessees had obtained. If the learned Judge in the Chief Court had put this question before himself, their Lordships think he would never have quashed the decision of the Judge of first instance, and this decision their Lordships think must be restored.

There remains a question which has given their Lordships some trouble, the question of costs. The Appellants, the lessees who had been made parties to the proceedings in the Chief Court, were entitled to come to His Majesty in Council and have the erroneous decision of that Court reversed. The party who procured that erroneous decision was a creditor, or rather, for he also was in liquidation, the receiver of that creditor's estate. He has not appeared to support the order which he obtained, and in an ordinary case he ought to pay the costs of the appeal to

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His Majesty, if there is any estate out of which they could be paid.

But there are special circumstances. The Appellants must have been aware for some time that no appearance was going to be entered for the Respondents, and being in a position to bring on the case *ex parte*, they appear to have greatly delayed before bringing it on. The decision of the Chief Court was dated the 31st July 1918, and this case was not set down for hearing till the 26th May 1922. During almost all that time the Appellants were in the following position. If for commercial reasons it suited them to accept the order of the Chief Court to hold the premises during the remainder of their lease, and then get out of what might by reason of changes in commerce be a bad bargain, they were in a position to do so by abandoning their appeal. If, on the other hand, it suited them, as apparently it has suited them, to re-establish their sale, they had only to bring their case to a hearing.

In these circumstances, there is no hardship in making them bear their costs of the appeal to His Majesty.

Their Lordships will, therefore, humbly recommend His Majesty that this appeal should be allowed, that the order of the Chief Court should be discharged, and that the order of the Additional District Judge at Delhi should be restored, and that there be no costs of this appeal.

Solicitors: Messrs. Ranken, Ford and Chester for the Appellant.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 28 of 1920.

SANDERSON, C. J.

RICHARDSON, J.

1921,

11, July.

RUNG LAL KALOO-

RAM, Appellant,

v.

KEDAR NATH KESRI-

WAL, Respondent.

Indian Arbitration Act (VII of 1918)—Indian Stamp Act (II of 1899), secs. 15, 36 and Sch. I, cl. 5 (c)—Arbitration proceedings—Award made on submission not stamped, whether its validity may be challenged in suit to set aside the award.

Where the Plaintiff and the Defendant submitted their disputes under a contract to arbitration by a document which did not bear any stamp and the arbitrators having made their award in favour of the Defendant, the Plaintiff brought a suit to set aside the same and contended that the award was invalid, inter alia, on the ground that the document containing the submission did not bear any stamp:

Held—That the award was valid and its validity could not be challenged on the ground that the document containing the submission did not bear any stamp.

Per SANDERSON, C. J.—The submission having been admitted in evidence by the arbitrators, it was not open to either of the parties to call in question such admission in the arbitration proceedings on the ground that the submission had not been duly stamped. The award therefore was a valid award and it was not open to the Plaintiff to rely upon the fact that the submission was not stamped for the purpose of showing that the award was invalid.

Per RICHARDSON, J.—Once an instrument is admitted in evidence in any proceeding either under sec. 35 or 36 of the Indian Stamp Act, it is available in that proceeding for all purposes as if it had been properly stamped at the outset. The

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proceeding will go through to a valid termination and cannot afterwards be challenged for want of jurisdiction by reason of non-compliance with the Stamp Act.

Sec. 36 would be entirely nullified if on the conclusion of the proceeding in which the instrument is admitted, the proceeding could be set aside by a separate proceeding initiated by one of the parties on the sole ground that the person having authority to receive evidence had admitted or acted upon an unstamped or insufficiently stamped document.

This was an appeal from the judgment of Mr Justice Ghose, dated the 15th January 1920, passed in the exercise of Original Civil Jurisdiction.

The facts will appear from the following extracts from his Lordship's judgment - -

"The Plaintiff firm and the Defendant firm entered into a contract, dated the 25th August 1919, under which the Plaintiff firm agreed to buy and the Defendant firm agreed to sell 20 bales of grey shirtings at Rs 22-4 per piece on certain terms and conditions mentioned in para. 1 of the plaint. The Plaintiff firm stated that they were ready and willing to take delivery of the goods in terms of the contract but the Defendant firm failed and neglected to deliver the goods as stipulated and thereupon the Plaintiff firm repudiated the contract and treated the same as cancelled. Certain correspondence thereafter passed between the parties or their representatives and on the 5th October 1918, according to the Plaintiff firm, one Luchminarain Singhanian of the firm of Ram Protap Ridcurn and one Bhajanlal Hurlalka of the firm of Bolaram Sewdutroy enquired into the disputes which had arisen between the parties. It appears that on the 5th October 1918 the Plaintiff firm by their representative Runglal and the Defendant

firm by their representative Goberdhone Das Khemkar referred the matters in dispute to the arbitration of the two persons whose names I have just mentioned, namely, Luchminarain Singhanian and Bhajanlal Hurlalka. The reference to arbitration is contained in Ex. A1 which has been tendered in evidence by Mr. Advocate-General's clients. On the same day it appears that the arbitrators heard the representatives of the two firms and made their award which was written on the same sheet of paper in which the reference to arbitration appears and was signed by the arbitrators in the presence of the representatives of the two firms mentioned above. On the 9th December 1918 an award, purporting to be an award of the Marwari Chamber of Commerce, in respect of the disputes which had arisen between the parties was received by the Registrar of this Court

On the 27th December 1918 the present plaint was put on the file by the Plaintiff firm praying for a declaration that the said alleged award, meaning thereby, the award referred to in the plaint, in other words, the award which had been sent to this Court on the 9th December 1918, was in no way binding upon the Plaintiff firm and was void and unenforceable and that the Defendant firm had no right whatsoever under the said alleged award and were not entitled to execute the same and that the said alleged award should be cancelled and adjudged void. The Defendant firm filed their written statement in this matter on the 8th February 1919. Shortly stated, their contentions were, that the matters in dispute between the parties had been referred by the parties to the arbitration of two gentlemen, namely, Luchminarain Singhanian of the firm of Ram Protap Ridcurn and Bhajanlal Hurlalka of the firm of Bola-

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ram Sewdutyoy, who were two of the members of the Marwari Chamber of Commerce and who had been appointed by the Marwari Chamber of Commerce to arbitrate in the matter of disputes relating to transactions in piece goods and that the said Luchminarain Singhanian and Bhajanlal Hurlalka had been authorised to act as arbitrators by a written submission to arbitration signed by the representatives of the Plaintiff firm and the Defendant firm in a book of references to arbitration which was kept in the Nagri language in the Marwari Chamber of Commerce, and that in accordance with the submission to arbitration referred to above, the arbitrators, Luchminarain Singhanian and Bhajanlal Hurlalka decided upon the reference to them and made and published their award on the 5th October 1918 in the presence of the representatives of the parties and that no objection had been taken by either party to the said arbitrators proceeding with the reference of the 5th October 1918 or to any terms of the award which they made and published subsequently. The Defendant firm went on to add in their written statement that in accordance with the practice which obtained in the Marwari Chamber of Commerce, copies of the awards of arbitrators who were members of the Marwari Chamber of Commerce or who had been appointed by the said Chamber of Commerce to decide disputes were delivered on stamp paper and issued by the Marwari Chamber of Commerce under the signature of the Secretary of the Marwari Chamber of Commerce and that in accordance with the said practice, a copy of the award in question was sent to the Registrar of this Court on the 9th December 1918. The Defendant firm further stated in the alternative that the parties, that is to say, the Plaintiff firm and the Defendant firm, had referred to

the said Marwari Chamber of Commerce their disputes and that the said Chamber of Commerce had and has power under their rules to refer the same to persons subordinate to them and that the said disputes could be decided in meetings other than the weekly general meetings of the said Chamber and that in accordance with the practice which obtains in the Marwari Chamber of Commerce, the disputes between the parties had been so decided by the arbitrators who had been appointed by the Marwari Chamber of Commerce to decide disputes as regards transactions in piece goods

* * * * *

On the pleadings before me, the following issues were settled between the parties:—

(1) Did the parties submit their disputes to the arbitration of Luchminarain Singhanian of the firm of Ram Protap Riddicurn and Bhajanlal Hurlalka of the firm of Bolaram Sewdutyoy?

(2) Did the said two persons make and publish their award, dated 5th October 1918?

(3) What relief, if any, is the Plaintiff entitled to?

Mr. Advocate-General appearing for the Plaintiff firm raised a further issue, namely.—Was there a submission to the Marwari Chamber of Commerce and if so, was such submission valid and had the Marwari Chamber of Commerce any jurisdiction to act upon such submission? If there was a valid submission, was the award validly and properly made and is such award binding on the Plaintiff firm?

* * * * *

The Plaintiff firm have not called any evidence before me but have contented themselves by putting in evidence the document which had been signed by the two parties, that is to say, the Plaintiff

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firm and the Defendant firm, and which it was alleged was the submission to arbitration. Under the provisions of Art. (V), sub-cl (2) of the Indian Stamp Act, an agreement to refer matters to arbitration requires a stamp of eight annas. The document which was tendered in evidence by the Plaintiff firm did not bear any such stamp and I held under the provisions of sec 35 of the Indian Stamp Act, that the document could only be tendered in evidence upon payment of the duty with which the same was originally chargeable, namely, a stamp of eight annas, together with a penalty of Rs. 5. That penalty was paid along with the duty and it was thereupon received in evidence in this case. It was contended on behalf of the Plaintiff firm that although the document in question could be received in evidence in manner aforesaid under the provisions of sec 35 of the Indian Stamp Act, still inasmuch as it was a document which had to be stamped and had not been stamped at the time of the reference to arbitration, and at the date when the arbitration was proceeded with, the arbitrators had no jurisdiction whatever to act upon the document, and if the arbitrators had no power to act upon the document which was placed before them, the award made by the arbitrators was invalid and could not be enforced.

With reference to the Plaintiff firm's contention that the arbitrators had no jurisdiction whatsoever to act upon that document the same not having been stamped, and that therefore the award was invalid, I must hold against the Plaintiff firm. The document in question was signed by both parties and I do not think it lies in the mouth of the Plaintiff firm at this stage to raise the question that the arbitrators had no jurisdiction what-

soever. The objection arising from the want of stamp, ought to have been taken before the arbitrators; it not having been taken by the Plaintiff firm before the arbitrators, they are not entitled, in my opinion, at this stage to take that objection and I hold that the arbitrators were competent on the submission before them to decide the questions which had been referred to their arbitration. That being so, the award was certainly valid.

* * * * *

Hon'ble T. C. P. Gibbons, Advocate-General and Mr. S. N. Bannerjee, Counsel, for the Appellant.

Mr. Zorab and Mr. S. C. Bose, Counsel, for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Ghose.

The main object of the suit was to set aside an award which it was alleged by the Plaintiffs was void, unenforceable and in no way binding upon them and they asked that the award should be cancelled.

The facts to which it is necessary for me to refer for the purpose of my judgment are as follows:—The Plaintiffs and the Defendant agreed to submit a dispute about some bales of goods to two persons. The agreement was in writing and it was signed by Rung Lal on behalf of the Plaintiffs and by Goberdhone Khemkar on behalf of the Defendant. The document is set out at p. 24 of the paper-book. It was an informal document but it was not disputed in this Court that it was an agreement to refer the matter in dispute to the arbitration of the two individuals. These two persons made an award, and it was endorsed upon the document which contained the submission to arbitration.

RUNG LAL KALOORAM v. KEDAR NATH KESRIWAL.

It was signed by the two arbitrators. That award was filed in pursuance of the provisions of the Arbitration Act. This suit was brought, as I have already said, for the purpose of having it declared that the award was void.

Several grounds were relied upon in the Court of first instance which have not been relied upon in this Court: and, the only ground upon which the learned Advocate-General has relied in this Court is that the agreement containing the submission to arbitration did not bear any stamp at all, and his argument is that inasmuch as it did not bear a stamp it was not open to the arbitrators to act upon it, that they had no jurisdiction to enter upon the arbitration and consequently had no jurisdiction to make an award; and that upon that ground the learned Judge ought to have decided in favour of the Plaintiffs.

There is one matter to which I ought to refer which to my mind is incidental to the main matter, at the trial the learned Judge insisted upon the document in question being stamped. The learned junior Counsel who was appearing for the Plaintiffs tendered the document as a piece of paper bearing the signatures of the arbitrators and pointing out that it was not stamped. Then the learned Judge insisted upon one of the parties stamping the document and paying the penalty. The result was that the Plaintiffs under those directions paid the stamp duty and the penalty which amounted in all to Rs. 5-8 annas, the amount of the stamp being 8 annas and the penalty Rs. 5. The learned Advocate-General urged that in this case inasmuch as the Plaintiffs were alleging that the award was invalid by reason of the submission bearing no stamp, the learned Judge ought not to have insisted on the document being

stamped. On this occasion, I do not intend to express any opinion as to whether the learned Judge was right on that point and for the purpose of my judgment I propose to assume that the learned Advocate-General's argument upon that point is correct and to assume that this stamping of the document in the Court before my learned brother Mr Justice Ghouse does not affect the point which he has argued in this Court, namely, that inasmuch as the document containing the submission when presented to the arbitrators did not bear a stamp, they had no jurisdiction to act upon it. The matter depends first upon the provisions of the Arbitration Act and from those provisions it is clear that "submission" means a "written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

In this case there is no dispute that there was a written agreement signed by or on behalf of the parties concerned and therefore so far as the Arbitration Act is concerned there was a good submission to arbitration upon which the arbitrators were entitled to act and to make an award. But it is in respect of the provisions of the Stamp Act that the point arises. By sec. 35 of the Indian Stamp Act, it is provided "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped."

The first thing to notice about this section in my judgment, is that there are two classes of persons indicated by this section—first a person having by law or consent of parties authority to receive evidence and secondly a public officer.

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We are not concerned in this case with "public officer;" we are concerned with a person or persons having by consent of parties authority to receive evidence. The instrument in this case is not stamped and therefore under the provisions of the first part of sec. 35 it should not have been admitted in evidence by a person having authority to receive evidence or acted upon by such person. That section seems to me to imply that the instrument which is referred to in the section is one which in the first instance is to be received in evidence before it can be acted upon. Whether that be so or not, in my judgment in this case the submission to arbitration must have been put in evidence before the arbitrators, before they could act upon it. The submission—the agreement in writing—must be produced to the arbitrator and if they are not satisfied as to the execution of the document, it is necessary that the execution of the document should be proved before the arbitrators. In any event it seems to me clear that the submission in this case was a document which had to be put in evidence before the arbitrators. It was then duty to see that it was properly stamped. It was not stamped. If an objection had been taken at the time then the proviso to sec. 35 would have come into force, and upon payment of the stamp duty and the penalty the instrument would have been admitted in evidence in accordance with the proviso. That was not done. It is necessary therefore to refer to another section. Sec. 36—which provides, "where an instrument has been admitted in evidence, such admission shall not, except as provided in sec. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped." The provisions of sec. 61 are not material to the question which arises

in this case. The submission was, in my judgment, admitted in evidence by the arbitrators, and having been admitted in evidence by the arbitrators, it was not open to either of the parties to call in question such admission in the arbitration proceedings on the ground that the submission had not been duly stamped. The award, therefore, which was made upon the submission, was in my judgment a valid award. It was filed in accordance with the provisions of the Arbitration Act. In my judgment it is not now open to the Plaintiffs who are parties to the submission, and who thereby agreed to the matter being referred to the arbitration of the two arbitrators and who raised no objection to the agreement, containing the submission, being admitted in evidence to rely upon the fact that the submission bore no stamp, for the purpose of showing that the award was invalid. It has to be remembered that the provisions in the Stamp Act were passed for the purpose of protecting the revenue and, in my judgment, the words, which have been relied upon by the learned Advocate-General of sec. 35, under the circumstances of this case and having regard to the proviso of sec. 35 and the terms of sec. 36 of the Stamp Act, have not the effect of rendering the award invalid.

For these reasons in my judgment the learned Judge's decision should be upheld and this appeal should be dismissed with costs.

RICHARDSON, J.—I agree. The submission to arbitration (perfectly good submission under the Indian Arbitration Act, 1899) was chargeable under the Indian Stamp Act, 1899, with a duty of eight annas and should have been stamped accordingly. It bore no stamp. Nevertheless it was received and acted upon by the arbitrators. Apparently, their attention

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was not drawn to the point. They made their award. The award was filed in Court and became enforceable as a decree under sec. 15 of the Arbitration Act.

The learned Advocate-General has contended that the submission was invalid because it was not duly stamped. He argues that the proceedings founded on the submission are thereby rendered wholly void and of no effect and that the Plaintiffs are entitled to succeed in this suit on that ground alone.

To my mind, however, the terms of sec. 36 of the Stamp Act are sufficient to show, that no such inconvenient result is entailed and that the want of a stamp did not go to the jurisdiction of the arbitrator to make an award.

A failure to comply with the Stamp Act may doubtless entail a penalty under that Act. The nature and extent of any such penalty must depend on the relevant provisions according to their true construction. Speaking generally, however, the object of the legislature appears to have been to secure the public revenue so far as it is reasonably practicable to do so, and *prima facie* it would seem hardly reasonable that the whole of possibly expensive proceedings should be vitiated and thrown away by the want, as in this case, of an eight anna stamp.

The learned Advocate-General relies on the imperative language of sec. 35. If that section stood alone, there might be more force in the argument addressed to us but sec. 35 must be read with sec. 36.

Sec. 35 seems to be based upon the assumption that every "person having by law or consent of parties authority to receive evidence" knows the law and will apply it. On that assumption, such person is given no discretion. He is not to admit in evidence for any purpose or to act upon any instrument chargeable with

duty unless such instrument is duly stamped. That prohibition is subject to certain provisos, among which is proviso (a) Under that proviso, if the duty is paid, together with the prescribed penalty, the instrument is to be admitted "subject to all just exceptions." I am not very clear as to the meaning of the last words but nothing turns upon them in the present connection.

In the present case, if the arbitrators had known the law and had insisted, as they should have done, on the duty and penalty being paid, nothing could have been said and all would have been well. The deficiency in the document would have been cured.

But while proviso (a) affords an easy escape from the consequences of the prohibition in the first part of sec. 35, the prohibition is none the less on that account definite and positive. An imperative duty is apparently imposed on those who have authority to receive evidence, and if sec. 35 stood by itself, there might well be a question what the result would be if the duty were not observed. At this point, however, the effect of sec. 36 has to be considered.

The legislature, as I understand the matter, did not forget that those who have authority to receive evidence might sometimes be ignorant of, or inattentive to, the requirements of the Stamp Law, or that difficult and doubtful questions might arise as to the amount of duty chargeable. Such cases are met by sec. 36, under which "where an instrument has been admitted in evidence"—that is where the instrument has been admitted in fact, whether in total or partial neglect of the provisions of sec. 35—"such admission shall except as provided in sec. 61, be called in question at any stage of the same

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suit or proceeding on the ground that the instrument has not been duly stamped."

Under that provision if any penalty is to be exacted, it can only be exacted under sec. 61. The revenue is then protected, so far as it is protected, by that section.

In my opinion, once an instrument is admitted in evidence in any proceeding, either under sec. 35 or under sec. 36, it is available in that proceeding for all purposes as if it had been properly stamped from the outset. The proceeding will go through to a valid termination and cannot afterwards be challenged for want of jurisdiction merely by reason of non-compliance with the Stamp Act.

Sec. 36 would be entirely nullified if on the conclusion of the proceeding in which the instrument is admitted, the proceeding could be set aside by a separate proceeding initiated by one of the parties on the sole ground that the person having authority to receive evidence had admitted or acted upon an unstamped or insufficiently stamped instrument.

Reading secs. 35 and 36 together and with the other provisions in Chap. IV of the Act, under the heading "Instruments not duly stamped," I come to the conclusion that the legislature did not intend that the admission of an instrument not duly stamped should go to the jurisdiction of the Judge or other person admitting it. To my mind, the language of the Act, fairly interpreted, does not lead to that result but indicates the contrary. The revenue from stamps is sufficiently protected in other ways.

In the present suit, the learned Judge acted under sec. 35, proviso (a) and by his direction the Plaintiff paid the prescribed penalty. The present suit cannot, I think, be regarded as a subsequent stage of the proceeding before the arbitrators, but it is not necessary now to consider

whether the learned Judge was right in acting under sec. 35, or whether, if so, he was right in making the Plaintiff pay the penalty. If the section applies, possibly the Defendant who relied on the submission should have paid the penalty rather than the Plaintiff who seeks to set aside the arbitration. It is not in the view I take necessary to decide any such question or to consider whether there is any other provision in the Act under which the learned Judge might more appropriately have proceeded.

Assuming, however, that the learned Judge was at liberty to deal with the document as he did under sec. 35 (a), then without deciding the point I should be disposed to say that the document, having been admitted in the proceeding before him, could not be challenged in that proceeding for want of the proper stamp and for the purpose of that proceeding would fall to be treated as if it had been duly stamped from the outset. This, if correct, would be an additional reason why the appeal should fail.

I agree that the appeal should be dismissed with costs.

Mr. J. K. Sarcar, Solicitor for the Appellant.

Messrs. O. C. Ganguly & Co., Solicitors for the Respondent.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2677 of 1920.

CHATTERJEA, J.

CUMING, J.

1922,

Heard,

6, December.

1923,

Judgment,

26, January.

MAHENDRA NATH BOSE

and ors., Defendants,

Appellants,

v.

ABINAS CHANDRA BOSE,

Plaintiff, Respondent.

Suit for cesses—Heir of reversioner of a Hindu widow joining her in granting a lease, but pre-deceasing her, if a necessary party—Suit, if maintainable against some of the heirs of the original tenants—Whether such suit is one for rent or for damages—Previous rent suit between the parties, whether bars suit for omitted cesses under Or. 2, r. 2, Civil Procedure Code (Act V of 1908)

Where a Hindu widow granted a lease of her property in which her presumptive reversioners joined, and one of them pre-deceased her—

Held—That the deceased had merely a contingent interest, and as he pre-deceased the widow, he had no right at the time of his death which could devolve upon his heir, and the suit was properly instituted by the surviving reversioner on whom the property devolved after her death.

Where a suit for cesses was instituted against the heirs of the original lessees, some of whom were not properly served:

Held—That so far as the original lessees were concerned, their liability for rent was, in the absence of a contract to the contrary, joint and several, having regard to the provisions of sec 43 of the Contract Act, and any one of them could be sued for the entire rent.

JOGENDRA NATH ROY v. NAGENDRA NARAIN NANDI (1), RAMESWAR SINGH v. JAIDEV JHA (2), KRISHNADAS ROY v. KALI-

(1) 11 C. W. N. 1026 (1907).

(2) 12 C. L. J. 591 (1910).

TARA CHAUDHURANI (3) and BERADAR SINGH v. BACHA MAHTO (4) followed.

KASI KINKAR SEN v. SATYENDRA NATH BHADRA (5) distinguished.

Quere.—Whether upon the death of the original contracting party a suit can be maintained against some only of the heirs.

KASI KINKAR SEN v. SATYENDRA NATH BHADRA (5), SHEIKH SAHAD v. KRISHNA MOHAN BASAK (7), SIBA KRISHNA v. JAGAT CHANDRA (8), LALIT MOHAN SINGH ROY v. HARAN CHANDRA KHAMRUI (9), SUBASHI DASSI v. RAJ KRISHNA ROY (11), MEAJAN MANDAL v. JOGENDRA NATH DE (12) and CHAMATKARINI DAS v. TRIGUNA NATH SARDAR (10) reviewed.

Held further—That a suit for cesses was maintainable against all the heirs of one of the original lessees, although the heirs of the other original lessees were not properly made parties.

Where the lessees agreed to pay all cesses but failed to pay, and the same was realised from the lessor, and in a previous suit for rent between the parties the claim for cesses was not included and subsequently a suit for recovery of cesses was brought against the lessees.

Held—That the lessor was entitled to claim cesses as damages and the suit was not barred under Or. 2, r. 2, C. P. C.

This was an appeal against the decree of Amrita Lal Mukerji, Esq., District Judge of Zillah Nadia, dated the 6th of August 1920, modifying the decree of Babu Hem Chandra Bose, Munsif of Meherpur, dated the 21st of July 1919.

(3) 22 C. W. N. 289 (1917).

(4) 5 P. L. J. 32 (1919).

(5) 15 C. W. N. 191; s. c. 12 C. L. J. 642 (1910).

(7) 24 C. L. J. 371 (1916).

(8) 45 Ind. Cas. 732 (1918).

(9) 36 Ind. Cas. 243 (1916).

(10) 17 C. W. N. 333 (1918).

(11) 23 C. W. N. xxvii (1918).

(12) 63 Ind. Cas. 949 (1920).

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The appeal arose out of a suit brought by Aghore Nath Bose for realisation of road cess and public work cess of certain lands for the years 1916-17 and 1917-18 against Mahendra Nath Bose and nine others, the heirs of three original tenants of the land. The lands belonged to one Kshantakali who in 1276 B. S. made a permanent *mourashi* settlement of 5 annas share of zemindari right with her brothers, Bidhubhushan, Matilal and Ramlal. The then presumptive reversioners, Brojogopal Sarkar and Aghore Nath, the Plaintiff joined in the settlement. The lease stated that the Defendants were to pay revenue and cesses. Brojogopal, one of the presumptive reversioners, died in 1313 B. S.; and, on the death of Kshantakali in 1322 B. S., the property devolved on Aghore Nath Bose alone. The predecessors of the Defendants, the original tenants, paid revenue and cesses duly. But from 1916-17 the Defendants, after the death of the original tenants, their predecessors-in-interest, paid only revenue, but no cesses; and cesses for 1916-17 and 1917-18 were realised from the Plaintiff by certificate. The Plaintiff thereupon brought this suit for realisation of the said cesses from the Defendants. The defence *inter alia* was that the suit was not maintainable by Aghore Nath alone in the absence of Brojogopal's heirs, that the Defendants were not liable to pay Road and Public Works Cesses under the lease, that cess being rent the Plaintiff's suit was barred under Or. 2, r. 2, C. P. C., by reason of a previous suit for rent brought by him in which the claim for cess was not included.

The Court of first instance decreed the Plaintiff's suit in full against all the Defendants. On appeal, the only point urged was that the suit could not proceed

as all interested persons had not been made parties and that the Plaintiff's suit was barred by Or. 2, r. 2, C. P. C. The District Judge held that of the two heirs of Matilal, Defendant No. 2 was not properly represented and, of the six heirs of Ramlal, two, *viz.*, Defendants Nos. 9 and 10 had not been properly served, and decreed the Plaintiff's suit as against the other seven Defendants. These seven Defendants preferred this Second Appeal to the High Court.

Babu Piyari Mohon Chatterjee for the Appellants contended.—

1st.—That the suit by the Plaintiff in the absence of his co-sharer, the heir of Brojogopal was not maintainable.

2nd.—That the suit against some of the heirs of the original tenants was not maintainable. *Kasi Kinkar v. Satyendra* (5) and *Barendra v. Aghore* (13).

3rd.—That the suit was barred by Or. 2, r. 2 of the Code of Civil Procedure, cess being rent and the Plaintiff had previously brought a suit for arrears of rent without including the claim for cess; cited *Basanta v. Asutosh* (11) and *Barendra v. Aghore* (13). Sec. 47, Cess Act. Sec. 3, Bengal Tenancy Act.

4th.—That the Plaintiff being registered only in respect of 4 as. 2 gandas share, he is not entitled to anything in excess of that share.

Babu Mrityunjay Chattopadhyay for the Respondent

1st.—Brojogopal who had only a contingent interest in the property having predeceased Kshantakali, no interest in the property devolved on him and his heir was not a necessary party.

2nd.—In this case the original con-

(5) 15 O. W. N. 191; s. c. 12 C. L. J. 642 (1910).

(11) 25 O. W. N. 525 (1920).

(13) 1 L. L. 27 Cal. 97 (1899).

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tractors were three in number and they were all dead. The liability of the original contractors was joint and several. Sec. 43, Indian Contract Act. As between the heirs of the original tenants also the liability was joint and several, because they inherited the liability of their predecessors-in-interest. Cited *Jay Govindo v. Manmatha* (15), *Jogendra v. Nagendra* (1), *Rameswar Singh v. Jaidev* (2), *Krishnadas v. Kalitara* (3), *Subashi v. Raj Krishna* (11), *Meagan v. Jogendra* (12) *Kasi Kinkar's case* (5) and *Sheikh Sahad's case* (7) are distinguishable, inasmuch as those were cases of one original promisor whose interest had devolved on several who were not all made parties. At any rate, in this case, the interest of Bidhubhushan, one of the original promisors or tenants, was fully represented by Defendants Nos 3 and 4 against whom I am entitled to a money-decree. See observations of Jenkins, C. J., in *Chamatkarini v. Triquna* (10), also *Lalit Mohan v. Haran Chandra* (9), observations of Richardson, J., in *Krishnadas v. Kalitara* (3) and *Benadar Singh v. Bacha Mahto* (4). In *Barendra v. Aghore* (13), the attention of their Lordships does not seem to have been drawn to the fact that the original promisors or tenants were more than one.

3rd.—The suit is not for rent: but for

damages and is therefore not barred by Or. 2, r. 2 of the Code of Civil Procedure. Cited *Harendra Nath v. Kumar Nath* (16) and *Jatindra Mohun v. Jarao Kumari* (17).

4th.—This point was not taken before the lower Appellate Court.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for recovery of cesses in respect of a *mourashi mokurani* tenure upon a *kabuliyat*.

It appears that one Kshantakali Dasi who had inherited certain properties from her son, together with the presumptive reversioners, Brojogopal and Aghorenath, granted a *mourashi mokurani* lease of the property to three persons, Bidhubhushan Bose, Ramlal Bose and Matilal Bose on the 13th Jeyth 1276 B. S. The lessees were to pay the Government revenue on behalf of the lessors and credit a portion of the rent in repayment of the debt due to them by Kshantakali under a *kistbandi*, and pay the net profit, viz., Rs. 300, to Kshantakali for her life, and after her death to the reversionary heirs, Brojogopal and Aghorenath. The lessees undertook to pay the Dak peon's salary and agreed that if in future any *anka* (cesses) like Dak peon's salary be imposed, the lessees would pay the same and the lessors would have no connection therewith.

Brojogopal predeceased Kshantakali and after her death the property devolved upon Aghorenath. The lessees failed to pay the cesses, and the Collector realised the same from Aghorenath (the original Plaintiff) who thereupon brought the suit out of which this appeal arises to recover the cesses from the Defendants who are

- (1) 11 C. W. N. 1026 (1907)
- (2) 12 C. L. J. 591 (1910)
- (3) 22 C. W. N. 289 (1917)
- (4) 5 P. L. J. 32 (1919)
- (5) 15 C. W. N. 191; s. c. 12 C. L. J. 642 (1910)
- (7) 24 C. L. J. 371 (1916)
- (9) 36 Ind. Cas. 243 (1916)
- (10) 17 C. W. N. 833 (1913)
- (11) 23 C. W. N. xxvii (1918)
- (12) 63 Ind. Cas. 949 (1920)
- (13) 25 C. W. N. 525 (1920)
- (15) I. L. R. 33 Cal. 580 (1906)

(16) I. L. R. 32 Cal. 169 (1904)

(17) I. L. R. 33 Cal. 140; s. c. 10 C. W. N. 201 (P. O.) (1905)

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the heirs of the original lessees. Three of them, however, were not properly served with summons.

The defence was that the heir of Brojogopal Bose was a necessary party to the suit, that the Defendants were not liable under the lease to pay cesses to the Collector nor to the Plaintiff under the Cess Act, and that the suit was barred under Or 2, r 2 of the Civil Procedure Code.

The Court of first instance overruled the contentions of the Defendants and decreed the suit. On appeal that decree was set aside with respect to some of the Defendants only, *viz*, Pasupati, Probodh and Nanigopal. The remaining Defendants have appealed to this Court.

The first contention in the appeal is that the present suit by Aghore (and on his death by his son) alone is not maintainable in the absence of the heir of Brojogopal. It is urged that although Brojogopal predeceased Kshantakali, he had a vested interest in the property which devolved upon his heir. This contention was not raised in the lower Appellate Court. It is contended that the question arises upon the lease itself and was raised in the Court of first instance. But although Brojogopal as a presumptive reversionary heir joined in the lease, he had merely a contingent interest, his right was contingent upon his surviving Kshantakali, and as he predeceased the lady, he had no right at the time of his death which could devolve upon his heir. Aghore Bose survived the lady and the suit therefore was properly instituted by him alone.

The next contention is that the suit cannot be maintained against some only of the heirs of the original tenants. The original lessees Bidhubhushan, Ramlal and Matilal are all dead. All the heirs of Bidhubhushan are parties, but some of

the heirs of Ramlal and Matilal are not made parties or not properly served with summons, and the question is whether it is necessary to have all the heirs of the original lessees parties to a suit for rent.

So far as the original lessees are concerned their liability for rent was, in the absence of a contract to the contrary, joint and several, having regard to the provisions of sec 43 of the Contract Act. It has been held in several cases that a landlord may bring a suit for the whole rent of the holding against some of the several joint tenants, see *Jogendra Nath Roy v Nagendra Narain Nandi* (1), *Rameswar Singh v Jaider Jha* (2), *Krishnadas Roy v Kalitara Chaudhurani* (3) and *Beradar Singh v Bacha Mahto* (4). In all these cases the suit was against some of the original tenants who entered into the contract of tenancy. In the case of *Kasi Kinkar Sen v. Satyendra Nath Bhadja* (5), an opinion was expressed that whether a promise is joint or joint and several is a question of construction depending upon the intention of the parties to a contract, and that it is not an inflexible rule of law that in every case of a lease to two or more persons jointly there is a promise that each of them will be responsible for the entire rent, so that the landlord may recover the rent against any one of them. The observations were, however, *obiter*, as in that case the persons who were sued were not the original contracting parties but the heirs of the original tenants. So far as the original contracting parties are concerned, the cases cited above show that any one of them may be sued for the entire rent.

(1) 11 C. W. N. 1026 (1907).

(2) 12 C. L. J. 591 (1910).

(3) 22 C. W. N. 289 (1917).

(4) 5 P. L. J. 32 (1919).

(5) 15 C. W. N. 191 : s. c. 12 C. L. J. 842 (1910).

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There is divergence of opinion, however, upon the question whether upon the death of the original contracting party, a suit can be maintained against some only of the heirs. In the case of *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (5) cited above it was held [following the principle stated in the case of *Ahinsa Bibi v Abdul Kader* (6)] that the heirs really constitute one body and cannot be treated necessarily as persons who had made joint and several promises and the suit was accordingly held not to be maintainable. *Kasi Kinkar's* case (5) was followed in *Sheikh Sahad v Krishna Mohan Basak* (7). In *Siba Krishna v Jagat Chandra* (8), it was held by Woodroffe and Smither, JJ., that a landlord cannot maintain a suit for arrears of rent against one of several heirs of a deceased tenant without joining the others as Defendants, and that sec. 43 of the Contract Act has no application to such a case. In the case of *Krishnadas Roy v Kalitara Chaudhurani* (3), one of the Judges (one of the members of this Bench) expressed a similar view. The observation, however, was *obiter*, as it was not a case of heirs of the original tenant, and the other learned Judge (Richardson, J.), reserved his opinion on the point.

On the other hand, in three cases a contrary view has been taken. In *Lalit Mohan Singh Roy v. Haran Chandra Khamrui* (9), it was held that a suit against the heirs of a deceased tenant for arrears of rent which did not accrue due in the life-time of the deceased is

maintainable, even though all the heirs are not made parties to the suit. The case of *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (5) was distinguished on the ground that the rent sued for in that case became due in the life-time of the father and some of the heirs only were sued for the arrears. The learned Judges, Fletcher and Teunon, JJ., followed the case of *Chamatkarini Dasi v. Triguna Nath Sardar* (10) and referred to the observations of Jenkins, C. J., in that case, viz., that the liability of the tenants to pay the rent was contractual and that applying the provisions of sec. 43 of the Indian Contract Act any one or more of the promisors could be compelled to fulfil the promise. The case of *Lalit Mohan Singh Roy v. Haran Chandra Khamrui* (9) again was followed by Fletcher and Walmsley, JJ., in *Subashi Dassi v. Raj Krishna Roy* (11).

In the case of *Chamatkarini Dasi v. Triguna Nath Sardar* (10), one Biswanath was the original tenant, and he was succeeded by his sons Narendra and Gouri and two grandsons by two predeceased sons. The suit for rent was instituted against Narendra alone; the holding was purchased by his wife Chamatkarini, and the question arose whether the sale at which she purchased was a sale for arrears of rent under Chap. XIV of the Bengal Tenancy Act, so as to pass the entire holding when all the tenants of the holding had not been joined as parties to the suit for rent. It was held that all the tenants should be made parties (except where one of a number of tenants is put forward by the rest as their representa-

(3) 22 C. W. N. 249 (1917).

(5) 15 C. W. N. 191; s. c. 12 C. L. J. 642 (1910).

(6) I. L. R. 25 Mad. 28 at p. 35 (1901).

(7) 24 C. L. J. 371 (1916).

(8) 45 Ind. Cas. 732 (1918).

(9) 25 Ind. Cas. 243 (1916).

(5) 15 C. W. N. 191; s. c. 12 C. L. J. 642 (1910).

(10) 28 Ind. Cas. 243 (1916).

(11) 17 C. W. N. 243 (1912).

(11) 23 C. W. N. xxvii (1918).

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tive) in order that the decree and the sale in execution of it may have the important consequences described in Chap. XIV of the Bengal Tenancy Act. That was the actual decision in the case but the learned Chief Justice (Jenkins, C. J.) observed that the liability of the tenants was contractual and under sec. 43 of the Contract Act a landlord may bring a suit for the whole rent of the holding against one of several raiyats for the purposes of a mere money-decree. It is to be observed that the Defendant to the suit himself did not enter into the contract but was one of the heirs of the original tenant. This evidently was not noticed, and it was unnecessary to do so because the question was whether the decree having been obtained against one of the tenants the entire holding passed at the sale. It was immaterial therefore whether the Defendant was one of the original tenants or was one of the heirs of the original tenant.

In the case of *Meagan Mandal v. Jogendra Nath De* (12), the suit for rent was brought against some of the heirs of the sole original tenant and the learned Judges Tennon and Newbould, JJ., held that the cases of *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (5), *Krishnadas Roy v. Kalitara Chaudhurani* (3), *Siba Krishna Sinha v. Jagat Chandra* (8) and *Sheikh Sahad v. Krishna Mohan Basak* (7) were distinguishable (though the grounds of distinction were not stated) and followed the decisions in the cases of *Lalit Mohan Singh Roy v. Haran Chandra Khamrui* (9), *Subashi Dass v. Raj*

Krishna Roy (11) and *Chamatkarini Dasi v. Triguna Nath Sardar* (10). The learned Judges observed that they did so more readily as the Defendants in that case were the tenants in actual occupation of the land; and the rent for which the suit was brought accrued due not in the time of the original tenant but in the time of the Defendants, and also because a decree for rent was obtained against the Defendants for a previous period.

It appears therefore that so far as the heirs of the original tenant are concerned the view taken in the cases of *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (5), *Sheikh Sahad v. Krishna Mohan Basak* (7) and *Siba Krishna Sinha v. Jagat Chandra Talukdar* (8) is in conflict with that taken in *Lalit Mohan Singh Roy v. Haran Chandra Khamrui* (9), *Subashi Dass v. Raj Krishna Ray* (11) and *Meagan Mandal v. Jogendra Nath De* (12).

The observations in the case of *Chamatkarini Dasi v. Triguna Nath Sardar* (10) and those of one of the Judges in *Krishnadas Roy v. Kalitara* (3) are obiter, because as stated above, in the first case the question for consideration was whether a sale in execution of a decree for rent obtained against some only of the tenants passed the entire holding, and in the second the suit was brought against some of the original tenants, and was not a case of a suit against some of the heirs of the tenant.

But the principle upon which the observation by Jenkins, C. J., in the case of

(3) 22 C. W. N. 289 (1917).

(5) 15 C. W. N. 191. s. c. 12 C. L. J. 642 (1910).

(7) 21 C. L. J. 371 (1916).

(8) 45 Ind. Cas. 722 (1918).

(9) 36 Ind. Cas. 243 (1916).

(12) 68 Ind. Cas. 949 (1920).

(3) 22 C. W. N. 289 (1917).

(5) 15 C. W. N. 191. s. c. 12 C. L. J. 642 (1910).

(7) 24 C. L. J. 371 (1916).

(8) 45 Ind. Cas. 722 (1918).

(9) 36 Ind. Cas. 243 (1916).

(10) 17 C. W. N. 833 (1913).

(11) 23 C. W. N. xxvii (1918).

(12) 68 Ind. Cas. 949 (1920).

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Chamatkarini Dasi (10), was based, viz., that the liability of the tenants was contractual and that under sec. 43 of the Contract Act, a landlord may bring a suit for the whole rent of the holding against one of several raiwats for the purposes of a mere money decree—a principle applicable to the original contracting parties—was applied by Fletcher and Teunon, JJ., to the case of heirs of the original contracting party in *Lalit Mohan Singh Roy's* case (9), while in the case of *Siba Krishna Sinha* (8) Woodroffe and Smither, JJ., held that sec. 43 was not applicable to the case of heirs.

The authorities on the point appear to be in an unsettled state, and if it were necessary to decide the question we would have referred the matter to the Full Bench because these questions arise very frequently in rent suits. We think, however, that in the present case it is unnecessary to do so because even assuming that in the case of the heirs of the original tenant the liability is a joint liability and not a joint and several one, in the present case all the heirs of one of the original tenants, viz., Bidhubhusan, are parties to the suit and have been properly served. So far as the original tenants are concerned the decisions are practically agreed [except the *obiter dictum* in *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (5)] that a suit for rent can be maintained against any or some of the tenants having regard to the provisions of sec. 43 of the Contract Act. That being so, Bidhubhusan alone, as one of the original tenants, could have been sued for the entire rent, and all his heirs (assuming that the liability descend-

ed to them jointly) can be similarly sued for the entire rent. In other words, assuming that the liability of the heirs of each tenant is a joint one, a suit for the entire rent can be maintained if all the heirs of one of several tenants are made parties. For instance, if A, B and C jointly take a lease, the liability of each of them is a joint and several liability and assuming that on the death of A, the liability of all his heirs is a joint one, a suit can be maintained against his heirs provided all his heirs are joined. In the same manner as A alone could be sued for the entire rent in his life-time, similarly on the death of B and C, the liability of each of them would devolve upon all the heirs of each, but we do not see why upon the death of A, B and C, the liability should devolve upon all the heirs of A, B and C (taken together) jointly.

It may be said that although where A, B and C jointly take a lease, A alone may be sued for the entire rent having regard to the provisions of sec. 43 of the Contract Act, and it would be hard that the heirs of A alone, who were no parties to the contract, should be made liable for the entire rent. But the right of A in the tenure devolved upon his heirs together with the liability for rent, and as A alone could be sued for the entire rent, his heirs who succeed to his rights in the tenure may be sued for the entire rent.

The Defendants relied upon a judgment of the High Court in another suit for rent between the same parties relating to the same tenure where it was held that all the heirs of the deceased tenant (in singular) should be made parties and the rent suit was dismissed because this was not done. The fact, however, that there was not one but several joint contractors originally does not appear to have been brought to the notice of the learned

(5) 15 C. W. N. 191 : s. c. 12 C. L. J. 642 (1910).

(6) 45 Ind. Cas. 732 (1918).

(9) 36 Ind. Cas. 243 (1916).

(10) 17 C. W. N. 833 (1913).

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Judges who decided that case. That judgment is therefore not binding upon the question now raised before us.

As stated above, all the heirs of Bidhubhushan, one of the original tenants, who alone could have been sued for the entire rent, in his life-time, are parties to the suit. It is not denied that they are in possession, and there is no suggestion that the arrears of rent accrued due in the life-time of the original tenants. The Plaintiff, who is the Respondent before us, is willing to take a decree against the heirs of Bidhubhushan alone which of course will be a mere money-decree. In these circumstances we think that the suit cannot be dismissed as against them.

The next contention is that the suit is barred by the provisions of Or. 2, r. 2 of the Civil Procedure Code. It appears that a suit for rent was previously brought against the Defendants and the claim for cesses was not included in it. But under the contract, the lessees agreed to pay cesses into the Collectorate and it was because the Defendants did not pay the same to the Collector and the Collector realised the cesses from the Plaintiff that the latter became entitled to claim the same as damages against the Defendants. The claim for cesses therefore is not barred under Or. 2, r. 2 of the Civil Procedure Code.

The last contention is that the Plaintiff's name was registered only with respect to four annas and odd share, he is not therefore entitled to recover the entire amount claimed. This objection was however not raised in the Courts below, and we decline to entertain it for the first time in Second Appeal.

The result is that the decree of the Court of Appeal below will be confirmed so far as the heirs of Bidhubhushan Bose are concerned, and the suit will be dis-

missed as against the other Defendants. These other Defendants will, however, pay their own costs in all the Courts. As against the Defendants who are the heirs of Bidhubhushan Bose, the Plaintiff will get costs in all Courts.

S. C. C.

[CIVIL REVISIONAL JURISDICTION]

ORDER No. 732 OF 1920.

MOOKERJEE, C. J.]

FLETCHER, J.

1920,

7, June.

In the matter of

MUKUNDA LAL DHAR,

Petitioner.

Legal Practitioners Act (XVIII of 1879)—Pleader—Application for renewal of certificate after lapse of years—Discharge from Government service, if a ground for refusal to renew the certificate—Suppression of facts relating to the discharge, how far should interfere with the renewal.

A pleader, on getting Government service, applied to the High Court and obtained an order of suspension for the period of his employment under Government. After a number of years, being discharged from the service, he applied for renewal of his certificate, but in the application the facts relating to his discharge were not mentioned. On enquiry by the High Court it was elicited that the applicant had been discharged for his reprehensible conduct, e.g., untruthfulness, in connection with a criminal case:

Held—That the conduct of the applicant in relation to the criminal case, though open to serious comment, was not such as would justify the refusal of his application for renewal of certificate.

That it was incumbent on him to make in his application a full and complete disclosure of the facts which had led to his removal from Government service and as such his conduct was not calculated to inspire absolute confidence. Therefore, although he was excluded from practis-

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ing his profession for all time, the High Court ordered that the certificate should not be renewed at once, but after six months.

In re ABIRUDDIN AHMED (1) referred to.

This was an application for renewal of pleader's certificate.

The facts are briefly as follows:—The Petitioner, Babu Mukunda Lal Dhar, was a pleader, but having obtained an appointment in the police service, he applied to the High Court and obtained an order of suspension during the period of his employment under Government. In January 1920, the Petitioner was discharged from police service and in February 1920, he forwarded an application to the High Court through the District Judge of Dacca for renewal of his certificate. When the application was received in the High Court, an enquiry was made as to the circumstances which had led to the discharge of the Petitioner from the service of Government. It then transpired that the Petitioner, who had been assaulted and stabbed in the house of a woman instituted a complaint, but though there was a conviction, it was held that the Petitioner had told different stories in the complaint and in the witness-box. The Inspector-General of Police, thereupon, held an enquiry, and came to the conclusion that it was not desirable that the Petitioner should continue to hold the responsible position of an Inspector and so his services were dispensed with. When these facts were discovered on enquiry, the High Court ordered the matter to be determined judicially. Thereupon the present application was made.

Babus Mohendra Nath Roy and Suresh Chandra Talukdar for the Petitioner.

(1) I. L. R. 28 Cal. 209; s. c. 15 C. W. N. 357; 12 C. L. J. 625 (1910).

Babu Dwarka Nath Chakravorty, Officiating Senior Government Pleader for the Government.

The JUDGMENT OF THE COURT was as follows:—

This is an application by one Mukunda Lal Dhar for renewal of his certificate as a pleader. He was enrolled as a pleader on the 19th July 1907 and his certificate was renewed in the year following. He subsequently obtained an appointment in the police service under the Eastern Bengal and Assam Administration and on his own application the following order was made by this Court on the 25th January 1909: "The High Court is pleased, under r. 32 of the rules relating to legal practitioners, to suspend him from practising as a pleader for the period during which he may be employed under Government. It will be open to him to apply for permission to resume practice when he relinquishes that employment. Renewal of certificates during the period of suspension is not necessary." On the 9th January 1920, the Petitioner was discharged from police service. On the 17th February 1920 he forwarded an application to this Court through the District Judge of Dacca for renewal of his certificate, so that he might resume practice. In this petition, he stated that he was no longer in Government service. The District Judge thereupon directed him to produce a copy of the final order of discharge from Government service. He produced a copy which stated that he had been discharged as alleged. Thereupon the District Judge recorded the following note on the petition: "Order produced: the application may be forwarded to the High Court, as I see no reason why it should not be allowed."

When the application was received in

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this Court, an enquiry was made as to the circumstances which had led to the discharge of the Petitioner from the service of Government. It then transpired that the Petitioner had been removed from the service of Government because of the part he played in a criminal case. It is not necessary for our present purpose to deal in detail with the circumstances of that case; it is sufficient to state that the Petitioner who had been assaulted and stabbed in the house of a woman was the complainant. On investigation by the Magistrate it was found that the allegation of assault was well founded but that the circumstances under which the event had happened were not as narrated by the complainant in the witness-box. There was consequently a conviction of the accused in that case though not exactly on the basis of the story told by the Petitioner. The Sessions Judge took the same view of the matter. The Inspector-General of Police, thereupon, held an enquiry into the conduct of the Petitioner, and came to the conclusion that it was not desirable that he should continue to hold the responsible position of an Inspector. But in view of the fact that he had done good work during his term of service, the Inspector-General thought that it was not necessary to dismiss him and that it would be sufficient to dispense with his services. When these facts were discovered on enquiry, this Court, in its administrative department, thought it best to inform the Petitioner that the matter must be determined judicially.

Thereupon, the present application was made and although the details of the circumstances which had resulted in his removal from the service were not stated in the petition, it was indicated that he had been removed in connection with the criminal case in question. As regards his

conduct in relation to the criminal case, we are of opinion that though open to serious comment, it has not been proved to be such as would justify the refusal of the present application. The substance of the matter was that there was a divergence between the story outlined by him in the first information and his statement on oath in Court. He has, however, not been prosecuted for perjury, and we cannot say with certainty that his conduct has been such that he should not be allowed to resume his practice.

A different question, however, requires consideration. It is plain that in his first application to this Court for renewal of his certificate he did not state the facts which had led to his removal from Government service. We are of opinion that this was not the proper way to treat this Court and that it was incumbent on him to make a full and complete disclosure as was laid down in the case of *In re Abiruddin* (1). If he apprehended that full disclosure might lead to the refusal of his application, his conduct is clearly reprehensible. On the other hand, if he thought that the Court need not know all his antecedents, his judgment was manifestly wrong. In either view, his conduct is not calculated to inspire absolute confidence. We have anxiously considered the matter in all its aspects and we have come to the conclusion that although we need not exclude him from practising his profession for all time, the certificate should not be renewed at once. We direct that the certificate be renewed with effect from the 1st January 1921.

J. N. R.

(1) I. L. R. 38 Cal. 309; s.c. 15 C. W. N. 357; 12 C. L. J. 625 (1910).

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all of them depose that she was carried off by these two Appellants and others. There is no reason to disbelieve them, and no evidence whatever to support the story given by Derajuddin.

It is argued on his behalf, first, that he acted *bonâ fide* in the interests of the girl and her grandmother; secondly, that the marriage with Shamsher Ali was not legal, and therefore no offence was committed.

I cannot accept either contention.

There is no evidence whatever that Derajuddin acted in concert with, or at the instigation of, his mother. She has not been called as a witness in the case.

As to the legality of the marriage, it is admitted that the father of the girl is dead.

The legal right to give her in marriage was with his relatives, and Majuddin is his nearest relative, and a paternal uncle of the girl.

He gave her in marriage; the ceremony was performed by a *molla* authorised to celebrate marriage; and marriage was registered and a *kabbinnama* drawn up.

In the circumstances, the marriage was a legal one, and the contention fails.

The appeal is accordingly dismissed.

Against the above order the Petitioners obtained the present Rule.

Rabus Bimal Ch. Das Gupta and *Debendranarain Bhattacharjee* for the Petitioners.

The JUDGMENT OF THE COURT was as follows:—

The Petitioners have been convicted of kidnapping a girl named *Sohya Khatun* from lawful guardianship and sentenced under sec. 363, C. P. C., to two months' rigorous imprisonment each. The girl in question is a Mahomedan girl whose

age according to the case for the prosecution is 8 or 9 and according to the defence about 2 years less.

This Rule is granted on the ground that the husband of the girl from whose care she was taken was not her lawful guardian under the Mahomedan law, nor was he proved to have been lawfully entrusted with the care or custody of the minor so as to make the explanation to sec. 361, I P C., applicable. We hold that the Rule must be made absolute on this ground. The husband of a Mahomedan girl who has not attained puberty is not the lawful guardian of her person under the Mahomedan law. The lawful guardian of such a person is ordinarily her mother, and in the present case since the mother is dead the lawful guardian is the mother's mother who is also the mother of the Petitioner Derajuddin. The learned Magistrate in his explanation states that the minor girl was in temporary guardianship of her husband on behalf of his maternal grandmother who was the lawful guardian. But there is no finding in either of the judgments, nor do the facts seem to support the view that the maternal grandmother entrusted the girl's husband with the care or custody of the minor.

That being so, we make this Rule absolute. We set aside the conviction of and the sentence passed on the Petitioners; we acquit them of the charge under sec. 363, I P C., and direct that their bail bonds be discharged.

J N R.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER,
UPPER BURMA.]

VISCOUNT HALDANE.)

VISCOUNT CAVE.

LORD PARMOOR.

MR. JUSTICE DUFF.

1922,

Heard, 4, July.

Judgment, 31, July.]

MA SHWE MYA,

Appellant,

v.

MAUNG HO HNAUNG,

Respondent.

Registration Act (XVI of 1908), secs. 2, 32—Mortgage bond executed in favour of trial Judge to secure performance of decree to be made in appeal—Presentation for registration by clerk of District Judge, if legal—"Representative," if includes agent—Re-registration under Act XV of 1917—Right of objector to validity of registration to add costs of successful appeal to security.

The provisions of sec. 32 of the Registration Act (XVI of 1908) are imperative and, unless a document presented for registration is so presented by one of the persons described in the section, the presentation does not give to the registrar the indispensable foundation of his authority to register it, and the registration, if made, is invalid.

JAMBU PARSHAD v. MUHAMMAD AFTAB ALI KHAN (1) referred to.

The term "representative" in sec. 32 refers to the legal personal representative or (by virtue of sec. 2) the guardian or committee of the person described and does not include a clerk or agent.

The word "representative" is a term of ambiguous meaning and must be construed according to its context. In a certain context it may mean an agent, but in sec. 32 of the Registration Act that meaning is excluded by the circumstance that under para. (c) of the section, the agent is separately referred to and is required to hold a duly authenticated power of attorney, whereas a representative

under the section can present the document for registration in his own right.

Pending an appeal to the Privy Council, the Respondent to the appeal was allowed to execute his decree (which was ultimately reversed) upon furnishing security for the performance of any order which His Majesty in Council might make in the appeal and a mortgage bond was executed in favour of the District Judge of P for this purpose, for the benefit of the Appellant. It was presented for registration by a clerk of the District Court and was registered by the registering officer. The Appellant's objection that the registration was invalid as it was not legally presented for registration having been overruled by the District Judge and the security approved and the High Court having affirmed that order, Appellant appealed to His Majesty in Council:

Held—That the registration of the security bond was invalid and the security was insufficient and that the Appellant would have liberty to apply for re-registration under Act XV of 1917 adding to the security the costs of the appeal to the Judicial Commissioner and to His Majesty in Council on the question of the security.

This was an appeal against two orders, both dated the 12th July 1920, of the Court of the Judicial Commissioner, Upper Burma, affirming two orders, dated the 18th November 1919, and 9th January 1920, respectively, of the District Court, Magwe.

The main question for determination in this appeal was:—(1) Whether the security bond, dated the 8th January 1920, was validly registered under the provisions of the Indian Registration Act of 1908.

facts of the case may be briefly stated as

(1) L. R., 48 I. A. 33; s. c. I. L. R. 37 All.

47; 19 G. W. N. 352 (1914).

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brought a suit, No 8 of 1913, in the District Court of Magwe against the Appellant. This suit was dismissed with costs by the District Court, but on appeal the Court of the Judicial Commissioner, Upper Burma, gave the Respondent a decree, dated the 28th August 1918, against the Appellant for Rs. 34,000 and costs. The Appellant thereupon appealed to His Majesty in Council,* and while his appeal was pending the Respondent applied to the Court of the Judicial Commissioner for execution of the said decree. On the 29th January 1919, the Judicial Commissioner made an order, under the provisions of the Civil Procedure Code, 1908, Or. 45, r. 13 (2) (b), to the following effect: "I allow the decree to be executed only on security for Rs 75,000 in immoveable property being given by the Respondent to the satisfaction of the District Court for the performance of any order which His Majesty in Council may make on the appeal in respect of which a certificate has already been granted by this Court."

When the case went back to the District Court certain persons offered on behalf of the Respondent certain oil wells as security, and on the 21st March 1919, the District Judge, without directing any enquiry as to the prices and the titles of the oil wells but acting on his own information, made an order accepting the same as good and sufficient security. But the Judicial Commissioner set aside that order on the 1st July 1919, and directed the District Judge to make proper enquiry.

On the 18th November 1919, the District Court, after making enquiry as to the values of the oil wells offered as security, made an order accepting the

security. The bond accepted was unregistered, and when notice was issued to the Appellant to show cause why execution should not issue and for settlement of proclamation of sale, the Appellant objected *inter alia* that the bond required registration. The District Court overruled the objection and allowed execution to issue and fixed January 10th, 1920, as the date of the sale of the properties belonging to the Appellant which were attached.

The Appellant thereupon appealed (Civil Miscellaneous Appeal No. 464 of 1919) to the Court of the Judicial Commissioner, Upper Burma, praying also for an interim order to stay the execution pending the decision of the appeal. The Judicial Commissioner, while refusing to stay execution, directed by its order, dated the 22nd December 1919, that "the lower Court must, of course, see that a legally binding bond is executed before execution is allowed to proceed."

On the 6th January 1920, the Appellant applied to the District Court for stay of sale pending the production on the part of the Respondent of a duly registered bond. On the 8th January 1920, the District Court made an order refusing to stay the sale, but directing that the sale should be held as originally fixed on the 10th January, provided the Respondent produced by the next day a duly registered bond.

On the 8th January 1920, ten persons, each purporting to own an oil well, executed the security bond in question mortgaging ten oil wells in all. This document was presented for registration under the Indian Registration Act, No. 16 of 1908, at the office of the Sub-Registrar by one "Maung U on behalf of the Additional District Judge, Yenangyaung." The Sub-Registrar, acting on such pre-

* L. R. 48 I. A. 214 (1921).

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sentation, registered the bond and gave the usual certificate of registration. The following day the Appellant presented a petition to the District Court stating that the bond was not legally presented for registration, and that the registration was not valid, and praying that the sale should not proceed in the absence of a validly registered security bond. But on the 9th January 1920, the District Judge made an order overruling the Appellant's objections and holding that the security bond was valid and binding.

Against the last-mentioned order also the Appellant appealed (Civil First Appeal No. 244 of 1920) to the Court of the Judicial Commissioner, Upper Burma. On the 12th July 1920, the Judicial Commissioner made an order holding that the registration was valid and dismissed the appeal. He also held that the security was sufficient and ordered that the appeal No. 464 of 1919 should also be dismissed.

The Appellant appealed against the last-mentioned orders to His Majesty in Council.

Mr. J. M. Parikh (ex parte) for the Appellant.—Under sec. 32 of the Indian Registration Act XVI of 1908, provision is made for registration of documents, and unless those provisions are strictly carried out the registration is imperfect.

Jambu Parshad v. Muhammad Aftab Ali Khan (1).

The bond in suit was not presented "by some person executing or claiming under the same" nor by the "representative" "assign" or "agent" of such person within the meaning of sec. 32.

Sec. 88 of the Act does not apply to an instrument under which the Additional District Judge is claiming.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVE.—The question arising for determination upon this appeal is whether a certain security bond, dated the 8th January 1920 was validly registered under the Indian Registration Act No. XVI of 1908. Sec. 32 of that Act, so far as it is now material, requires that every document to be registered under the Act "shall be presented at the proper registration office (a) by some person executing or claiming under the same. . . ; or (b) by the representative or assign of such person; or (c) by the agent of such person, representative or assign, duly authorised by power of attorney executed and authenticated in manner hereinafter mentioned." It is established by a series of decisions, of which one of the most recent is *Jambu Parshad v. Muhammad Aftab Ali Khan* (1) that the provisions of the section are imperative, and that, unless a document presented for registration is so presented by one of the persons described in the section, the presentation does not give to the registrar the indispensable foundation of his authority to register it, and the registration, if made, is invalid.

In the present case the document in question—a mortgage bond given by certain persons to the District Judge of Yenangyaung, to secure the performance of any order which His Majesty in Council might make on an appeal then pending in this suit—was presented for registration (as the endorsement shows) to the Sub-Registrar at Yenangyaung "by Maung U on behalf of the Additional District Judge, Yenangyaung," and was registered by the Sub-Registrar who gave the usual certificate of registration.

(1) L. R. 42 I. A. 22; s. c. I. L. R. 37 All. 47; 19 C. W. N. 282 (1914).

(1) L. R. 42 I. A. 22; s. c. I. L. R. 37 All. 47; 19 C. W. N. 282 (1914).

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Maung U appears to have been a clerk of the District Court. On application being made to the District Judge for the approval of this security as sufficient, the Appellant objected that it had not been duly presented for registration under the Act, but the District Judge overruled the objection and approved the security, and his decision was affirmed by the Judicial Commissioner. Hence the present appeal. It should be added that the principal appeal in the suit has since been allowed by His Majesty in Council,* so that the bond, if valid, has become operative; and that the Appellant is desirous, before seeking to enforce the bond against the obligors and the mortgaged property, to have it determined whether the bond is effective or requires re-registration under Act XV of 1917.

The Respondent was not represented on the appeal, and their Lordships have accordingly not heard an argument in support of the validity of the bond; but on the facts brought to their notice they are of opinion that there was no proper presentation under the section, and accordingly that the registration was invalid. The bond was not presented by any person executing or claiming under it. For the District Judge was not present, and, although the obligors appear to have attended for the purpose of admitting execution, they did not join in the presentation. Nor was the document presented by any agent holding a power of attorney. The only question, therefore, is whether Maung U, who appears to have attended and presented the deed on behalf of the District Judge, can be said to have been a "representative" of the District Judge within the meaning of para. (b) of sec. 32. In their Lordships' opinion, he cannot.

The word "representative" is a term of ambiguous meaning, and must be construed according to its context. In ordinary legal use, it denotes the executor or administrator, or sometimes the heir or next of kin. In a certain context it may mean an agent; but in the present case, that meaning is excluded by the circumstance that under para. (c) of the section, the agent is separately referred to and is required to hold a duly authenticated power of attorney. By sec. 88 of the Act, it is provided that Government officers and certain public functionaries need not appear in person or by agent at a registration office in any proceeding connected with the registration of instruments executed by them in their official capacity, and that, in such cases, reference may be made to the office for information; but no similar provision is made for the case of instruments under which any such officer or functionary may claim. Probably the omission is inadvertent; but if so, this must be remedied (if at all) by legislation. Their Lordships' attention has not been called to any enactment which makes a clerk of a Court the representative, in any legal sense, of the Judge. Upon the whole, their Lordships are satisfied that the term "representative" in sec. 32 refers to the legal personal representative or (by virtue of sec. 2) the guardian or committee of the person described and does not include a clerk or agent. The result is that, in their Lordships' opinion, this appeal should be allowed, and it should be declared that the registration of the security bond was invalid, and that the security was insufficient. Upon this declaration being made, the District Judge will, no doubt, give facilities for the re-registration of the bond under Act XV of 1917. The Appellant should be at liberty to add her costs

* L. R. 48 T. A. 214 (1921).

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of the appeal to the Judicial Commissioner on the question of the security, and her costs of this appeal, to her security.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor: Mr Edward Dalgado for the Appellant.

G. D. M. Appeal allowed.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]
SUIT No. 2016 OF 1920.

PAGE, J. } JADAB CHANDRA MITTER
 1923, and ors.
 29, January. v.
 ROMESH CHANDRA BOSE.

Solicitor and client—Solicitor paying fees to counsel under express verbal authority of the client—Fees not allowed on taxation as between solicitor and client—Solicitor, if entitled to retain client's money—Rr. 6, 9, 32, 72, Chap. XXXVI of the Rules and Orders of the High Court, Original Side.

The Plaintiffs instituted the suit to recover a sum of Rs. 4,082 from the Defendant, a solicitor of this Court, who had acted for the Plaintiffs in another suit and had been paid by them various sums of money for the purpose of prosecuting that suit. The Defendant admitted liability for a sum of Rs. 1,724-2-3 which he put into Court. At the trial the dispute was about the sum of Rs. 1,700. The Defendant pleaded that the same was irrecoverable as having been paid by him to counsel engaged in the other suit under instructions from the Plaintiffs, and that he was entitled to retain this sum although the same was in excess of the scale of fees laid down in r. 32, Chap. XXXVI of the Rules and Orders of the High Court, Original Side, and although the whole of it had been disallowed by the Taxing Officer.

Held—That the solicitor having failed to apply successfully to a Judge in Chambers for review of the order of the Taxing Officer under and within the time

specified in r. 12, Chap. XXXVI of the Rules and Orders of the High Court, the order of the Taxing Officer became final and conclusive.

Held also—That a solicitor is entitled to retain only such moneys of his client as, in accordance with the rule of Court, he being an officer of the Court is entitled to claim against him.

SAILENDRA MOHAN DUTT v. DHARANI MOHAN ROY (1) referred to.

The facts are as follows.—On the 14th July 1914 a suit (No. 857 of 1914) was instituted in the High Court, Original Side, wherein the Plaintiffs in this suit and one Rishukesh Mitter were Defendants and they engaged the Defendant Romesh Chandra Bose as their solicitor in the said suit. On the 15th January 1917 the said suit was dismissed with costs. The Defendant's bill of costs was taxed by the Taxing Officer who allowed a sum of Rs. 4,237-1-0 as between party and party. An appeal was preferred against the order dismissing the suit and the Defendant's employment as such attorney for the Plaintiffs continued. The Appellant applied for stay of execution whereupon he was ordered to pay to the Plaintiffs' attorney, the Defendant Romesh Chandra Bose, the sum of Rs. 4,237-1-0 as being the taxed costs in the suit as between party and party on his undertaking not to part with the same pending the determination of the said appeal, and the said sum of Rs. 4,237-1-0 was deposited with the Defendant. The said appeal was subsequently dismissed with costs. Out of the said sum of Rs. 4,237-1-0 a sum of Rs. 400 was paid to the Plaintiffs and the Defendant declined to pay the balance of Rs. 3,837-1-0. The Plaintiffs made payments from time

(1) I. L. R. 49 Cal. 618 : s. c. 28 C. W. N. 870 (1921).

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to time to the extent of Rs. 8,565-18-0 on account of costs of the suit and of the appeal and the total taxed costs of the Defendant came up to Rs. 8,320-3-9 and there was therefore a sum of Rs. 245-10-3 due to the Plaintiffs from the Defendant. The Plaintiffs now sued to recover the said sum of Rs. 3,837-1-0 and the sum of Rs. 245-10-3, i.e., Rs. 4,082-11-3 in all.

The defence was that the Plaintiffs executed in favour of the Defendant certain warrants of attorney whereby they authorised him to do all such acts and to pay all such fees as he should think necessary and they undertook and promised to pay this Defendant all such fees to Counsel and officers of the Court and all such other charges, costs, expenses which he might or should from time to time pay, incur or be entitled to in and about the premises. The Defendant engaged various Counsel to represent the Plaintiffs and he agreed to pay and paid them certain fees under the express authority of the Plaintiffs and after duly informing them that the whole of such fees would not be allowed on taxation. The Defendant included the fees paid to counsel in his bill of costs but the Taxing Officer disallowed a portion of such fees so paid inasmuch as there was no written authority from the Plaintiffs. The Defendant stated that owing to his close relationship with the Plaintiffs, he did not take any written authority from them for the payment of the said fees to Counsel. The Defendant made various other payments on behalf of the Plaintiffs which were not included in the said bills of costs and after giving credit to the Plaintiffs for the various sums received from them there became due to this Defendant a sum of Rs. 2,112-14-9 in respect of the balance of account with the Plaintiffs. The De-

fendant submitted that the said sum of Rs. 4,237-1-0 in his hands was subject to a lien in his favour in respect of the said sum of Rs. 2,112-14-9. The Defendant retained the said sum of Rs. 2,112-14-9 leaving a balance of Rs. 1,724-2-3 which he craved leave to put into Court. The Defendant put the amount into Court after filing the written statement.

At the trial the amount disputed consisted of a sum of Rs. 1,700 which was paid as fees to counsel briefed in the suit and appeal which were over and above the amounts allowed on taxation. These amounts were disallowed by the Taxing Officer as no authority in writing was produced for paying such special fees.

Mr. Langford James (with him *Mr. B. K. Ghosh*) for the Defendant.—A solicitor who has spent money under the instructions of and on behalf of his client is in the position of an ordinary agent and has the common law right to recover such moneys from his client. There is nothing equivalent to the Solicitors Acts in this country. There is nothing in the Legal Practitioners Act, in cl. 9 of the Letters Patent or in the Rules of the High Court to prevent the solicitor from recovering moneys actually paid by him at client's request unless the bill is taxed. There is no rule requiring authority in writing, the rules cited refer to the discretion of the Taxing Officer. The Court is not in any way bound. [*Sailendra Mohan Dutt v. Dharani Mohan Roy* (1)].

Secondly, the attorney is not asking for payment of his bill. It is the client who has come to Court wanting to recover back monies spent at his request.

The Court as a Court of equity is entitled to inquire if the monies were so spent irrespective of the taxation rules.

(1) 1 L. R. 49 Cal. 318; 4 C. 23 O. W. N. 570 (1921).

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The Court could have gone into the matter earlier if an application had been made under r. 32 for leave to allow these special fees. It can still go into it.

In the matter of Thakur Dasee Dasee (2) and *Lumsden v. The Shipcote Land Company* (3) cited.

Mr. Zorab (with him Mr. S. N. Banerjee) for the Plaintiffs contended that under Chap. XXXVI, r. 6 of the Rules of the Court written authority from the client for the purpose of incurring special expenditure was absolutely essential. He also contended that the taxed bills had become final and conclusive under r. 72. Evidence was not admissible to show if the amounts were spent upon the client's express authority under sec. 91 or sec. 92 of the Indian Evidence Act

The JUDGMENT OF THE COURT was as follows:—

PAGE, J.—This is a suit for the recovery of moneys paid to a solicitor for and on behalf of the Plaintiffs under an order of the Court. It arises in this way. The Plaintiffs employed the Defendant to act for them as their solicitor in certain proceedings, the Plaintiffs succeeded in the proceedings in the first instance, and as a condition for stay of execution a sum of Rs. 4,000 was ordered to be paid by the unsuccessful party to the Defendant on his undertaking not to part with it until the hearing of the appeal was completed. The Plaintiffs succeeded on the appeal, and this sum is still in the hands of the solicitor, the present Defendant.

The only issue which I have to consider in this case relates to certain fees amounting to Rs. 1,700 which were fees paid to Counsel, or alleged to have been

paid to Counsel, by the Defendant. Those fees, I find as a fact, were discussed between the Defendant and the Plaintiffs before Counsel were briefed or the fees paid. I am quite satisfied, having heard the Defendant in the box, and also one of the Plaintiffs, that the Defendant did tell the Plaintiffs whom he was going to brief, that the Plaintiffs were very anxious to employ certain eminent Counsel who practised before these Courts, and that he informed them that, if they chose to retain these eminent Counsel, he would have to pay a fee which would probably not be allowed on taxation. Nevertheless, they were very anxious, as is obvious from the correspondence, to have the case thoroughly considered, and they were prepared to employ these expensive Counsel. I think that they knew what they were going to do, and that they were advised by the Defendant that if they did employ those Counsel, the whole of the fees which were to be paid to them would not be recovered on taxation. However, no written authority was signed by the Plaintiffs to enable the Defendant to brief those Counsel. The Defendant said that he did not obtain the usual written authority because they were relations and friends and he trusted them to pay what was right and proper in the matter.

Now, when taxation took place before the Master, the whole of the items in dispute (i.e., about Rs. 1,700) were included in the Defendant's bill, and the whole of the sums in dispute were disallowed by the Taxing Master in the course of his taxation; no application has been made to Court to review the decision of the Master, no reference has been made by the Master under r. 9 to the Court, and no application has been made by the Defendant in respect of these costs indepen-

(2) I. L. R. 28 Cal. 227 (1906).

(3) [1906] 2 K. B. 432.

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dently of a review under r. 72 or a reference under r. 9. The allocators were passed by the Master as regards one set of costs on the 26th May 1917 and as regards another set of costs on the 22nd January 1919, several years ago. The Defendant says in this case: "It is perfectly true that I did not obtain an order of the Master for payment of those costs; I could not have done so because the Master only had jurisdiction up to a certain amount, and these costs were in excess of the amount over which he had jurisdiction, but I could at any time, if I had chosen, have applied to the Court to grant me an order or at any rate to send back to the Master authority for the Master to grant such costs for Counsel as in the circumstances the Master thought right, even although they were above the amounts which the Master had jurisdiction under r. 32 to grant; but I did not take such steps; I just sat on the money, but now that I have been asked to return the money and an action is brought to recover the money from me, I can, if I choose, ask the Court to hold that this money is a disbursement on behalf of the Plaintiffs; and that these moneys ought not to be repaid by me to the Plaintiffs." A case was cited to me, which is *Sailendra Mohan Dutt v. Dharani Mohan Roy* (1), and it appears from that authority that the Court on an application made to it, is not bound to find that a written document, or a written agreement, has been signed by the client authorising the solicitor to brief Counsel at a fee which is in excess of the amount allotted by the Master. The Court, as I understand the judgment, held that, although the rules as to a written document being necessary were applicable to the jurisdiction of the

Master, they did not in any way bind or restrict the Judge in the exercise of the unfettered jurisdiction, which the Court held that he possessed, to order such fees for Counsel to be allotted as he thought right. Therefore the Defendant was justified in saying that in the event of an application having been made by him, he was not bound to prove before the Judge that he had received in respect of those costs an authority in writing signed by the client in that behalf. But in that case although the Court held that the Court has an unfettered discretion to grant such a sum or special fees for Counsel as it thinks fit, it did not go the length of saying that in every case or at any time the Court will grant an application made by a solicitor similar to the one which this solicitor says he is entitled to make in this case, because if you find, as in the case which we are considering now, that a solicitor includes in the items of costs which he carries in these sums for Counsel, he has submitted to the jurisdiction of the Taxing Master for the purpose of deciding what is a proper sum for the Taxing Master to allot in respect of these accounts, and having done so he comes under r. 72, Chap. XXXVI. R. 72 says that any party who is dissatisfied with the decision of the Taxing Officer as to any item or part of any item which may have been objected to, may not later than 7 days from the date of the decision or within such further time as the Taxing Officer or Judge may allow, apply to a Judge in Chambers for an order to review the taxation as to the same items, and the Judge may thereupon make such order as to him may seem just, but the Taxing Master's decision shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid. Now, in this case all the items in

(1) I. L. R. 40 Cal. 618; s. c. 35 C. W. N. 570 (1921).

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question were carried on before the Taxing Master. The Taxing Master considered them, and in so far as the amount in question is concerned disallowed them. I do not find in the judgment which I have referred to that I am precluded in any way from holding that, where a solicitor has elected to submit these items to the judgment of the Taxing Master, and the Taxing Master has given a decision as to them that he cannot several years afterwards apply to the Court, to increase the sums allotted, because, were he at liberty to do so, it would altogether destroy the effect of r. 72. If he could do so, then the last words of r. 72 would not mean what they say. The words of r. 72 provide that, apart from an application to the Court within 7 days, or such further time as may be allowed by the Court, the order of the Taxing Officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid. In this case, the Master having struck out those items, there has been no appeal, no application to the Court under r. 72 or under r. 9 or in any other way, with the result that under r. 72 the order of the Master has become final and conclusive as to those items.

Now, how does that affect this action which I am now considering? The Defendant claims that he is entitled to retain these moneys as being moneys which he has disbursed on behalf of the Plaintiffs, and he says: "I may do so apart altogether from the rules of taxation because as an agent I have disbursed moneys for my principals at their request, and I am entitled to recoup myself from moneys in hand which otherwise I should have been obliged to return to the Plaintiffs. I do not think that that contention is a sound one, because, in my opinion,

the effect of it* would be that, provided that moneys were actually disbursed, it would not matter whether such moneys were to be allowed on taxation or not. In any case, on the general principle of agency, if they were disbursed by an agent on behalf of principal, the agent would be able to retain moneys of his principal sufficient to cover such disbursements. That is not, in my opinion, a course open to a solicitor. A solicitor is entitled to retain such moneys of his clients as, in accordance with the rule of Court, he, being an officer of the Court, is entitled to claim against them and, therefore, the Defendant can only retain such sums against his clients in this action as under the rules of Court he could be justified in claiming. I have already held that he has no right at all in law to retain any of these sums after the Taxing Master has disallowed them without having made a successful application to the Court either to review, or on a reference or otherwise, to increase those sums. No such application has been made and in my opinion, he is not entitled to claim any of those sums which he is seeking to retain. He admits that, if he is not entitled in law to claim these sums that he has no right whatever to keep them as against the Plaintiffs, and the result will be that I hold that, as he has no right in law, having regard to the order of the Taxing Master, which is final and conclusive, to claim these sums as a solicitor against his clients, he has no right to retain them as against the Plaintiffs. Therefore he will have to reimburse the Plaintiffs the amount of these fees.

Under the circumstances there will be judgment for that sum, which is Rs. 1,700, and a further sum of Rs. 1,724 which the Defendant has paid into Court, making altogether Rs. 3,424. But I do

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not propose to make a judgment with costs because it is clear that in this case the Defendant, on the evidence before me, has in fact disbursed these moneys on behalf of the Plaintiffs

There will be judgment without costs.

Direction for taxation

Mr M. N. Dutt, Solicitor, for the Plaintiffs

Mr S. N. Ghose, Solicitor, for the Defendant

D. N. S.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2771 OF 1920.

KUNJA MOHAN CHAKRA-

MOOKERJEE, J. VARTY and anr., Defend-

CHOTZNER, J. ants, Appellants,

1922,

v.

Heard, 19, July. MANINDRA CHANDRA

Judgment, ROY CHOUDHURI and

20, July. anr., Plaintiffs,

Respondents.

Suit for rent—Cause of action—Jurisdiction—Sale—Civil Procedure Code (Act V of 1908), sec. 20, 21, Or. VI, r. 3—Bengal Tenancy Act (VIII of 1885), sec. 144—Rent suit may be instituted in Court where Defendant resides—Sale to be held in Court where tenure or holding is situate—Jurisdiction.

A suit for rent may be instituted in a Court where the Defendant resides, but the sale in execution of the rent decree must be held in the Court where the tenure or holding is situate.

Cls. (a) and (b) of sec. 20 of the Civil Procedure Code allow a landlord to institute a suit for rent where the tenant resides.

CHINTAMAN NARAYAN v. MADHAVRAY VENKATESH (2) relied on.

Sec. 144 of the Bengal Tenancy Act merely defines the expression "cause of

(2) 6 Bom. H. C. R. (A. O. J.) 22 (1889).

action" as applied to suits between landlord and tenant for the purposes of the Code of Civil Procedure.

FAZLUR RAHAMAN ABU AHMED v. DWARKA NATH CHOUDHURY (1) referred to.

A Court which has no jurisdiction over a property is not competent to bring it to sale, and the effect of such a sale is a nullity

It is an elementary principle of law that if a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities and may not only be set aside at any time by the Court in which they are rendered but may be declared void by every Court in which they are presented. These principles apply not only to original Courts but also to Courts of appeal

Jurisdiction cannot be conferred upon a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction.

RAJLAKSHMI DAS v. KATYANI DAS (4), LEDGARD v. BULL (5), MINAKSHI NAIDU v. SUBRAMANIAM SASTRI (6) and GURDEO SINGH v. CHANDRIKA SINGH (7) referred to

Sec. 21 of the Civil Procedure Code, which is an exception to the above rule, cannot be so interpreted as to have a wider application than what is justified by its terms.

When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the

(1) 1 L. R. 30 Cal. 453. s. c. 7 C. W. N. 402 (1903).

(4) 1 L. R. 32 Cal. 639 at p. 668 (1910).

(5) L. R. 13 I. A. 134; s. c. 1 L. R. 9 All. 191 (1886).

(6) L. R. 14 I. A. 140. s. c. 1 L. R. 11 Mad. 20 (1897).

(7) 1 L. R. 36 Cal. 193 (1907).

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Judge their arbitrator and be bound by his decision on the merits when these are submitted to him. This, however, can be accomplished only when the parties have expressly consented to such a procedure.

This was an appeal from a decision of H. C. Maitland, Esq., District Judge, Rangpur, dated the 20th July 1920, reversing that of Babu Ram Chandra Banerji, Munsif, Kurigram, dated the 2nd June 1920.

The facts of the case material to this report are as follows.—

The Plaintiffs sued the Defendants in the Munsif's Court at Kurigram on the 29th April 1918 to recover *khas* possession and *wasilat* upon the establishment of Plaintiffs' right by auction-purchase of the Defendants' *lagan* holding. The defence, *inter alia*, was that the Plaintiffs were not entitled to *khas* possession and *wasilat*, that they could get only the annual rent due to their share, and that the Plaintiffs fraudulently obtained a decree for rent in a different Court, and that the said decree and the sale thereunder were without jurisdiction, and were not binding on the Defendants.

The Court of first instance found the following facts—Plaintiffs obtained an *ex parte* rent decree in the Munsif's Court at Rangpur against the Defendants, and at the sale in execution of that decree held in that Court on the 8th January 1907, they purchased the land in suit at a nominal price of rupee one only. Admittedly the land in suit was in Ulipur within the jurisdiction of Kurigram Court. The balance of the decretal amount was subsequently realised by attachment of the Defendants' moveables.

Upon these findings the Court of first instance held that although the Defendants might reside in Rangpur town but as the land in suit was outside the jurisdic-

tion of the Rangpur Court, the Munsif at Rangpur had no jurisdiction to try the rent suit, and as such the decree and the sale of the Defendants' holding in that rent suit were void for want of jurisdiction, and that the Plaintiffs acquired no title by his alleged purchase.

The Court of first instance therefore, disallowed the prayer for *khas* possession and *wasilat* and gave the Plaintiffs a decree for rent for the years 1321 to 1324 B. S. for which rent was claimed.

The following portion of its judgment dealing with the question of jurisdiction will be found material—

“Under sec. 16 of the Civil Procedure Code a suit for immovable property with rent or profit shall be brought in the Court within the local limit of whose jurisdiction the property is situate. The rent suit too under sec. 114 (b) of Bengal Tenancy Act is to be instituted in the Court in whose jurisdiction the land is situated. So the Rangpur Court has no territorial jurisdiction over the properties within Ulipur Thana. The Plaintiffs have their head-quarters at Nawabgunj in Rangpur town, so it was easy for them to get an *ex parte* decree to enable them to purchase the valuable property of the Defendants. The residence of the Defendants is no ground as the property is situate outside the jurisdiction of Rangpur Court. The decree and the sale passed by the second Munsif of Rangpur are, *ipso facto*, void for want of jurisdiction. Much stress is laid on the fact that the decretal amount was realised by attachment of judgment debtors' moveables and that the judgment debtors contended that they were not liable to be arrested. This does not constitute waiver or legalise the decree and sale, for there can be no waiver of fraud and the consent of parties cannot give jurisdiction. The want of jurisdic-

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tion can be shewn in any proceeding or raised in any defence and no separate action is required. I hold that the Plaintiffs acquired no title by their alleged purchase and that the decree, sale and purchase were fraudulent and collusive."

On appeal by the Plaintiffs, the learned District Judge of Rangpur reversed the decision of the Munsif and gave the Plaintiffs a decree for *ikas* possession.

The following portion of the judgment of the District Judge will be found material :—

"I would first consider the matter of jurisdiction. The learned pleader for the Appellants based his argument on sec. 21, C. P. C. If even an Appellate or Revisional Court dealing with the case itself cannot give effect to an objection as to place of sump unless that objection was taken in the Original Court, surely it is the barest common sense to suppose that a Court dealing with another case many years afterwards cannot do so. . . . I decide that the argument of the learned pleader for the Appellants is well-founded, and that the defect of jurisdiction in the rent suit cannot be gone into now by this Court."

Against this decision of the District Judge, the Defendants preferred this second appeal.

Babu Surendra Chandra Sen (with him *Babu Dwijendra Krishna Dutt*) for the Appellants.

Babu Mohini Mohan Chakravarty for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in a suit for recovery of possession or, in the alternative, for assessment of rent. The disputed tenure was held by the Defendants under the Plaintiffs and fell into

arrears. The Plaintiffs thereupon instituted a suit for arrears of rent and obtained a decree. In execution of that decree the tenure was sold on the 8th January 1907 and was purchased by the landlords, decree-holders, for the sum of Re. 1. On the 29th April 1918 the Plaintiffs, landlords, instituted the present suit for ejectment on the allegation that the Defendants were in unlawful occupation notwithstanding the sale of their tenure. The Defendants urged that the decree had been made and the sale had been held without jurisdiction, so that their interest in the tenure had not been affected thereby. The trial Court accepted this contention as well-founded and dismissed the claim for ejectment. The Court, however, made a decree for arrears of rent. Upon appeal the District Judge has reversed that decision and made a decree in ejectment with mesne profits. On the present appeal the view taken by the District Judge has been assailed as contrary to law.

It is not disputed that the tenure is situated within the jurisdiction of the Court of the Munsif at Kurigram within the District of Rangpur. The suit for rent, however, was instituted in the Court of the Munsif at the head-quarters of that District. The Defendants did not appear, with the result that the suit was decreed *ex parte*. The decree was then executed at the instance of the Plaintiffs and the tenure was brought to sale in the Court where the decree had been passed. On these facts, the Defendants contend that the decree was made and the sale was held without jurisdiction.

In support of the contention that the decree was made without jurisdiction, reliance has been placed upon sub-sec. (1) of sec. 144, Bengal Tenancy Act, which is in these terms :—"The cause of action

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in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought." This provision, it will be observed, does not specify the Court where the suit is to be instituted. It merely defines the expression "cause of action" as applied to suits between landlord and tenant for the purposes of the Code of Civil Procedure. That this is the true scope of the section is clear from the decision in *Fazlur Rahman Abu Ahmed v. Dwarka Nath Chowdhury* (1). In that case, it was ruled that sec. 144, Bengal Tenancy Act was controlled by secs. 15 and 17 of the Civil Procedure Code of 1882, and that consequently a suit for rent was required to be instituted, subject to pecuniary limitations, in the Court of the lowest grade competent to try it. Sir Francis Maclean, C. J., pointed out that sec. 144 merely lays down where the cause of action in suits between landlord and tenant shall, for the purpose of the Code of Civil Procedure, be deemed to have arisen: it does not say in which Court the suit is to be instituted. To ascertain this, we must go to sec. 17 of the Code of Civil Procedure, 1882, which provides that all other suits, that is, other than those mentioned in sec. 16, shall be instituted in a Court within the local limits of whose jurisdiction the cause of action arises. This, in the case of suits between landlord and tenant, is controlled by sec. 144, Bengal Tenancy Act, which tells us where, in such suits, the cause of action shall be deemed to have arisen: i.e., within the

local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the holding or tenure in connection with which the suit is brought. We must consequently turn to the provisions of sec. 20 of the Code of 1908 which replace sec. 17 of the Code of 1882. Now sec. 20 provides that subject to the limitations aforesaid, that is, the limitations set out in the preceding sections, every suit shall be instituted in a Court within the local limits of whose jurisdiction (a) the Defendant or each of the Defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or (b) any of the Defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain, provided that in such case, either the leave of the Court is given, or the Defendants who do not reside, or carry on business or personally work for gain as aforesaid, acquiesce in such institutions, or (c) the cause of action wholly or in part arises. Consequently under sec. 20 (c) of the Code of 1908 read with sub-sec. (1) of sec. 144, Bengal Tenancy Act, a suit for rent may be instituted in the Court within the local limits of the jurisdiction of which lies the property in respect of which a suit for possession may have been brought. This, however, does not exhaust all the provisions of sec. 20. Cls. (a) and (b) of sec. 20 allow a landlord to institute a suit for rent where the tenant resides. This must obviously be limited to cases where the landlord seeks a decree for money. Where, however, the landlord seeks a decree for rent as also ejectment under sec. 66, Bengal Act, the suit must be treated as

(1) 1 L. R. 80 Cal. 458; s. c. 7 C. W. N. 402

1908.

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one for recovery of immovable property within the meaning of cl. (4) of sec. 16 and can consequently be instituted in the Court within the local limits of whose jurisdiction the property is situate. In the case before us, there is evidence to show that at the time the suit for rent was instituted, the Defendants resided within the local limits of the Court of the Munsif at the head-quarters of the district of Rangpur. The suit was consequently brought in a Court which had jurisdiction and the decree cannot successfully be impeached on that ground. The view we take is supported by the decision in *Chintaman Narayan v. Madhavav Venkatesh* (2), where it was ruled that a suit to recover the rents of land situated in District T may be brought in District S, where the Defendant is residing, although in such suits the Plaintiff's title to the land in respect of which the rent is sought to be recovered, may incidentally come in question.

We have next to consider whether the sale was held with jurisdiction. As we have already stated, the sale was held by the Court which had made the decree. That Court had jurisdiction over the person of the Defendants but not over the disputed property. In these circumstances, it is plain that the Court was not competent to bring the property to sale. The only case in which a Court is entitled to sell immovable property beyond the local limits of its jurisdiction is that provided in Or. 21, r. 3 of the Code of 1908, which provides as follows: "Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure." This provision was inserted for the first time

(2) 6 Bom. H. C. R. (A. C. J.) 29 (1909).

in the Code of 1908 and gave effect to the decision of this Court in *Ramlal Moitra v. Bama Sundari Debbya* (3). We must hold accordingly that the sale was held without jurisdiction. This brings us to the question of the effect of such sale. In our opinion, there is no room for controversy that the sale was a nullity. In support of this conclusion reference may be made to the decision in *Rajlakshmi Das v. Katyani Das* (4). It is an elementary principle of law that if a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented. If a Court has no jurisdiction, its judgment is not merely voidable but void and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgment and orders are the exercise of arbitrary power under the forms but without the sanction of the law. These principles apply not only to original Courts but also to Courts of Appeal. Accordingly where an Appellate Court does not possess jurisdiction to review the action of the Court below, jurisdiction cannot be conferred upon it by consent of the parties; and any waiver on their part cannot make up for the lack or defect of jurisdiction. This view has been recognised by the Judicial Committee in *Ledgard v. Bull* (5) and *Minakshi Naidu v. Subramania Sastri* (6). Reference may

(3) I. L. R. 12 Cal. 307 (1885).

(4) I. L. R. 38 Cal. 639 at p. 668 (1910).

(5) L. R. 13 I. A. 131; s. c. I. L. R. 9 All. 191 (1896).

(6) L. R. 14 I. A. 160; s. c. I. L. R. 11 Mad. 26 (1887).

KUNJA MOHAN CHAKRAVARTY v. MANINDRA CHANDRA ROY CHOUDHURI.

also be made to the decision of this Court in *Gurdeo Singh v. Chandrika Singh* (7), where the authorities on the subject are reviewed.

It was contended, however, on behalf of the Respondents that although the sale was held without jurisdiction, and although the proceedings could not be validated on the ground of acquiescence, still the proceedings might be deemed as those of an arbitrator chosen by the parties. In support of this proposition reliance was placed upon a passage from the judgment of the Judicial Committee in *Ledgard v. Bull* (5), where Lord Watson observed that when, in proceedings pending before the Court, the parties agree to accept the Judge's decision as final, even though the Court may not have jurisdiction, they thereby constitute the Judge a *quasi*-arbitrator. The effect of such agreement is that the decision of the Judge is not appealable and cannot be questioned in any way. But though the Judge may be considered as an arbitrator, his decision is not, and does not, in any way, resemble an award, *Burgess v. Morton* (8). This principle, however, has no application to the circumstances of the present litigation. The decree was made *ex parte*; the sale was held *ex parte*; and consequently it cannot be assumed that the parties, that is, the decree-holder and the judgment-debtor agreed to constitute the Judge as their arbitrator and to abide by the sale held by him.

Finally, reference has been made, in the course of the argument, to sec. 21 of the Civil Procedure Code, which forms the basis of the view taken by the District Judge. That section provides that

no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice. That provision was inserted for the first time in the Code of 1908 and is framed on the analogy of sec. 11 of the Suits Valuation Act of 1881. The provision is an exception to the well-established rule that where the Court has no inherent jurisdiction over the subject-matter of the suit, its decree is a nullity, even though the parties may have consented to the jurisdiction of the Court. This exception cannot obviously be so interpreted as to have a wider application than what is justified by its terms. It is impossible for us to hold that sec. 21 debars the Defendants from questioning the validity of the execution sale which is the root of the title of the Plaintiff. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits when these are submitted to him. This, however, can be accomplished, only when the parties have expressly consented to such a procedure.

The result is that this appeal is allowed, the decree of the District Judge is set aside and that of the Court of first instance restored, with costs both here and in the lower Appellate Court.

H. C. S. *Appeal allowed with costs.*

5) L. R. 13 I. A. 134; s. c. I. L. R. 9 All, 191 (1896).

(7) I. L. R. 86 Cal. 193 (1907).

(8) [1896] A. C. 136.

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM APPELLATE DECREE**

No. 2200 OF 1920.

C. C. GHOSE, J.	PROMODE CHANDRA
CHOTZNER, J.	ROY CHOUDHURY,
1922,	Defendant, Appellant,
Heard,	v.
1, December.	BINAYAKDAS
Judgment,	ACHARJYA CHOU-
19, December.	DHURY and ors., Plain-
	tiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 106, suit under, for correction of entries in record-of-rights—Sec. 103B, presumption of correctness of entry in record-of-rights, if can be rebutted by road cess returns and quinquennial register prepared under Reg. 48 of 1793—Road cess returns, admissibility in evidence.

The rent of a tenure was recorded as fixed in the record-of-rights. In a suit under sec. 106, Bengal Tenancy Act, for correction of the entry, the landlords alleged that the rent was enhancible and produced quinquennial registers prepared under Reg. 48 of 1793 and the tenants contended that the rent had remained unvaried for over 20 years and filed some road cess returns:

Held—That having regard to the provisions of the Act the road cess returns in question were not admissible in evidence at all. To start with, there was a presumption in favour of the tenants from an entry under sec. 103, Bengal Tenancy Act. Therefore the onus of proof rested entirely on the landlords to negative the effect of the said presumption. Assuming that the entry in the quinquennial register was admissible in evidence, the said entry by itself was not sufficient to negative the presumption in favour of the tenants.

This was an appeal preferred on the 4th of August 1920 against the decree of F. W. Ward, Esq., Special Judge of Zilla Mymensingh, dated the 8th of May 1920,

affirming the decree of Babu A. K. Mukherjee, Assistant Settlement Officer of Netrokona, dated the 3rd October 1918.

The material facts will fully appear from the judgment.

Babus Sarat Kumar Roy Chowdhury and Birendra Kumar De for the Appellant.

Babus Jogesh Chandra Roy and Pro-lash Chunder Mazumdar for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal, has arisen out of a suit under sec. 106 of the Bengal Tenancy Act at the instance of the landlords for correction of certain entries in the record-of-rights of village Pechandary, the survey of which has been made and the record-of-rights in respect thereof has been prepared under the provisions of Chap. 10 of the Bengal Tenancy Act. The Plaintiffs landlords alleged that the rent of the tenure in suit was enhancible; the tenants in their defence, however, urged that having regard to the entry under sec. 103B of the Bengal Tenancy Act and to the fact that rent has remained unvaried for a period of over 20 years the claim of the Plaintiffs landlords was not entertainable. The Assistant Settlement Officer of Mymensingh before whom this matter came in the first instance was of opinion that although the entry in the record-of-rights was in favour of the Defendants, still having regard to the quinquennial register of 1205 B. S. prepared under the provisions of Reg. 48 of 1793 and to the entries in certain road cess returns filed by the Plaintiffs landlords, the claim of the latter was sustainable and he accordingly decreed the suit with costs, declaring that the rent of the tenure was liable to enhancement. He further ordered that the necessary correction in the record-of-rights should be made as

PROMODE CHANDRA ROY CHOUDHURY v. BINAYAKDAS ACHARJYA CHOUDHURY.

for by the Plaintiffs. There was an appeal to the Special Judge of Mymensingh at the instance of the Defendants tenants. The learned Judge after taking into consideration the documentary evidence in the case held that there was no substance in the appeal and he accordingly, dismissed the same.

The two pieces of documentary evidence relied upon by the learned Judge are (i) the quinquennial register referred to above which showed that at the time when the register was prepared the rent of the tenure in question was 75 sicca rupees which was equivalent to Rs. 80 of the East Indian Company (the rent according to the Defendants having been a sum of Rs 89-11-8 p for a series of years), and (ii) the road cess returns filed by the landlords in accordance with the provisions of the Cess Act. The learned Judge after discussing the weight to be attached to the entries in the road cess returns, held that there was sufficient evidence on behalf of the landlords to meet the Defendants tenants' case, although he was of opinion that the register standing by itself was far from being conclusive. It is to be observed, however, that the road cess returns in question were tendered as exhibits in this case not on behalf of the Plaintiffs landlords but on behalf of the Defendants tenants. Now so far as the road cess returns are concerned, it is quite clear, having regard to the provisions of the Cess Act that they were not admissible in evidence at all and, therefore, so far as the Defendant's case is concerned we must leave out of consideration the road cess returns. Therefore, there remained the quinquennial register which was tendered as an exhibit on behalf of the Plaintiffs landlords. Now to start with, there was a presumption in favour of the Defendants

from an entry under sec. 103B of the Bengal Tenancy Act. Therefore, the onus of proof rested entirely on the Plaintiffs landlords to negative the effect of the said presumption. The question then arises as to whether the Plaintiffs, landlords, have discharged that onus. It is unnecessary to go into the question as to whether the quinquennial register was admissible in evidence or not. Assuming, however, that the entry in the quinquennial register was admissible in evidence, we are of opinion that the said entry by itself was not sufficient to negative the presumption under sec. 103B of the Bengal Tenancy Act. Indeed, it has been recognised by the learned Judge himself that that piece of evidence is far from being conclusive. We are satisfied, however, from the judgment of the learned Judge taken as a whole that the onus was wrongly placed on the Defendants and in that view of the matter he came to the conclusion that the Plaintiffs, landlords, had proved their claim. We think, however, that the entry in the quinquennial register is not sufficient to prove the Plaintiffs' case. In this view of the matter, we must allow the appeal and direct that the appeal be decreed and the suit dismissed with costs in all Courts.

J. N. R

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 696 OF 1922.

RAKHAL CHANDRA

[CHATTERJEE, Defendant,
Petitioner,

v.

RANKIN, J.

1923,

3, January.

ROHINI KUMAR CHATTERJEE, Plaintiff,
Opposite Party.

* Provincial Small Cause Courts Act (IX of 1887),
jurisdiction of Small Cause Court to try a suit
upon a contract to pay a certain sum as compensation.

RAKHAE CHANDRA CHATTERJEE v. ROHINI KUMAR CHATTERJEE.

*tion for things misappropriated—Construction of
plaint—Discretion to award interest.*

Defendant in collusion with certain Railway Officers took some coal belonging to Plaintiff and misappropriated it. The Plaintiff and the Defendant discussed the matter and the Defendant executed a *chit* promising to pay a particular sum made up in a particular way. Plaintiff brought a suit in the Small Cause Court alleging in the plaint the aforesaid collusion and misappropriation and the execution of the *chit* agreeing to pay the money. In decreeing the suit the Small Cause Court Judge awarded interest at 24 per cent. per annum on the ground of Defendant's conduct.

. Held—That the plaint properly read is a plaint upon the *chit* and is not a suit for damages either for theft of coal or for the conversion of the coal in any sense. As there was nothing in the plaint to show that the transaction was represented as two alternative causes of action, there was no objection in law to the case being tried in a Small Cause Court.

Although in the absence of evidence of custom, 24 per cent. per annum is a high rate, the Court had jurisdiction to grant it.

This was a Rule issued against an order of the Court of the Additional Sub-Judge of Khulna made in Small Cause Court Suit No. 5 of 1922.

The Defendant Petitioner, in collusion with the Railway Officers concerned, took some coal belonging to the Plaintiff Opposite Party and misappropriated it or converted it to his own use. The Plaintiff then went to the Defendant, they discussed the matter, and the Defendant executed a *chit* promising to pay, not damages at the market value, but a particular sum made up in a particular way.

The Plaintiff sued the Defendant and got decree for the sum and interest at 24 per cent. per annum. The Defendant, thereupon, moved the High Court and got the present Rule.

Babus Brojodal Chakraborty and Radhika Ranjan Guha for the Petitioner
Babu S. N. Mukherjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This Rule was issued on two grounds, the first being that the Court below had no jurisdiction and the second being that the judgment was erroneous in law as the learned Judge had failed to decide various questions raised in the proceedings. The learned pleader for the Petitioner has put his case thus: That in the plaint there are really to be found two causes of action—one being an action for damages for the wrongful misappropriation of certain coal belonging to the Plaintiff—that wrongful misappropriation resulting in a criminal offence and therefore coming within cl 35, sub-cl (iii) of the Second Schedule to the Provincial Small Cause Courts Act; and the second being a claim upon a contract evidenced by a document called a *chit* said to have been executed by the Defendant to pay a certain price for the coal in question. The complaint made is that although the suit considered as a claim upon a *chit* was within the competence of the Small Cause Court, the learned Judge while purporting to give judgment upon that cause of action has allowed himself to be influenced by the other aspect of the case and has in particular dealt with the question of interest upon a view which shows that he had not only in his mind the cause of action on the *chit* but the other cause of action which is not proper to a Small Cause Court.

RAKHAL CHANDRA CHATTERJEE v. ROHINI KUMAR CHATTERJEE.

Now, I have not the advantage of being able to read in the vernacular the plaint in this case, but I have had the paragraphs explained to me and in my opinion the plaint properly read is a plaint upon the *chit* and is not a suit for damages either for theft of coal or for the conversion of the coal in any sense. It is quite true that in the third paragraph of the plaint it is alleged that the Defendant in collusion with the Railway Officers took the coal and misappropriated it or converted it to his own use. I will assume that the meaning of that is exactly the same as if the plaint had stated that the Defendant had stolen the property. Nevertheless when one reads the plaint fairly, one sees that that paragraph is followed by a statement of subsequent facts, namely, that the Plaintiff went to the Defendant, that they discussed the matter, that the Defendant executed the *chit* promising to pay, not damages at the market value, but a particular sum made up in a particular way. There is nothing in the plaint to show that the transaction is represented as two alternative causes of action. At the end of the plaint, it is true that there is a reference to the place at which the cause of action arose and reference is made to the fact that within the jurisdiction of the Court the *chit* was executed and the goods were delivered. It has been suggested to me that that reference to the place where the goods were delivered shows that the Plaintiff was harking back to a claim for damages for the conversion of the coal. I do not think so. Reference to the place of delivery would be true of the circumstances which would tend to show that the suit was properly brought if brought only and solely on the *chit*. In my view, the plaint was intended to be, when carefully looked at, a claim for a particular

sum of money shown by the *chit* and not a claim for damages either for conversion or for compensation for theft. That being so, neither of the ways in which the Petitioner put his case when applying for the Rule, nor the very much better way in which his case was put before me by the learned pleader can stand. I think there is no objection in law to the case being tried in a Small Cause Court. The matter really ends there as there is no substance at all in the second ground mentioned in the petition. But the learned Judge in dealing with the question of interest used the following language: "As regards interest, I think it proper, under the circumstances of this case, as the Defendant's conduct was most heinous from the very beginning, to grant it. 'The rate is not high' " I think what the learned Judge meant was this:—First of all, I do not think, he was referring merely to the circumstances under which the coal was originally taken. He was referring to the fact that in his view the Defendant had signed the *chit* and afterwards repudiated it. I think, moreover, the remark is to explain why he thinks it a proper case to grant interest at all.

As regards the rate of interest, what he says is that the rate is not high and he allowed the rate claimed, that is, two per cent. per mensem. Now there is something to be said as a matter of discretion under the Civil Procedure Code against allowing a rate of interest as high as 24 per cent. per annum except in the presence of a contract to that effect or some evidence that that was the usual rate in the particular market concerned. There was no such allegation in the plaint and though it has been stated that it is the usual rate, the only finding of the learned Judge is that the rate is not high.

RAKHAL CHANDRA CHATTERJEE v. ROHINI KUMAR CHATTERJEE.

I should rather have thought a rate of 24 per cent. per annum a very high rate of interest, but this matter is not in any way affected in my judgment by the fact that the learned Judge has entertained a kind of case which was not within his jurisdiction. I think, he had full jurisdiction over all matters comprised in the plaint when the plaint is properly understood, although in the absence of evidence of custom, 24 per cent per annum is a high rate. I think he had jurisdiction to grant it. I therefore do not think it fit in this case to interfere.

The result is that the Rule is discharged with costs—one gold mohur.

J. N. R.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 924 of 1922.

JOGESH CHANDRA SEN

and anr., Accused,

Petitioners,

v.

C. C. GHOSE, J.

CHAOTZNER, J.

1922,

21, December

[NIKUNJA BHARI CHOW-

DHURY, Complainant,

Opposite Party.

Criminal Procedure Code (Act V of 1898), sec 203, dismissal of complaint after giving accused opportunity of being heard—Sec 437, Sessions Judge's order for further enquiry without giving accused opportunity of being heard, propriety of.

1 complaint was dismissed under sec 203, Cr. P. C., after giving the accused an opportunity of being heard. The Sessions Judge set aside the order of dismissal and directed a further enquiry without giving the accused an opportunity of being heard.

Held—That in the circumstances of the case, the accused should have been given an opportunity of being heard before the learned Sessions Judge at the hearing of the application under sec. 437, Cr. P. C., he having been allowed to be present from

the very commencement of the proceedings at the instance of the complainant

HARIDAS SANYAL v. SARITULLAH (1) distinguished.

This was a Rule granted on the 21th October 1922 against an order of the Sessions Judge of Chittagong (H. C. Stork, Esq.), dated the 22nd September 1922, directing on appeal a further enquiry into the complaint which was brought by the Opposite Party against the Petitioners under sec. 379, I P. C. and which was dismissed under sec. 302, Cr P C. by the Additional Sub-Divisional Magistrate of Chittagong (Mr S. C. Sinha), on the 28th August 1922

The complaint of the Petitioner was dismissed by the Additional Sub-Divisional Magistrate of Alipur by the following order under sec. 203, Cr P. C. :—

"The tank in question appertains to the non-occupancy tenancy of the complainant party under the accused. It has been in possession of the complainant who has not been paying any rent to the accused party. The accused party maintains that it is entitled to receive rents from the complainant party and has been asking the latter party to take settlement and pay reasonable rent. The complainant party having refused, the accused party treated the land as not under settlement with the complainant and fished in it by way of asserting their right and claim of possession to the tank. This catching and taking of the fish by the accused is the subject of the theft complained of in the present case. . . The claim has no doubt been honestly put forward even though it may be ascertained to be unfounded eventually. But it is clear that it is not merely colourable. If a claim to property is honestly made, then Criminal Court's jurisdiction

(1) I. L. R. 15 Cal. 608 (F. B.) (1888).

JOGESH CHANDRA SEN v. NIKUNJA BEHARI CHOWDHURY.

is ousted. The application is dismissed under sec. 203, Cr. P. C."

The complainant thereupon moved the Sessions Judge of Alipur who by his following judgment ordered a further enquiry under sec. 437, Cr. P. C.

On a motion to the Sessions Judge the Court observed: "There is no doubt that in the *khattian* the complainant's father is recorded as a tenant of the Opposite Party's father and an agreement is recorded in virtue of which rent is not paid. The *khattian* undoubtedly raises a strong presumption in favour of the Petitioners. There is no evidence that the Opposite Party endeavoured to assess the land to rent by using the provisions of Bengal Tenancy Act and the *prima facie* presumption is undoubtedly that the Opposite Party tried by a forcible act to take the law into their own hands in a way they were not justified to do. The learned Magistrate in view of the presumption arising from *khattian* has no justification for the remark that the accused believed honestly that they were taking fish from their land. The allegations set forth are sufficiently serious and justify a further enquiry."

The accused thereupon moved the High Court and obtained the present Rule.

Babus Monmatha Nath Mookerjee and *Amulya Charan Sen* for the Petitioners.

Babus Dwarkanath Sanyal and *Lalit Mohan Sanyal* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

In this case the complaint of the complainant was dismissed under sect. 203, Cr. P. C. It was dismissed after giving the accused an opportunity of being heard. The learned Sessions Judge on being moved by the complainant has, however, set aside the order of dismissal and direct-

ed a further enquiry. The point which is now urged by Mr Mookerjee is that the order directing a further enquiry should not, in the circumstances of this particular case, have been made without giving the accused an opportunity of being heard.

The facts to which our attention has been drawn by Mr. Mookerjee in this case are that the tank which is the subject-matter of dispute was recorded in the record-of-rights as appertaining to the non-occupancy holding of the complainant under the accused and that it was rent-free. The Magistrate who dismissed the complaint came to the conclusion that the accused honestly believed that he was entitled to a *kabuliyat* from the complainant undertaking to pay rent in respect of the tank or if the *kabuliyat* was not forthcoming, he was entitled to take fish out of the tank and that in the circumstances disclosed, the matter was more or less of a civil nature. The learned Sessions Judge has proceeded to a certain extent upon the *khattian* which was prepared under the provisions of Chap X of the Bengal Tenancy Act. We do not desire to express any opinion on the facts of the case nor on the merits of the dispute between the parties. We are satisfied that this is one of those cases in which the accused should have been given an opportunity of being heard (he having been allowed to be present from the very commencement of the proceedings at the instance of the complainant) before the learned Sessions Judge at the hearing of the application under sec. 437, Cr. P. C. Our attention has been rightly drawn by Mr. Sanyal to the language of the decision of a Full Bench in *Hari-das Sanyal v. Saritullah* (1). We do not desire to depart in any way from the

(1) I. L. R. 15 Cal. 808 (F. B.) (1888).

JOGESH CHANDRA SEN v. NIKUNJA BEHARI CHOWDHURY.

principle laid down in the Full Bench decision but the words used by Mr. Justice Wilson and Mr. Justice Prinsep in delivering the judgments of the Full Bench case do not imply that the discretion of the Magistrate or Sessions Judge is in all cases fettered. As has been stated above, in the circumstances of this particular case, we have come to the conclusion that the accused should have been given an opportunity of being represented before the learned Sessions Judge.

In this view of the matter, we set aside the order of the Sessions Judge of Chittagong, dated the 22nd September 1922, and direct that the petition of the complainant under sec. 437, Cr. P. C., be re-heard by him after giving notice to the accused.

The Rule is made absolute in these terms

J. N. R. Rule made absolute

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1128 OF 1922.

NEWBOULD, J. GONESH SAHA,
SUHRAWARDY, J. Petitioner,
1923, v.
22, February. THE EMPEROR,
 Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 403, conviction for possession of some stolen property, if legal, when the accused had previously been tried in respect of some other articles found in his possession on the same date and acquitted.

Several articles of stolen property having been found in the possession of the Petitioner, he was charged in respect of some of them under sec. 411 and acquitted. He was subsequently tried and convicted in respect of the other properties found in his possession on the same date.

Held—That in the absence of evidence that the different articles which were the subject of the charges in the two trials were received at different times, the second

trial was illegal under the provisions of sec. 403, Cr. P. C.

ISHAN MUCRI v. QUEEN-EMPRESS (2) and QUEEN-EMPRESS v. MAKHAN (1) followed.

This was a Rule to show cause why the order of the Deputy Magistrate, Alipur (S. M. Murshed, Esq.), dated the 13th day of November 1922, convicting the Petitioner under sec. 411, I. P. C., and sentencing him to undergo rigorous imprisonment for two months, an appeal from which order was dismissed by the Additional District Magistrate of the 24-Parganas on the 28th November 1922, should not be set aside.

The facts of the case are as follows:—

On the 7th December 1921 several articles of stolen property were found in the room occupied by the Petitioner. In respect of some of them he was prosecuted and after being convicted under sec. 411, I. P. C., by the trying Magistrate he was acquitted on appeal. He was subsequently tried and convicted in respect of other properties found in his possession on the same date. The Petitioner preferred an appeal to the Additional District Magistrate of 24-Parganas who in dismissing the appeal passed the following judgment:—

"The Appellant has been convicted of dishonestly retaining certain stolen properties (e.g., a coat and vest and a shawl) knowing or having reason to believe them to be stolen.

There is incontestable evidence to show that the articles in question were stolen property. It is also proved that the articles were found in the room occupied by Appellant. The defence has examined two witnesses to prove that the Appellant's father explained to the Sub-

(1) I. L. R. 15 All. 317 (1898).

(2) I. L. R. 15 Cal. 511 (1898).

GONESH SATIA v. THE EMPEROR.

Inspector at the time of the search that the goods in question as well as a large number of other articles of dress had been received by Appellant's mother on pledge and that she used to receive such goods on pledge. The Appellant's mother was alive at the time and she has died since. The defence now set up does not appear to me true. If the above allegation had been made at the time of the search the Sub-Inspector would, no doubt, call for evidence of the woman's receiving the goods on pawn. It is clear that taking advantage of the death of the Appellant's mother the Appellant has sought to throw the burden on her. The stolen goods has been found in possession of the Appellant under circumstances which lead irresistibly to the conclusion that he retained them with a guilty knowledge. The conviction and sentence of the Appellant are upheld. The appeal is dismissed."

The Petitioner thereupon moved the High Court and hence the present Rule.

Babus Dasarathi Sanyal and Lalit Mohan Sanyal for the Petitioner.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner in this case has been convicted under sec. 411, I. P. C., on the charge of having been in dishonest possession of stolen property on the 7th December 1921. It appears that on that date several articles of property were found in the room occupied by the Petitioner. In respect of some of them he was prosecuted and after being convicted under sec. 411, I. P. C., by the trying Magistrate he was acquitted on appeal. He has now been tried and convicted in respect of other properties found in his room on the same date. There was

subject of the charges in the two trials were stolen from different persons, but there is no evidence that they were received at different times. The facts of the case cannot be distinguished from those of *Queen-Empress v. Malkhan* (1), which follows the decision of a Divisional Bench of this Court in *Ishan Muchi v. Queen-Empress* (2). On this authority we hold that the second trial was illegal under the provisions of sec. 403, Cr. P. C.

We accordingly make this Rule absolute and set aside the conviction and sentence passed on the Petitioner and direct that he be discharged from his bail bond.

J. N. R. Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1134 OF 1922.

NEWBOULD, J.	PRASANNA CHANDRA
SUHRWARDY, J.	MAJUMDER, Accused,
1923,	Petitioner,
23, February.	v.
	UPENDRA NATH
	SHOW, Complainant,
	Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 423, Appellate Court's power to convict under a different section while maintaining the conviction by the trial Court.

Where the trial Court convicted the accused under sec. 143, I. P. C., but acquitted them of the offence under sec. 379, I. P. C., and the Appellate Court, while upholding the conviction under sec. 143, I. P. C. and the sentence, set aside the acquittal under sec. 379:

Held—That the Appellate Court had no jurisdiction to set aside the acquittal of the Petitioner when he upheld the conviction under sec. 143, I. P. C. It was not a case of altering the conviction which was within his powers under sec. 423, Cr. P. C.

This was a Rule granted against the

(1) I. L. R. 15 All. 217 (1895).

PRASANNA CHANDRA MAJUMDER v. UPENDRA NATH SHOW.

order of the Deputy Magistrate of Bogra (S. K. Ganguly, Esq.), dated the 30th day of June 1922, convicting the Petitioner, under sec. 143, I P. C., and sentencing him to pay a fine of Rs. 100, or, in default, to two months' rigorous imprisonment, which order was on appeal modified by the Additional Sessions Judge of Pabna and Bogra (Bogra) on the 18th September 1922, by further convicting the said Petitioner, under sec. 379, I. P. C.

The facts of the case are briefly as follows:—The Petitioner was convicted with five others under sec 143, I. P. C., of being a member of unlawful assembly but was acquitted of the charge under sec 379, I P. C. On appeal, the Additional Sessions Judge of Pabna and Bogra upheld the conviction and the sentence, viz. fine of Rs. 100 or two months' rigorous imprisonment in default, but set aside the acquittal of the offence under sec. 379 and further convicted the Petitioner under sec 379, I. P. C.

The following judgment was passed by the lower Appellate Court —

"The Appellant has been convicted with five others under sec 143, Indian Penal Code of being a member of unlawful assembly, the object of which was by means of and show of criminal force to obtain possession of a certain tank, known as Fulpukur tank, of which complainant Surendra Mohon Mandal was in possession.

The defence is that accused was in possession of the tank and the argument before me was directed to show that he was never legally ousted from possession. Even if this be true it assists him little, because if complainant had been in possession, even though wrongfully, for a long period, accused is not justified in attempting to oust him by force. I consider the evidence of actual possession of

complainant satisfactory, and I note particularly the existence of two tin huts for which the accused could not account.

I consider therefore that the learned Magistrate's findings of fact are correct, but I think he is mistaken in holding that upon these findings there is no offence under sec. 379, I. P. C. The removal of the *daos* and *jats* was undoubtedly intended to prevent the complainant from exercising his lawful right of fishing in the tank and therefore to cause him wrongful loss. Consequently it is dishonest, though it may have been intended to cause no wrongful gain to accused.

The acquittal under sec. 379 is therefore set aside, and the Appellant is convicted under that section.

"The sentence will remain as before."

Babu Bir Bhusan Dutt for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner in this case was convicted by the Deputy Magistrate of Bogra under sec. 143, I. P. C. and sentenced to pay a fine of Rs. 100. On appeal to the Sessions Judge of Pabna he upheld the conviction and sentence and further passed an order setting aside the order of acquittal of the offence under sec 379, I. P. C., which had been passed by the trying Magistrate. The learned Sessions Judge had clearly no jurisdiction to set aside the acquittal of the Petitioner when he upheld the conviction under sec. 143, I P. C. It was not a case of altering the conviction which was within his powers under sec. 423, Cr. P. C. We accordingly make this Rule absolute and set aside the order of the Sessions Judge so far as it sets aside the acquittal of the Petitioner under sec. 379, I. P. C., by the trying Magistrate.

J. N. B.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY, ADMIRALTY AND
VICE-ADMIRALTY DIVISION (IN PRIZE).]

LORD SUMNER.

LORD PARMEON.

LORD WRENBURY.

SIR ARTHUR CHANNELL.

1922,

Heard, 5, July.

Judgment, 5, July.

SOCRATES

ATYCHIDES,

Appellant,

v.

THE SECRETARY
OF STATE FOR
INDIA IN COUNCIL.
Respondent.

*Prize Court proceedings—Turkish born Greek naturalised before war as a Persian subject, but commercially domiciled as a Turk, ship owned by—
Condemnation—Onus.*

The claimant was a member of the Orthodox Greek Church and was born in Constantinople a Turkish subject. About 3 years before the war he had been naturalised as a Persian subject, but he continued to carry on his business in Constantinople as before, when the "Kara Deniz" which he had purchased on 15th August 1914 was, after declaration of war between Great Britain and Turkey, seized and captured as an enemy vessel on 13th November 1914:

Held—That under the circumstances the burden of proof was upon him to satisfy the Judge that the commercial Turkish domicile which he had retained up to the time when the war broke out had been altered. He might have stated that it was his intention definitely to give it up and not to resume business in Constantinople at all. But the statements he made in Court did not suffice to discharge the burden of proof and the ship was properly condemned.

This was an appeal from a judgment and decree of the High Court of Bombay in prize, dated the 12th June 1919. The question raised by this appeal is whether the Appellant, Socrates Atychides, who was claimant in the prize proceedings, was domiciled or had a commercial domi-

cile in the Ottoman Empire at the time when the "Kara Deniz" was seized and condemned as good and lawful prize. The condemnation took place on the ground that at the time of her seizure she belonged to an enemy of the Crown.

The Appellant was born at Constantinople and lived and carried on business there all his life.

In 1911, he became a Persian subject in order to prevent his sons having to serve in the Turkish army and thereafter the ships which he owned flew the Persian flag. On 15th August 1914, the "Kara Deniz" was purchased by the Appellant from a Turkish Co. and arrived in Bombay shortly afterwards flying the Turkish flag and manned by Turkish officers and crew.

On the 25th August, the name of the ship was purported to be changed and the Persian flag was hoisted and an application was made for clearance from Bombay. The port officer, however, refused to recognise the change or to grant a clearance in the absence of the ship's register.

On the 5th November 1914, war was declared between Great Britain and Turkey and on the 13th November 1914 the "Kara Deniz" was seized and captured as an enemy vessel. On 13th January 1915, the Appellant filed his claim for the said vessel and also for damages for her detention and capture.

The cause was tried before MacLeod, C. J., who delivered a preliminary judgment on 11th March 1915. The learned Chief Justice found that according to the municipal law of Persia and Turkey the transfer of the "Kara Deniz" on the 15th August 1914, was complete. That under Art. 57 of the Declaration of London, 1909, the neutral or enemy character of a vessel must be determined by the flag she is entitled to fly irrespective of

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the personal status of the owner, but that there was considerable justification for the Respondent's contention that there was a strong inference that an arrangement had been made between the Appellant and the vendors that the latter should retain control of the vessel after the transfer which had been effected merely to allow of the vessel reaching the nearest Turkish port (Basra) under the Persian flag.

His Lordship therefore directed the cause to stand over *sine die* to enable the Appellant to produce further evidence in support of the *bonâ fides* of the transfer.

In April 1919 an application was made to the Prize Court by the Respondent for the further hearing of the cause on the ground that apart altogether from the question of the *bonâ fides* of the transfer, the Appellant had a Turkish domicile which he had not abandoned and the vessel must therefore be deemed an enemy vessel.

On the 9th June 1919, MacLeod, C. J., gave judgment and decided that at the outbreak of war the Appellant had his commercial domicile in Turkey, that at the time of the capture and for many months after he had no intention of removing that domicile to a neutral country, that he did nothing towards abandoning or renouncing his Turkish domicile and therefore that the vessel being owned by a person domiciled in an enemy country was subject to condemnation as lawful prize as an enemy ship.

Mr. A. Mirza Khan for the Appellant contended that the detention was unjustifiable before the declaration of war, and that being a neutral ship the seizure was unlawful.

Sir Leslie Scott, K. C. (Sol. Gen.) and Hon'ble Geoffrey Lawrence for the Respondent were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—Although their Lordships do not find it necessary to call upon the Crown for any argument, they must not be understood to cast the smallest slight upon the argument which has been advanced to them on behalf of the Appellant in so doing. Indeed, they wish to say that great assistance has been rendered to them by the brevity, the clearness and the good judgment which Mr. Mirza has displayed on behalf of his client; but their Lordships have come to the conclusion that there is no ground made out upon which they can interfere with the condemnation which was pronounced in the Court below.

The case is a claim in prize for the condemnation of the "Kara Deniz." It has been heard on two occasions. On the first the learned Judge found that the formalities of the transfer to the claimant appeared to be complete, but he had doubts, which the circumstances certainly seem to have warranted, whether the transaction might not have been a collusive one entered into for the purpose of assisting the Turkish Government, then an enemy of His Majesty, and accordingly the case was adjourned to give the claimant the opportunity of calling further evidence upon that point. Subsequently the case came on again, and a decree of condemnation was pronounced upon the ground that the claimant had, at the time of the capture and continuously thereafter, a commercial domicile in Constantinople, and that he had never formed any intention, or taken any steps, which had the effect of divesting him of that commercial domicile and adopting some other. If the decision that he had not done so, and had therefore retained his Turkish commercial domicile, was

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correct, it is not contended before their Lordships that the condemnation was not properly pronounced.

The question is one of fact, and depended in the first instance upon the evidence given as to the acts and intentions of the claimant. He was by race a Greek. He was a member of the Orthodox Greek Church, but was born in Constantinople a Turkish subject. About three years before the war he had been naturalised as a Persian subject, but he continued to carry on his business in Constantinople as before. In partnership with a Turkish subject he traded as a manager of shipping, and, in co-ownership sometimes with Turks and sometimes with Germans, and in one or two cases without any co-owners, he was owner of a number of vessels trading principally in the Black Sea, where they carried the Russian mails, and through the Suez Canal and down the Red Sea, where they engaged in the pilgrim traffic to Mecca. This business he carried on up to the very eve of the outbreak of the war between Turkey and Great Britain. He happened then to be in the Piræus in consequence of some trouble which one of his vessels, the "Teheran," had got into. The imminence of war must have been obvious to him, as it was to everybody else, because his vessels had been employed in transporting troops for the Turkish Government, a service which they had rendered in time of peace for some years, but now were called on to render upon an exceptionally large scale.

In the autumn of 1914 mines had been laid in the Dardanelles, the traffic through the Straits was no longer conducted in the ordinary mode of times of peace, and it could hardly have been a surprise to him when, at the Piræus, he learned that war had formally begun. He took an

early opportunity of removing from the immediate area of war his wife and children, and brought them to the Piræus. His Turkish partners he left in Constantinople. His material interests were there, because his ships, except the "Teheran" and the "Kara Deniz," were in the hands of the Turkish Government, and his undertakings therefore continued as before in Constantinople, though they were seriously hampered, and perhaps brought to a standstill, by the war. He next devoted himself to the fortunes of the "Kara Deniz," which he had bought in the previous August. It may be assumed for present purposes that everything connected with the purchase was done in good faith, but she was a vessel at that time on passage eastwards, and reached Bombay before he had been able to communicate with the captain for the purpose of taking the formal steps necessary to change her flag and to establish her as a Persian vessel. She reached Bombay flying the Turkish flag, under the command of a Turkish captain, with a Turkish crew; she had no register on board, but in other respects she was documented as a Turkish vessel. He accordingly went to Bombay himself for the purpose of trying to terminate her stay at Bombay, for the authorities insisted that before the change of ownership could be recognised the register must be produced and put into regular order. His intention was to forward the vessel to a destination, which he says had been pre-arranged, Basra.

Under these circumstances the burden of proof was upon him to satisfy the learned Judge that the commercial Turkish domicile, which he had certainly retained up to the time when war broke out, had

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up, and not to resume business in Constantinople at all. As to that he made statements in evidence before the learned Judge which negatived any such intention, because he said in cross-examination, "I shall go back as soon as the Dardanelles are open. It is immaterial to me whether war is going on or not. I want to go to look after my business. I was afraid of the safety of my wife and family, as they were Greeks." It is true that in re-examination he said, "I do not want to trade there while war continues. If I got to Constantinople I would try and get my ships to Piræus," and it is suggested that what he really meant was that he expected that very shortly, not only would Constantinople be in the hands of the British forces, but apparently would have been annexed to the British Empire and have become a British possession. No grounds are shown for so far-reaching an anticipation as that, but at any rate he gave this evidence before the learned Judge, who formed his own opinion as to it. Cogent grounds would be needed to alter the conclusion drawn by him from the oral evidence which the Appellant gave, in spite of the fact that he spoke Greek, and that it seems doubtful whether the interpreter thoroughly understood Greek, while the Court did not at any rate profess to understand that language. Every act of Mr. Atychides at the time was consistent with the intention to retain his commercial domicile at Constantinople, and is inconsistent with any intention to divest himself of it. He did his best to continue the voyage of the "Kara Deniz" to a Turkish port, although he was not able to show that there was any particularly pressing commercial object in sending her to Basra, where no cargo was engaged, where no agent had

been appointed and where, so far as appears, there was no trade to be expected. He continued to act exactly as before, so far as their Lordships know. It may be said that there was very little that he could do with his business in Constantinople, he being in the Piræus and his ships being in the hands of the Turkish Government; but still the matter rested with him, and on appeal their Lordships think it is impossible to dissent from the conclusion which the learned Judge arrived at in that state of the evidence, namely, that the claimant had not discharged the burden of proof which lay upon him of showing that he was no longer commercially domiciled in Turkey, as he had been before. That being so, it has not been argued before their Lordships that the condemnation should not stand.

There were other claims raised at the first trial, the nature of which appears to have been that it was contended that the ship had been detained by the Government at Bombay either without legal authority or in the unreasonable exercise of a legal authority, and under such circumstances as to warrant the claimant in the prize proceedings making a claim for damages for detention of the vessel. It may be that, if the ship had been released in the prize proceedings, he might have a claim for something of the kind, but what claim in prize he could have as an alternative to a claim for the release of the vessel and consistently with her condemnation does not appear.

On the first occasion, either by arrangement or in the discretion of the learned Judge, those questions do not seem to have been tried; on it was unnecessary to try them because the vessel was condemned, and there is

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was conceived the matter ended. It has been contended before their Lordships by counsel for the Appellant, first of all that there is such a grievance, and secondly that it is one upon which their Lordships ought to pass an opinion in the Appellant's favour. It is quite clear that, sitting in appeal, then Lordships could not investigate this matter for the purpose of giving a decision themselves, if it was never passed upon at Bombay before a Court there and after proper examination of the facts in Court, and their Lordships are clearly of opinion that no ground whatever has been made out for giving the Appellant any relief in that connection. If he has any such rights he should prosecute them in Bombay.

Their Lordships are very far from encouraging any supposition that he has such rights. Counsel frankly admitted that the case must be, not that there was illegal behaviour on the part of the port officials, but that they acted unreasonably in exercising legal rights for a long time instead of accepting the representation, diplomatically made on behalf of the claimant, and it was contended that the object was the indirect one of getting an opportunity of condemning a Persian vessel as Turkish if war should break out between Great Britain and Turkey. A charge of bad faith like that, which has never been investigated, still less supported, is one as to which it is unnecessary to say anything further.

Their Lordships therefore think that there is no ground whatever for interfering with the condemnation pronounced by the Chief Justice of Bombay, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor: Mr. A. J. Canning for the Appellant.

Solicitor: Treasury Solicitor for the Respondent.
G. D. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD DUNEDIN.	} RAJANGAM AYYAR, Appellant, v. RAJANGAM AYYAR, Respondent.
LORD PHILLIMORE.	
SIR JOHN EDGE.	
MR. AMEER ALI.	
MR. JUSTICE DUFF.	
1922,	
Heard, 10 and	
11, July.	
Judgment,	
31, July.	

Registration Act (III of 1877), sec. 17, sub-sec. 2, proviso (v)—Memorandum declaring that parties cease to be joint and providing for execution of a deed of partition, if must be registered.

Where a memorandum regarding the cesser of jointness, which amounted to a declaration that from that time forth the parties became entitled to possession and enjoyment of their properties in separate shares, provided for the execution of a further deed effectuating the partition.

Held—That by virtue of proviso (v) to sub-sec. 2 of sec. 17 of the Registration Act of 1877, the memorandum did not require registration and was admissible in evidence.

This was an appeal from an order of remand, dated the 24th February 1920 of the High Court of Judicature at Madras setting aside a preliminary decree, dated the 29th October 1918, of the Court of the District Judge of Tinnevely and directing him to ascertain what properties in British territory should be allotted to the Respondent to give him his half share in the whole of the joint family properties of the parties.

The main questions for consideration

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in this appeal are (1) whether a *yadast* and partition deed of the 7th January and 1st February 1915 respectively hereinafter referred to, were inadmissible for want of registration within British territory and if not, (2) whether the minor Respondent is entitled to have his suit treated as one for general partition between co-parceners.

The facts that led to the present litigation may be shortly stated as follows :— The minor Respondent's father Subramania, and the Appellant's father Krishna, were brothers and members of a joint Hindu family. They owned properties jointly in the Native State of Travancore, and in Tinnevely District within British territory. On the 7th January 1915, they executed a *yadast* effecting a division of the entire properties and allotting certain properties specified in schedules to each brother, and agreed that a partition deed in respect of the properties shall be executed and registered in Travancore and also in Tinnevely. On the 1st February 1915 the brothers executed a partition deed with certain modifications as regards property in the Travancore State, and had it registered on the 5th February in the office of the Sub-Registrar at Trivandrum. In this partition deed also, it was agreed that, in respect of the properties in British territory, they should get a partition deed regularly executed and registered there.

On the 6th May 1915 the Appellant's father Krishna died. The Appellant refused to execute and register a partition deed as agreed upon, and on the 21st December 1915 the Respondent's father instituted the present suit in the Court of the Subordinate Judge at Tinnevely against the Appellant. Later, the suit was transferred from the Subordinate

Judge's Court to that of the District Judge of Tinnevely.

The District Judge held that the *yadast* and the partition deed of 1915 were admissible in evidence and that all the suit properties were the joint family properties of the parties. He therefore passed a preliminary decree directing delivery of the properties claimed and the appointment of a Commissioner to divide the other properties.

Against the said decree, dated the 29th October 1918, the Defendant appealed to the High Court at Madras. The appeal was heard by Wallis, C. J., and Krishnan, J., who delivered separate but concurring judgments on the 24th February 1920. Their Lordships held that the *yadast* and the partition deed were inadmissible in evidence for want of registration: and they confirmed the finding of the District Judge that all the suit properties were the joint family properties of the parties. Krishnan, J., in the course of his judgment observed :—

"The suit is not in my opinion framed as one for specific performance of an agreement. In fact, in his plaint the Plaintiff has repudiated the alleged agreement in part; he cannot seek specific performance of a part alone. It is thus clear that the documents were relied on by the Plaintiff and were admitted by the lower Court as evidence of a transaction affecting the immoveable properties included in them. This is against the provision of sec. 49 of the Registration Act: and we must exclude them from consideration as evidence of a prior partition. Apart from these documents there is no legal evidence of any partition between the brothers Krishna Ayyar and Subramania Ayyar. The suit must therefore be dealt with as one for a general partition between two co-parceners; it is in

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reality a suit for such a partition with an allegation that some of the properties included in the plaint were already allotted to the Plaintiff's share. As he has failed to prove that allegation, he must be allowed to fall back on his general right to a share in the joint family properties as a co-parcener. In dividing the joint family property in British territory, the Court will of course take into consideration the joint family properties in Travancore, which were divided and allotted by Ex. Az to each brother for adjusting the Plaintiff's share in the properties in Tinnevely."

In the result the High Court passed an order setting aside the decree of the District Court, and remanding the suit to the District Court to ascertain what properties in British territory should be allotted to the Plaintiff to give him his half share in the whole of the joint family properties, and to pass a fresh preliminary decree according to law in the light of the observations made by the High Court.

Against the said order of remand, dated the 24th February 1918, of the High Court the Appellant now appealed to His Majesty in Council.

Messrs. Upjohn, K. C. and *B. Dubé* for the Appellant contended that the decision had been arrived at in complete disregard of the evidence, pleadings, and issues. The suit made in the plaint is for specific performance of an agreement. It is not a suit for a partition but for the carrying out of an agreement for partition and that agreement is not admissible in evidence for lack of registration. If it is urged that the suit is for partition, it is bad for non-joinder of parties. Indian Civil Procedure Code, sec. 221. The Plaintiff while asking for specific performance of the agreement is at the same

time repudiating part of it. This is not permissible.

Ma Shwe Mya v. Maung Mo Hnaung (1).

As to "Jeshtabagham," the High Court have not taken any evidence but have assumed that the law of British India is applicable. They then assume that the law of Travancore is the same as the law of British India and have wrongly decreed a partition of the Travancore properties.

Mr. DeGruyther, K. C. (with him *Mr. K. V. L. Narasimham*) for the Respondent.—There is admittedly a joint Hindu family and joint property, the onus is therefore on the Appellant who contends that part of such property is self-acquired to prove his contention. The form of the suit is immaterial. It was brought to determine what property could be partitioned.

Then LORDSHIP'S JUDGMENT was delivered by

MR. AMEER ALI.—This appeal arises out of a suit brought by the Plaintiff Subramania Ayyar, since deceased, in the Court of the Subordinate Judge at Tinnevely, in the Madras Presidency, on the 21st December 1915, under the following circumstances.

Subramania Ayyar, with his brother Krishna Ayyar, who died before the institution of the suit, formed a joint and undivided Hindu family subject to the Mitakshara law. They possessed considerable immovable properties both within the Travancore State and in British territories. The landed properties belonging to them in British India are situated in the Tinnevely District. In 1915 they decided to separate and make

(1) L. R. 48 I. A. 214; s. c. I. L. R. 48 Cal. 632 (1921).

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an amicable division of the properties belonging to them, both immovable and movable. By a *yadast*, or memorandum of agreement, dated the 7th January 1915, which is marked as Exhibit Ay in these proceedings, they agreed to divide their properties both in Travancore and in British territories according to certain specified shares. Later, on the 1st February of the same year, effect was given to this agreement in respect of the properties in Travancore, under which Krishna Ayyar, as the elder brother, obtained, under the designation of *jeshta-bhagam*, a larger share than would have come to him otherwise. This document was registered in Travancore, and effect appears to have been given to it in respect of the properties situated in that State. No division, however, was made of the properties in Tinnevely or separate possession delivered to the parties of their respective shares. Krishna Ayyar having died in the meantime, his son, the present Defendant, evaded the fulfilment of the agreement embodied in Exhibit Ay; and accordingly Subramania brought the present suit for its enforcement.

In the plaint the relief asked for is a decree for partition by metes and bounds, and a direction to the Defendant to execute a conveyance of the properties that should fall to the share of the Plaintiff in terms of the agreement.

The Defendant in his written statement raised three objections to the suit: firstly, that the agreement (Ay) had been obtained by Subramania from his father under undue influence, secondly, that a large portion of the properties in which the Plaintiff claimed a share was his father's self-acquisitions and did not form part of the ancestral estate; and thirdly, that the agreement, not having been registered in

British India, could not be admitted in evidence, and no suit for specific performance could be based on it.

The District Judge held that the Defendant had failed to prove his allegation of undue influence to invalidate the agreement on which the Plaintiff relies. He also held that the Defendant having admitted that there was a nucleus of ancestral property, it lay upon him to establish that the properties, which he claimed exclusively, were acquired by his father, and this onus he had wholly failed to discharge.

With regard to the non-registration of the agreement the District Judge said as follows:—

"I do not think that the fact that the *yadast* (Exhibit Ay) and the document of partition (Exhibit Az) referred to in paragraph 8 of the plaint were not registered in British India precludes their admission in evidence."

And, relying upon a decision of the High Court of Madras, he held that "if a present right is created, the instrument, though unregistered, is admissible in evidence in a suit for specific performance, and I hold that they are admissible in evidence in this suit." He accordingly made a decree in favour of the Plaintiff, declaring in the first place that the properties claimed by the Plaintiff had fallen to his share, and directing that the Defendant should put the Plaintiff in possession of the property detailed in Schedules 1, 4 and 6 of the plaint and half of certain other properties, after dividing by metes and bounds. He made certain other directions on the same basis.

On appeal to the High Court the learned Judges held, in agreement with the first Court, that the Defendant had utterly failed to prove that the memorandum had been obtained by undue influence,

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but they also held that the agreement Exhibit Ay, not having been registered in British India, was not admissible in evidence. Having regard, however, to the facts of the case and the admitted jointness of the parties until 1915, they directed a general partition in equal shares of the properties both in British India and the Travancore State.

The effect of the High Court's decision on the latter point is that it upsets the completed settlement embodied in Ex. Az, which was duly executed and registered in the Travancore State, and which appears to have been carried into effect, the Defendant or his father having got possession of the properties which fell to his share.

With regard to the properties in Tinnevely, the High Court considered, in agreement with the District Judge, that the Defendant having admitted an ancestral nucleus, it lay upon him to prove that the properties which he claimed were self-acquired.

The Defendant, on appeal, contends that the High Court were not justified in turning a suit for specific performance of an agreement which, not having been registered, could not be given in evidence, into a suit for general partition, and that accordingly the present claim should be dismissed. He also contends that the High Court were wrong in decreeing a partition of the properties in the Travancore District.

In their Lordships' judgment the High Court, in upsetting the division of the Travancore properties, appear to have proceeded upon a misapprehension.

The *yadast*, as its name implies, was a memorandum regarding the cesser of jointness, which amounted to a declaration that from that time forth the parties became entitled to the possession and en-

joyment of their properties in separate shares; and it provided for the execution of a further deed effectuating the partition. It says:—

"A partition deed in terms hereof shall be executed and registered in the office of the Sub-Registrar of this place, as also at Tinnevely, as early as possible; that until then this shall itself be in force"

It then goes on to give a larger share to Krishna Ayyar, as the elder brother. In accordance with the provisions of the agreement, a formal deed of partition (Az) was executed and registered in Travancore relating to the Travancore properties. It was entered into between two persons *sui juris* fully competent to enter into the transaction. It is difficult to perceive how that transaction can be upset in a suit which relates to properties in Tinnevely, and asks for a partition of those properties alone. Subramania, no doubt, in his plaint had said that he would bring a suit in the Travancore Court to set aside the division effected by Az, and it is possible that that statement led the Defendant to throw every possible obstacle in the way of the Plaintiff to get the relief he asked for. But it furnishes no ground, in their Lordships' opinion, to upset a completed transaction. The present suit must consequently be confined to the joint family properties situated in Tinnevely.

It has been contended that this is a suit for the specific performance of an unregistered contract; and that the High Court dealt with it as one for general partition.

As regards the non-registration of the agreement, it is to be observed that sec. 17 of the Indian Registration Act, 1877, makes the registration of certain classes of documents compulsory. Among others:—

(b) "non-testamentary instruments which

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purport to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property "

From this Proviso V to sub-sec. 2 excepts the following :—

" any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest "

Ex. Av is not a document by itself creating, assigning, limiting, or extinguishing any right or interest in immoveable property, it merely creates a right to obtain another document which will, when executed, create a right in the person claiming the relief, and on that ground their Lordships think Ex. Av did not require registration, and accordingly is admissible in evidence, so far as it goes.

The learned Judges of the High Court were, however, perfectly right in the view that the onus was on the Defendant to establish that the properties he claimed as the self-acquired properties of his father, Krishna Ayyar, bore that character.

The Defendant examined a number of witnesses on commission, apparently in support of his statement, but the depositions of these witnesses do not appear to have been put in evidence, and the list attached to the District Judge's judgment, after mentioning the exhibits filed on the Plaintiff's behalf and giving the names of his witnesses, contains the following entries :—

" Defendant's exhibits . . . nil "

Defendant's witnesses . . . nil "

Their Lordships are, therefore, of opi-

nion that the decree of the High Court should be varied by confining the decree for partition to the properties held by the parties in the Tinnevely District; that save and except this variation the appeal should be dismissed. The case will go back to the High Court for remission to the District Judge in order that he may appoint a Commissioner to make the division of the properties by metes and bounds in equal shares and to allot to the Plaintiff his half-share of the whole of the joint family properties situated in Tinnevely; that in case, owing to any circumstance, equal division cannot be made of any particular property to one party or the other, the difference should be arranged for by the Commissioner, subject to the decision of the District Judge. As the suit was one substantially for partition, their Lordships think that the parties should bear throughout the proceedings their costs, save and except that the Defendant should pay to the Plaintiff his half-share of the Court fees. Their Lordships will, therefore, humbly advise His Majesty accordingly.

Solicitors *Messrs Barrow, Rogers and Nevill* for the Appellant

Solicitor *Mr Douglas Grant* for the Respondent

G D M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 45 OF 1921.

MOOKERJEE, J. RADHA KANTO SAHA
CUMING, J. and ors., Plaintiffs,
1922, Appellants,

Heard, 14 and

r.

15, February. DEBENDRA NARAJN SAHA
Judgment, and ors., Defendants,

15, February. Respondents.

*Civil Procedure Code (Act V of 1908), Or. 7,
r. 11—Plaint insufficiently stamped—Court's duty*

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—*Court Fees Act (VII of 1870), sec. 7, cl. 5, sub-cl. (a) - Cl. 4, sub-cl. 'c'*—*Declaratory decree with consequential relief, what is.*

Where the Plaintiffs brought a suit for possession of revenue-paying lands against the Defendants alleging that after the dismissal of an appeal to High Court preferred by them from a mortgage decree relating to those properties obtained by some of the Defendants there was an adjustment of the decree and in contravention thereof it was fraudulently executed and the properties were purchased by the decree-holders in the name of another person, and it was sought by the Plaintiffs to have a two-fold declaration, namely, first, that their title to the mortgaged properties had not been affected by the execution proceedings and, secondly, that a supplemental personal decree subsequently passed could not have been validly made against them.

Held—That the suit was not one to set aside a decree or to obtain a declaratory decree with consequential relief under sec. 7, cl. 4, sub-cl. (c) of the Court Fees Act, but was one for possession under cl. 5, sub-cl. (a); the declaration prayed for that a personal decree could not have been made against them would be consequential on the success of their substantial claim in the suit, as the personal decree could be made only if there had been a valid and operative sale which had led to a partial satisfaction of the amount due under the mortgage-decree.

Held further—That when a plaint is insufficiently stamped, the Court is bound to give the Plaintiff time to make good the deficiency: The provisions of Or. 7, r. 11, C. P. C. are mandatory and can be brought into operation at any stage of the suit. The fact that the objection is heard at a time subsequent to the registration of the suit is immaterial.

This was an Appeal from an original decree passed by Babu Pasupati Bose, Officiating Fourth Subordinate Judge of Dacca, dated the 20th January 1921.

The facts of the case will appear from the judgment.

Babu Amarendra Nath Bose (for Dr. Sarat Ch. Bysak) and Babu Satis Chandra Chowdhury for the Appellants.

Babus Gopal Chandra Das and Suresh Chandra Talukdar (for Babu Kamini Kumar Sircar) for the Respondents.

The JUDGMENT OF THE COURT was as follows.—

The subject-matter of the litigation which has culminated in this appeal is immoveable property of considerable value comprised in a mortgage security executed by the Plaintiffs in favour of the first two Defendants. A decree was made on the basis of the mortgage on the 31st August 1916 and an appeal to this Court was dismissed on the 22nd March 1918. The case for the Plaintiffs is that after the disposal of the appeal there was an adjustment of the decree and that in contravention of such adjustment the decree was fraudulently executed with the result that the mortgaged properties were brought to sale. It is asserted that they were purchased by the decree-holders in the name of the fourth Defendant. Subsequently, on the application made on the 21st January 1920, a personal decree was made in due course on the 17th June 1920. The Plaintiffs seek to have a two-fold declaration, namely, first, that their title to the mortgaged properties has not been affected by the execution proceedings which they contend were void and no better than nullity; and secondly, that, if this view be correct, no personal decree could have been made against them. One of the objections taken by the De-

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fendant is that the suit has not been properly valued and that proper court-fees have not been paid on the plaint. The Subordinate Judge has held that this objection is well-founded. But though he has found this issue against the Plaintiffs he has not called for deficit Court-fees, as in his opinion, the suit is otherwise barred by specific rule of law. He has proceeded to hold that the suit is barred by limitation as also by the provisions of sec. 47 and Or. 21, r. 92, C. P. C. In this view, he has dismissed the suit. The Plaintiffs have appealed against the decree.

We are of opinion that the view taken by the Subordinate Judge that the suit has not been properly valued and that proper court-fees have not been paid cannot be supported. When we look at the plaint, the suit appears to us to be substantially a suit for possession of land within the meaning of sec. 7, cl. 5, sub-cl. (a) of the Court Fees Act, 1870. Under the provision of law, in a suit for possession of land, the amount of court-fee payable is according to the value of the subject-matter and where the subject-matter is land which forms an entire estate or a definite share of an estate paying annual revenue to the Government and such revenue is permanently settled, the value is deemed to be ten times the revenue so payable. The Plaintiffs allege in their plaint that although the estimated market value of the subject-matter of litigation is Rs. 16,673, ten times the revenue payable is Rs. 794-5-3 and they have paid court-fees on this sum. It has been argued, however, on behalf of the Respondents that the suit falls within the description of a suit to obtain a declaratory decree where consequential relief is prayed for, within the meaning of sec. 7, sub-sec 4, cl. (c) of the Court

Fees Act, 1870, and in support of this contention reference has been made to the case of *Ganesh Bhagat v. Sarada Prasad Mookerjee* (1). In our opinion this contention is not well-founded. The Plaintiffs do not seek to set aside the decree nor do they seek to obtain declaratory decree with consequential relief. Their contention is that although the decree was validly made, the circumstances which led up to the sale held at the instance of the decree-holders could not in law pass their title to the execution purchaser; and on this basis, they seek to recover possession of the property. No doubt they seek a declaration that the personal decree could not have been made against them. This declaration, however, can be consequential on the success of their substantial claim in the suit. Their contention is that a personal decree can be made under Or. 34, r. 6 of the Code only if there has been a valid and operative sale which has led to a partial satisfaction of the amount due under the mortgage decree. We hold accordingly that the suit was properly valued and that the plaint was adequately stamped. We desire to point out that even if the view taken by the Subordinate Judge had been well-founded the course pursued by him was contrary to the provisions of Or. 7, r. 11, C. P. C. The provisions of this rule are mandatory, and they require that where a plaint is written upon paper insufficiently stamped, the Court is bound to give the Plaintiff time to make good the deficiency; *Achut Ramchandra v. Nagappa* (2) and *Ram Sahay v. Kumar Luchmi Narayan* (3). The fact that the objection is heard at a time subsequent

(1) I. L. R. 42 Cal. 370 : s. c. 19 C. W. N. 895 (1914).

(2) I. L. R. 38 Bom. 41 (1913).

(3) 3 P. L. J. 74 (1917).

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to the registration of the suit is immaterial, because the provisions of this rule can be brought into operation at any stage of the suit, *Kishore Singh v. Subdol Singh* (4), *Venkata Tawker v. Ramaswami* (5), *Brahmamoyi Das v. Audisi* (6) and *Padmanund Singh v. Ananta Lal* (7). In this view it follows that as soon as the Subordinate Judge held that the plaint was not adequately stamped, he should have proceeded to have acted in accordance with the provisions of Or. 7, r. 11 upon the failure of the Plaintiff to carry out his order he should have rejected the plaint and not dismiss the suit. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him for trial on the merits. In view of the grave allegations made in the plaint we direct that the facts be first investigated on the evidence before the questions of law be considered. Costs will abide the result. We direct that under sec. 13 of the Court Fees Act, the court-fee paid on the memorandum of appeal be returned to the Appellants.

S. C. C.

[CIVIL REVISIONAL JURISDICTION.]

RULE No 529 OF 1922.

CHATTERJEA, J.

CUMING, J.

1922,

Heard, 4, Decem-
ber and

1923,

12, January.

Judgment,

2, March.

W. ROBEIRO,

Petitioner,

v.

ELIAS S. M. JACOB,

Opposite Party.

Calcutta Rent Act (III of 1920), secs. 2 (f) (ii)

(4) I. L. R. 12 All. 553 (1889).

(5) I. L. R. 18 Mad. 388 (1895).

(6) I. L. R. 27 Cal. 376 (1899).

(7) I. L. R. 34 Cal. 20 : s. c. 11 C. W. N. 38
(1906).

and 15 (3) - *Sub-letting by the tenant of a portion of the premises—First letting—Standard rent of the portion sub-let, how to be calculated.*

When a tenant sub-lets a portion of the premises, the standard rent of the portion so sub-let is to be determined according to the provisions of sec. 15 (3) of the Act and not under sec. 2 (f) (ii) of the Calcutta Rent Act. Under sec. 15 (3) the part sub-let is taken to have been first let when the entire premises were let out to the tenant.

This was a Rule granted on the 17th July 1922 against an order passed by the President, Calcutta Improvement Tribunal* (Mr S. C. Bannerjee), dated 23rd June 1922, revising an order made by the Rent Controller (Mr B. D. Banerjee), dated 24th January 1921.

The facts of the case will appear from the judgment.

Babu Bepin Chandra Mullick for the Petitioner

Babu Mohendra Nath Roy and Mr. Chippendale for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEA, J.—This Rule arises out of proceedings taken by the Opposite Party under the Calcutta Rent Act for fixing the standard rent of certain premises.

It appears that the Opposite party took a three years' lease of the entire premises No. 4 Ripon Street at a rent of Rs. 150 in July 1919, and on the 4th August 1919 sub-let it, with the exception of three rooms facing Ripon Street, at a monthly rent of Rs. 200 exclusive of taxes to the Petitioner. Disputes having arisen between the parties, regarding the rent, the Opposite Party applied to the Rent Controller for fixing the standard rent of the premises held by the Petitioner, i.e., of the building with the exception of the road-side rooms. The Rent Controller

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fixed the standard rent of the premises at Rs. 148 per month exclusive of taxes. The Opposite Party thereupon moved the President of the Improvement Tribunal for revision of the order of the Rent Controller under sec. 18 of the Rent Act, and the President held that the sub-letting of the premises (excepting the road-side rooms) was the first letting of the premises after November 1918, and fixed the standard rent of the premises in question as between the Opposite Party (the lessee) and the Petitioner (the sub-lessee) at Rs. 200 exclusive of taxes.

Now under cl. (c) of sec. 2 the expression "landlord" includes "a tenant who sub-lets any premises." The Opposite Party therefore is a landlord within the meaning of the Act. The expression "premises" includes a part of a building let separately. It is accordingly contended on behalf of the Opposite Party that as between the Opposite Party who must be treated as the landlord under the Act and the Petitioner the premises (*i. e.*, the part of the building separately let to the Petitioner) was first let on the 4th August 1919. In construing the provisions of sec. 2 (f) (i) the question arises whether it contemplates only one first letting or there may be more than one first letting as portions of the premises are sub-let from time to time to different persons.

For instance, a house consisting of two rooms is let out to A in January 1919. A then sub-lets one room to B, and the other to C, in February and March respectively. The question is whether the letting of the entire premises to A in January 1919 was the first letting of the rooms or the sub-letting in February and March was the first letting with respect to the rooms. The contention of the Opposite Party is that having regard to

the fact that the expression "landlord" includes a "tenant who sub-lets any premises" and "premises" includes a "part of the premises," the first letting with respect to B was in February and with respect to C in March respectively. On the other hand it is contended on behalf of the Petitioner that the words "the rent at which the premises were or may be first let" in sec. 2 (ii) contemplate only one first letting of the premises, and therefore in the above illustration both the rooms must be taken to have been first let when the entire premises were let to A in January 1919. The question of the standard rent depends upon the determination of the above question.

The question whether there can be only one standard rent or a number of different standard rents was considered in the case of *Chapsey Umersey v Keshavn Damp* (1), where Sitalvad, J., observed:

"The only object to my mind of including in the definition of 'landlord' a tenant, and in the definition of 'tenant' a sub-tenant is to extend the benefit of the Rent Act to sub-tenants, but I do not think it was intended that the standard rent was to be determined by different standards between the original landlord and tenant, and between the tenant and the sub-tenant. Otherwise the tenant while himself getting the advantage of the Rent Act would be able to profiteer as between himself and the sub-tenant

. . . Standard means a rule or a model and can only be one. The whole object of the Rent Act is to prevent tenants being made to pay rent which the legislature considers excessive or unreasonable . . . Standard rent must, I think, mean the rent at which the premises were originally let. The standard rent is to be fixed in relation to premises and not in

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relation to persons, and can therefore be only one, and not varying as between different individuals. In the case of *King v. York* (2), the Court of Appeal in dealing with the provisions of the Increase of Rent and Mortgage Interest Act, 1915, said: "The Act applied to houses, not to persons. The Act operated *in rem* not *in personam*. It stereotyped the rent of a house."

The learned President of the Improvement Tribunal differed from the view taken in the Bombay case, and pointed out that in sub-sec 3 of sec 13 of the Bombay Rent Act, it is provided that "in the case of any such sub-letting as is referred to in cl (a) of sub-sec. (1) the Court shall have regard to the standard rent of the premises a part of which has been or is sub-let," whereas there are no provisions corresponding to sub-sec (2) of sec 13 of the Bombay Act in sec 15 of the Calcutta Rent Act. That is so, but in the first place, the observations of Sitalvad, J., were not based upon the provisions of sub-sec. (2) of sec 13 of the Bombay Act, and secondly, I think that the provisions of sub-sec 3 (a) of sec 15 of the Calcutta Rent Act, viz, that the Rent Controller "may fix the standard rent at such amount as having regard to the provisions of this Act, and the circumstances of the case, he deems just," would include a consideration of the standard rent of the premises a part of which has been sub-let. Then the learned President is of opinion that "the view taken by Sitalvad, J., that the standard rent of a premises which has been let and sub-let in succession should be based on the rent of the original letting is opposed to the view taken by the Court of Appeal in *Glassop v. Ashley* (3), where the rent of

the last sub-letting, that is to say, the rent paid by the tenant in actual occupation was taken as the basis for the standard rent." There was, however, no question of last letting in that case. A Brewery Company were lessees of a public house at a rent of £130 on the 3rd August 1914. The Company had sub-let the house to the Defendant on a quarterly tenancy at a rent of £24 a year by an agreement containing a clause for the purchase of liquors by the Defendant from the Company. In August 1916, the lease to the Brewery Company expired and was not renewed, and the Defendant Company became tenant to the owners of the house who were the Plaintiffs, at a rent subsequently fixed at £30 a year. On 23rd March 1920 the Plaintiffs duly gave the Defendants notice to quit on 24th June 1920. They also gave him notice that if he held over after that date his rent would be £130 a year. The Defendant held over but refused to pay rent at a higher rate than £30 a year. The rateable value of the house was £24-16s. and no more. In an action by the Plaintiffs for possession of the house it was held by the Court of Appeal that the Defendant having been in occupation of the house on and ever since 3rd August 1914 the standard rent was £24, or at the most £24-16s. and not £130. It will be seen that both the lease and the sub-lease were in existence on the crucial date (3rd August 1914). Subsequently the sub-lessee became the tenant under the owners, as the lessee did not renew his lease on the expiry of the term, and the question was whether the rent paid by the original lessee, or that paid by the sub-lessee on the 3rd August 1914 was the standard rent.

The Court of Appeal thought it undesirable to give to the enactment any gene-

(2) [1919] W. N. 59, 63.

(3) [1922] 1 K. B. 1.

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ral construction, but was of opinion that in that case the rent paid by the tenant in actual occupation on the 3rd August 1914 was the standard rent. It was argued that "the statute is speaking not only of the original letting but of every sub-letting of the dwelling house, and so there may be any number of standard rents and the standard rent in question in any particular case is the rent payable by that tenant to that landlord between whom the dispute has arisen." On the other hand it was contended that "the plain intention of the Act is that there should be but one standard rent, namely, the rent payable on 3rd August 1914 by the tenant then in occupation to his immediate landlord." Bankes, L. J., observed: "In my view there are difficulties in the way of either construction as applicable to every case," and that he was not prepared to hold that in every case the rent paid by the tenant in actual occupation on 3rd August 1914 was the standard rent. Scrutton, L. J., on the other hand seems to have been of opinion that the legislature contemplated only one standard rent. Atkin, L. J., was also inclined to take that view, but he did not decide the question. The question therefore whether there was only one standard rent or there could be any number of standard rents was not decided, though two of the learned Judges were inclined to take the view that only one standard rent was contemplated. However that may be, there was no question of last sub-letting in that case as both the lease and the sub-lease were in existence on 3rd August 1914, and the precise question before us did not arise in that case.

In the case of *Woodward v. Samuels* (4) the Respondent (Samuels) was the tenant of a house at a rent of £45 from a

(4) [1920] W. N. 82.

date prior to 3rd August 1914 until 1919 when he purchased it, and converted it into three flats. He made alterations in the house the costs whereof amounted to £35. He then let the flats separately at varying rents making in all £2-18s.-6d equivalent to an annual rent of £153, the landlord paying the taxes and rates. The Appellant (Woodward) who in June 1919 became tenant of the first floor claimed that the 22s which he was charged for his flat was in excess of the standard rent provided by the Act of 1915, and applied to the Court for apportionment of the rent of the house between the three flats for the purpose of fixing the standard rent of his flat. The country Court Judge held that as the Appellant's flat was first let as a separate dwelling house in June 1919, the rent at which it was then let, viz, 22s a week was the standard rent of it, and there was no case for apportionment. On appeal it was held that the case clearly fell within the provisions of sec 2, sub-sec 3 of 5 and 6 Geo. 5 c. 97 (which expressly provides for apportionment of the rent), and the decision of the country Court Judge was reversed. The Court observed:—"If a house was pulled down and re-built since August 1918, the standard rent would be the rent at which the new building was first let, but it was otherwise with the conversion of an existing building into flats. If on conversion one of the flats was to be regarded as a distinct thing from the whole dwelling house, a landlord might by reserving one room for himself let the residue of the house at any rent he pleased."

The question is not free from difficulty. But the definition of the expressions "landlord" and "premises" might support the construction put forward on behalf of the Opposite Party only if it is held that the particular portion of the

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building sub-let to the Petitioner in August 1919 was not first let, when the entire building was let out to the Opposite Party in July 1919. It is difficult, however, to hold that a portion of a building is not let out when the entire building of which it is a component part is let out.

Then again the provisions of sec 15, sub-sec. (3) go against the construction relied upon by the Opposite Party. If the sub-letting of a part is the first letting, the rent at which such part is sub-let after November 1918 is the standard rent under sec. 2 (f) (ii). If so, there would be no necessity of enacting in sec. 15 (3), that in a case where a tenant has sub-let a part of any premises let to him, the Rent Controller "may fix the standard rent at such amount as having regard to the provisions of the Act and the circumstances of the case he deems just," because according to the contention of the Opposite Party, the rent at which such part was sub-let would automatically become the standard rent under sec 2 (f) (ii). The provisions of sec 15 (3) referred to above would come into operation if the part sub-let is taken to have been first let when the entire premises were let out to the lessee.

The construction sought to be placed by the Opposite Party would defeat the object of the Act. There can be no doubt that the Rent Act was intended for the protection of tenants generally, and not merely of lessees to the exclusion of sub-lessees, and if the contention of the Opposite Party, *viz.*, that the words "first let" in sec. 2 (f) (ii) should be construed to mean first letting between the tenant and sub-tenant, be accepted, the object of the Act may be frustrated. An entire premises may be taken on lease by a tenant at a rent of Rs. 500 a month, and he may sub-let in four flats at a rent of

Rs. 500 or for the matter of that, at any rent he pleases for each flat, each of which according to that contention would be a first letting so far as that particular flat is concerned. Having regard to the consideration stated above and the observations in the Bombay case referred to above, I am unable to hold that when an entire building is let out a subsequent sub-letting of a part of it is the first letting of such part.

Sec 15, sub-sec. 3 provides for a case such as the present. That section, as stated above, gives the power to the Rent Controller in certain cases, among others, in cases where a tenant has sub-let a part of any premises let to him, to fix the standard rent at such amount as having regard to the provisions of the Act and the circumstances of the case he deems just.

I am accordingly of opinion that the rent at which the portion of the house was sub-let to the Petitioner is not the standard rent, but the standard rent for that portion is to be fixed according to the provisions of sec 15, sub sec. (3). That has been done by the Rent Controller and he has fixed it at Rs. 148. The learned President of the Improvement Tribunal has fixed it at Rs. 200, but he has fixed the rent at Rs 200 on the ground that that was the rent payable under the first letting, and has not decided the question with reference to the provisions of sec. 15, sub-sec. (3).

The case must therefore go back to the learned President so that he may fix the standard rent having regard to the provisions of sec. 15, sub-sec. (3). Costs, 2 gold mohurs, to abide the result.

CUMING, J.—This is an application for the revision of an order passed by the learned President of the Calcutta Im-

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provement Trust Tribunal revising an order made by the Rent Controller.

The facts are these according to the Petitioner. In July 1919 the Opposite Party Mr. Elias Jacob took a three years' lease of the entire premises No. 40 Ripon Street on a rental of Rs. 150 a month. On the 4th August 1919 Mr. Jacob let the same premises to the Petitioner Mr. Robeiro with the exception of three rooms in the ground floor for Rs. 200 a month exclusive of taxes. The case of the Petitioner is that before November 1918 the rent of the entire premises was Rs. 100 and that that rent was not unduly low. He applied to the Rent Controller and the Rent Controller held that the standard rent of the premises let out to the Petitioner should be Rs. 148 having regard to the fact that Rs. 132 would have been the fair rent of the entire premises in November 1918 and the Opposite Party Mr. Jacob had spent some money in electric wiring. Mr. Jacob applied to the President of the Tribunal for revision of the order. The President of the Tribunal held that what was let out to Mr. Robeiro was the house less the three shops and the premises let to the Petitioner formed only a part of the entire premises. Therefore he held the letting must be considered as the first letting of the particular premises leased to the Petitioner and as such the case was a case of first letting and so the rent of Rs. 200 plus occupier's share of the taxes must be considered as the standard rent of the said portion of the entire premises.

The sub-tenant Mr. Robeiro has moved the Court in revision and he contends that the principle followed by the learned President of the Tribunal in assessing the rent is wrong. His contention appears to be as follows. This letting to him was not a case of first letting and does not

come under sec. 2 (f) (ii) of the Calcutta Rent Act. That this letting of the particular combination of rooms cannot be considered to be a first letting. These rooms had been let out before when the entire premises were let out.

The Opposite Party contend that this is the first letting of this particular combination of rooms. That this particular combination of rooms constitutes a premises under sec. 2 (c) and that this letting was therefore the first letting of these premises. The simple point for decision would seem to be this:

Supposing a dwelling house has already been let as a whole, would the subsequent sub-letting of a portion of the house be a first letting so far as that portion of the house was concerned?

The answer must, I think, be in the negative, for to hold otherwise would be at once to defeat the whole purpose of the Act. The landlord could by reserving a room for himself or letting it to a third party, let the house at any rent that he pleased and could so arrange by reserving a different room each time he let out the house that every letting of the house would be a first letting.

This was the point of view taken by the learned Judges in deciding the case of *Woodward v Samuels* (4). No doubt the decision was under the English Act (5 and 6 Geo. V, Chap. 97, 1915), but it has not been shown me that as far as this particular point is concerned, there is any difference between the Calcutta Act and the English.

No doubt in sec. 2 (v) "premises" means any building or part of a building and from this it is argued that this particular combination of rooms forms a different premises from the whole building of which it is a part.

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This no doubt is correct. But when the whole building was let out, this new particular combination of rooms was let out then as part of the whole and so this present letting cannot be considered as a first letting of the premises in question.

I therefore agree with the order which my learned brother proposes

M. N. K.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 258 OF 1922

CHATTERJEE, J. MAJOR A. Y. REILY,
PANTON, J. Defendant, Petitioner,
1922, v
Heard, 21, July. GOLAP KHAN, Plaintiff,
Judgment, and anr., Defendant
25, July. J No. 2, Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 47, Or. 21, rr. 2 (3) and 29 - Separate suit - Uncertified adjustment - Suit by judgment-debtor for declaration of satisfaction and for injunction restraining decree-holder from executing decree, if maintainable - Execution of decree, stay under Or. 21, r. 29.

In an application for execution of a rent decree, the judgment-debtor set up an agreement for satisfaction of the decree, but the executing Court refused to recognise the alleged satisfaction as it was not certified to that Court. A suit was thereupon instituted by the judgment-debtor for a declaration that the rent decree had been satisfied and for a perpetual injunction restraining the decree-holder from executing the decree and also for a temporary injunction. The Court below held that such a suit was not maintainable but allowed stay of execution of the decree on taking security from the judgment-debtor under Or. 21, r. 29 of the C. P. C.:

Held—That the provisions of Or. 21, r. 29 of the C. P. C., are inapplicable to a case like the present.

AZIZAN v. MATUR LAL SAHU. (1) and

(1) I. L. R. 31 Cal. 457 (1908).

DINA BANDHU NANDI v. HARIMATI DAS (2) referred to.

The language of Or. 21, r. 29 of the C. P. C., is very wide and if the rule stood alone, the Court would have the power to stay execution of the decree, as provided in the Rule. But in view of the sec. 47 and Or. 21, r. 2 (3) of the Code, the Court had no such power, and the order of the lower Court staying execution of the decree was set aside.

This was a Rule issued under sec. 115 of the Code of Civil Procedure, 1908, in the matter of Title Suit No. 229 of 1922 and Rent Execution Case No. 721 of 1921 of the Munsif, 2nd Court, Khulna.

The facts material to this report will appear from the following extracts from the petition of motion in the High Court.

"That your Petitioner brought a suit for recovery of rent (280 of 1918, Second Munsif's Court, Khulna) against amongst others the Plaintiff Opposite Party for a jama of which the annual rent is Rs. 250 and the claim was for the years 1321 to 1324 B. S., and obtained a rent decree on the 20th June 1918.

"That your Petitioner made an application for execution on the 30th April 1920 and the same was struck off on the 30th November 1920, that a second application for execution was made by your Petitioner on the 7th January 1921 and when this execution was pending the Plaintiff Opposite Party who is one of the judgment-debtors paid Rs 700 on the 2nd May 1921 and the application was struck off on the 3rd May 1921.

"That your Petitioner made a third application for execution on the 21st December 1921 for the balance of the decretal debt, viz., after giving credit of the

(2) I. L. R. 31 Cal. 480 : S. C. 8 C. W. N. 325 (1908).

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said sum of Rs. 100 which had been paid by the Plaintiff Opposite Party.

"That the entire amount for which the sale proclamation was published was Rs. 1,744-9-9.

"That on the 21st March 1922 the Plaintiff Opposite Party brought a suit (No. 229 of 1922) in the Second Munsif's Court at Khulna in which he alleged *inter alia* that he had deposited two sums of Rs. 242 and Rs. 1,450 in the estate of your Petitioner for the purpose of taking a settlement of two tenures which your Petitioner had purchased in auction, but the auction sales of both the tenures were set aside and therefore the agreement to take settlement of the tenures fell through, and that the Plaintiff Opposite Party wanted a refund of the sum of Rs. 1,692. That the Plaintiff Opposite Party in his plaint further alleged that subsequently there was an arrangement made by the Plaintiff Opposite Party with your Petitioner's manager Babu Sasadhar Ganguli that the execution of the rent decree (No. 280 of 1918) be adjusted in the following way, *viz.*, on payment of Rs. 100 as cost, the said sum of Rs. 1,692 be taken in lieu of the balance of the decretal debt, and in accordance with the said arrangement the Plaintiff Opposite Party paid Rs. 100 and it was further alleged that your Petitioner had entered full satisfaction in the execution case. That the Plaintiff prayed for a perpetual injunction on your Petitioner not to execute the decree which was then under execution and the sale was about to be held. That the Plaintiff also made an application for a temporary injunction for stay of execution pending the hearing of the suit. That on the 24th March 1922 the Plaintiff made an application under Or. 21, r. 29 of the C. P. C. for a stay of the Rent

Execution Case (No. 721 of 1921) till the final decision of the Plaintiff's suit."

On the 24th March 1922 the learned Munsif passed the following order allowing stay of execution of decree on taking security from the Plaintiff:—

"The pleaders of both parties are heard about the prayer for temporary injunction and also about the Plaintiff's application filed to-day for stay of execution of the decree under Or. 21, r. 29, C. P. C. In view of the rulings cited before me by the Defendant, I do not think that the suit so far as it is a suit for perpetual injunction restraining the Defendant from executing the rent decree (referred to in the plaint) and a declaration that the decree has been adjusted is maintainable [*Azizan v. Matuk Lal Sahu* (1) and *Dina Bandhu Nandi v. Harimati Das* (2) and *Sachi Prasad v. Amar Nath* (3)]. So the Plaintiff's prayer for temporary injunction cannot be granted. The Plaintiff has, however, asked for an alternative relief, *viz.*, for recovery of a sum of money, previously deposited by the Defendant by which the decree is alleged to have been satisfied by an adjustment. I think that the suit for that relief is maintainable, *Iswar Chandra v. Harish Chandra* (4) and *Hanmant v. Subbakat* (5). Therefore so far as that relief is concerned it is a valid suit, and the Court may stay the execution of the decree of the rent suit under Or. 21, r. 29, Civil Procedure Code on such terms as to security as it thinks fit. I therefore reject the prayer for the temporary injunc-

(1) I. L. R. 21 Cal. 437 (1893).

(2) I. L. R. 31 Cal. 480; a. c. R. C. W. N. 395 (1903).

(3) I. L. R. 46 Cal. 103; a. c. 23 C. W. N. 851 (1918).

(4) I. L. R. 25 Cal. 715 (1898).

(5) I. L. R. 28 Bom. 394 (1898).

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tion and grant the prayer for the stay of execution of the decree in Rent Execution Case No. 721 of 1921 until the disposal of this suit under Or. 21, r. 29, C. P. C., if the Plaintiff furnishes security to the extent of the amount for which the property is going to be sold away in the above case. As to-day is the last day to which the execution sale can be adjourned, the security must be furnished in course of this day. If the Plaintiff fails to furnish the security to-day, the execution will proceed."

On the 27th March 1922 the learned Munsif passed the following order:—

"The security furnished and accepted. Let the sale of Rent Execution Case No. 721 of 1921 be stayed till the disposal of the suit."

Against the aforesaid orders of the learned Munsif, dated the 24th and 27th March 1922, the Defendant-Petitioner moved the High Court and obtained the present Rule

Babus Surendra Chandra Sen, Sachindra Prasad Ghose and Benoyendra Nath Ganguly for the Petitioner

Babu Probodh Chandra Chatterjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This Rule was directed against an order passed under Or. 21, r. 29, C. P. C.

The Petitioner obtained a decree against the Opposite Party and in execution realised a part of the decretal amount. He again applied for execution of the decree and the Opposite Party thereupon set up an agreement for satisfaction of the decree. The alleged satisfaction of the decree, however, was not notified to the Court of execution within the time allowed and that Court accordingly refused to recognise the satisfaction of the decree. A suit was thereupon instituted

by the Opposite Party for declaration that the rent decree had been fully satisfied and for a perpetual injunction restraining the Petitioner from executing the decree and also for a temporary injunction. There was a further prayer that it might be declared that the Petitioner was bound to refund a certain amount deposited by the Plaintiff.

The Court below has held that a suit for perpetual injunction restraining the Defendant from executing the rent decree and for a declaration that the decree had been adjusted, was not maintainable and that therefore the prayer of the Plaintiff Opposite Party for a temporary injunction could not be granted. The learned Munsif, however, held that he could, under Or. 21, r. 29, C. P. C., stay execution of the decree on taking security from the Plaintiff.

In the case of *Azizan v Matuk Lal Sahu* (1), it was held by Piggot and Macpherson, JJ., Banerji, J., differing, that "sec. 244 is not limited by sec. 258 and that the suit was not maintainable. Where a decree is satisfied by an agreement out of Court and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement." Piggot, J., observed: "Sec. 244, C. P. C. does not absolutely bar a suit, but prohibits in a separate suit between the same parties to a decree any relief being granted which interferes with the conduct of the execution proceedings by the Court executing the decree." See also the case of *Dina Bandhu Nandi v Harimati Dasi* (2).

That being so, whatever other relief

(1) I. L. R. 21 Cal. 437 (1903).

(2) I. L. R. 31 Cal. 480: s. c. 8 C. W. N. 395 (1908).

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may be granted by the Court in such a suit, it cannot restrain the decree-holder from executing the decree.

Or. 21, r. 29 provides that "where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided."

The language, no doubt, is very wide and if the rule stood alone, the Court would have the power to stay execution of a decree, as provided in the rule. But sec. 47 of the Code lays down that all questions relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit; and under Or. 21, r. 2 (3) the Court cannot recognise any uncertified payment or adjustment of a decree.

We must give effect to the provisions of sec. 47 and Or. 21, r. 2 (3) as well as to Or. 21, r. 29, C. P. C.

Now, if the Court has no power to make a declaration that the decree has been satisfied by an uncertified adjustment or payment out of Court and if the Court cannot grant a permanent injunction restraining the decree-holder from executing the decree, we do not see how the Court can stay execution of the decree for a period during which the suit may be pending, although it cannot grant the same relief by its final decree. The Court below also has held that a temporary injunction cannot be granted. But the stay of execution of a decree practically stands on the same footing as a temporary injunction; and, as stated above, the Court cannot grant the relief for a temporary period which it cannot decree by its final judgment. The provi-

sions of Or. 21, r. 29 must therefore apply to cases not coming under Or. 21, r. 2 (3) read with sec. 47 of the Code.

We think, therefore, that the provisions of Or. 21, r. 29 are inapplicable to a case like the present.

The order of the Court below must be set aside and we direct accordingly.

The rule is made absolute with costs, one gold mohur.

Let the record be sent down without delay.

H. C. S. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1098 OF 1922.

GREAVES, J.

1923,

Heard,

21, February.

Judgment,

6, March.

NEWBOULD, J.

SUHRWARDY, J.

1923,

2, February.

NAGENDRA NATH BOSE
Accused, Petitioner,
v.
THE EMPEROR,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 403, legality of subsequent trial for criminal breach of trust in respect of a particular item, after previous trial and withdrawal of charge for criminal breach of trust for a gross sum misappropriated within a period covering the date of the subject of the subsequent charge.

A certain person was tried for criminal breach of trust under sec. 409, Cr. P. C., in respect of a gross sum misappropriated within a specified period. The charge was withdrawn with the leave of the Court as no evidence was offered. He was subsequently prosecuted for criminal breach of trust under sec. 408, Cr. P. C. in respect of a particular sum misappropriated on a date within the period covered by the previous charge under sec. 409;

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Held—*That the essence of the offence is the misappropriation and not the time within which it took place and that if the subject of the subsequent charge was not included in the gross sum, the offence subsequently charged is not the same as that in respect of which he was previously acquitted. Therefore the previous acquittal is no bar to the subsequent trial.*

EMPEROR v. KASHINATH (2) *relied on and followed.*

IN RE APPADURAI AYYAR (1) *referred to.*

This was a Rule to show cause why the criminal proceedings under sec. 408, I. P. C., pending against the Petitioner, in the Court of the Third Presidency Magistrate of Calcutta (Mr K. B. Das Gupta) should not be quashed.

The facts of the case are briefly as follows.—The Petitioner was previously tried and acquitted on a charge of having committed criminal breach of trust in respect of Rs. 18,924 and odd during the period between 1st October 1921 and 1st March 1922. In the present trial he was prosecuted on a charge of having committed criminal breach of trust in respect of a sum of Rs. 100 on the 30th November 1921. The Petitioner thereupon moved the High Court for quashing the proceedings under sec. 408, I. P. C., pending against him in the Court of the Third Presidency Magistrate, and obtained the present Rule. The Rule first came on for hearing before Newbould and Suhrawardy, JJ., who passed the following dissentient judgments :—

NEWBOULD, J.—In my opinion this Rule should be discharged. The Petitioner was tried and acquitted on a charge of having committed criminal breach of trust in respect of Rs. 18,924-4

annas during the period between 1st October 1921 and 1st March 1922. He is now being prosecuted on a charge of having committed criminal breach of trust in respect of a sum of Rs. 100 on the 30th November 1921. It is contended on behalf of the Petitioner that under sec. 403 of the Code of Criminal Procedure, the accused having been tried on the charge of defalcation committed within the period stated, he is not liable for prosecution for any further defalcation committed during that period. There would be considerable force in this contention if it were shown that the defalcation, which is the subject of the present charge, could or might have been included in the former charge. But it is the case for the Crown and on the materials before us I cannot say that that case will not be substantiated at the trial, that the defalcation of this item charged could not have been in the knowledge of the prosecution at the time of the previous trial. That being so, if it was impossible for the accused to have been tried at the previous trial I am unable to see how the acquittal can under the provisions of sec. 403, Cr. P. C., be a bar to his being now tried. I would therefore discharge this Rule.

SUHRAWARDY, J.—I regret I am unable to agree with my learned brother in the view of the law which he has taken in this case. In my opinion the second prosecution on the facts disclosed would not lie. The accused was charged in the previous trial with “committing defalcation being a public servant within the period from 1st October 1921 to 1st March 1922 in respect of an amount which was alleged in the charge to be rupees eighteen thousand nine hundred and twenty four and annas four only by dishonestly misappropriating or converting to his own use having been entrusted in such capa-

(1) 17 Cr. L. J. 30 (1916).

(2) 12 Bom. L. R. 226 (1910).

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city with certain property or dominion over such property." The present case is an attempt to prosecute him for committing embezzlement in respect of the sum of rupees one hundred received by him on the 30th November 1921, that is, on a date within the period in respect of which he was tried at the previous trial. It is therefore contended that the acquittal in the previous trial following on the withdrawal of the charge by the Standing Counsel under sec. 494 of the Criminal Procedure Code, operates as a bar to the present prosecution.

Sec. 222 (2), Criminal Procedure Code lays down that "when an accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence." It means that it is permissible to prosecute a person for defalcation within certain given dates irrespective of the number of items which he is said to have misappropriated. This clause to my mind modifies or affords an exception to the general rule enunciated in sec. 234, Criminal Procedure Code which says that a person cannot be tried for more than three offences committed within the period of one year. It enables the prosecutor to charge the accused with misappropriation in respect of any number of items in spite of sec. 234, Criminal Procedure Code, but does not entitle him to maintain prosecution by instalments for misappropriation committed within the same period of items which may have formed the subject of the previous charge. The main element

of the offence tried under sec. 222 (2) is the period within which the accused is said to have committed the offence of criminal breach of trust and not so much the amount in respect of which he might have committed it. For example, if the accused commits criminal breach of trust within certain dates in respect of twenty items it is open to the prosecution to charge him with all the twenty or for any less number. The offence would be considered to be one committed during those dates. If any other interpretation were accepted, namely, that the prosecution is at liberty to leave out certain items for further prosecution, the object of the law barring further prosecutions on the same facts would be defeated and would result in the splitting up of the "one offence" as created by sec. 222 (2). I do not think that the fact whether the item for the embezzlement of which the accused is subsequently charged was known or not known to the complainant or could or could not have been known to him affects the law on this point and is relevant to the present enquiry. The question that really matters is whether the accused might have been charged in the preceding trial with the offence for which he is subsequently put on his trial. As a matter of fact from the perusal of the record I find that Major T N Holt White was the complainant in the previous case and in the charge sheet it is stated that the accused committed criminal breach of trust in respect of rupees eighteen thousand and odd within the 1st October 1921 and 1st March 1922. In the detail of the items of the amount the fifth item is given as "other items." In the present case the same gentleman Major Holt White states in the charge sheet submitted by the police that "the accused committed criminal breach of trust as cashier

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in the office of the Military Works Department in respect of rupees one hundred deposited as earnest money in the said office by one Ramdhari a contractor on a tender on 30th November 1921 and which money was entrusted to the accused by the complainant through the ordinary course of business." I do not see how reading these two charges it can be said that Major Holt White did not know or could not know that he had made over this money to the accused when he brought the first charge. Be that as it may, I am of opinion that on the general question of law that is raised the plea of *autre fois acquit* must prevail and this Rule must be made absolute.

[The Rule was accordingly referred to a Third Judge, Mr. Justice Greaves.]

Babus Dasarathi Sanyal, Tarakeswar Pal Chowdhury and Phanindra Nath Mukherjee for the Petitioner.

Mr. S. K. Chakravarty for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This matter comes before me by reason of a difference of opinion between Mr. Justice Newbould and Mr. Justice Subhawardy. The facts are as follows :—

The Petitioner was charged at the Criminal Sessions held in Calcutta in August 1922 under sec. 409 of the Indian Penal Code with criminal breach of trust in respect of a sum of Rs. 18,924-4 alleged to have been misappropriated by him between the 1st October 1921 and the 1st March 1922. The charge was withdrawn with the leave of the Court on the 28th August 1922 as no evidence was offered. This in law amounts to an acquittal.

The Petitioner is now being prosecuted at the instance of the complainant, who was also the complainant in the previous matter, for criminal breach of trust as a

servant under sec. 408 of the Indian Penal Code in respect of a sum of Rs. 100 alleged to have been misappropriated by the Petitioner on the 30th November 1921, that is to say, within the period covered by the charge under sec. 409 in respect of the sum of Rs. 18,924-4.

The prosecution alleges that the sum of Rs. 100 was not included in the sum of Rs. 18,924-4-0 and that the facts relating thereto were not known to them at the time of the previous charge and the matter has been argued on this basis.

It is contended on behalf of the Petitioner that he is now being charged with the same offence of which he was acquitted at the previous trial and that having regard to the provisions of sec. 222 (2) of the Code of Criminal Procedure, he cannot now be charged with any misappropriation between the 1st October 1921 and the 1st March 1922 as any misappropriation within that period, whether included in the gross sum or not, is one offence by reason of the provisions of the sub-section. This is the view taken in *In re Appadurai Ayyar* (1).

On behalf of the Crown it is contended that sec. 222 (2) only dispenses with the particulars which otherwise would be required but that it does not say that the gross sum is to include every act of misappropriation committed within the dates specified in the charge. It is urged that the essence of the offence is the misappropriation and not the time within which it took place and that as the sum of Rs. 100, the subject of the present charge, was not included in the gross sum the offence now charged is not the same as that in respect of which the Petitioner was previously acquitted. This is the view taken in *Emperor v. Kashinath*

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Bagari Sali (2). With this view and with the reasoning of Chandravarkar, J, in his judgment in that case I respectfully agree.

In the result, I agree with Mr. Justice Newbould that the Rule should be dismissed.

J N. R.

Rule discharged.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

1922,

Heard, 9 and

11, May.

Judgment, 19, June.]

JAI BARHAM and ors.,

Appellants,

v.

KEDAR NATH
MAHWARI and ors.,

Respondents.

Civil Procedure Code (Act V of 1908), sec. 144—Execution sale set aside after purchase money applied to satisfy attaching creditors—Judgment-debtor, if may recover without making good purchase money—Judgment-debtor, if bound to make good moneys paid by auction-purchaser to incumbrancers—Voluntary and compulsory payments, difference between—Equity—Subrogation.

It is the duty of the Court under sec. 144 of the Civil Procedure Code to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed. But apart from that section it is inherent in the general jurisdiction of the Court to act rightly and fairly, according to the circumstances, towards all parties involved, and one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the primary Court or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which

entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

ROGERS v. THE COMPTOIR D'ESCOMPTE DE PARIS (2) referred to.

An execution sale of certain properties was set aside, but before that event the purchase money was distributed amongst creditors of the judgment-debtor who had attached the property and the auction-purchaser had also discharged two mortgage bonds to which according to the sale certificate granted to the purchaser the property was subject.

Held—That it would be inequitable and contrary to justice that the judgment-debtor should be restored to the property without making good to the auction-purchaser the moneys which had been applied for his benefit to satisfy the attaching creditors, but the payment to the mortgagee, which was an optional payment, made without any order of the Court, stood on a different footing and the making good of this payment could not be made a condition of restoration to the judgment-debtor.

Seemle —The payment to the mortgagee entitled the auction-purchaser to stand in the shoes of the mortgagee as holder of the mortgage bonds.

This was an application under sec. 144 of the Civil Procedure Code. Appellants, judgment-debtors, were owners of 16 annas share of Tappa Patsanda 10 annas share of that property was mortgaged to Anand Ram Mahwari. The remaining 6 annas share was unencumbered.

Certain creditors having obtained a money decree against the predecessor in title of the Appellants attached a portion of the property which was put up for sale

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in execution and was purchased by the Respondents. The latter then applied for a sale certificate of the judgment-debtors' 6 annas unencumbered share, which they obtained, and they entered into possession. The purchase money was paid into Court by the auction-purchasers and was distributed by the Court rateably among the decree-holders.

The judgment-debtors appealed to the High Court against the Subordinate Judge's order granting the sale certificate in respect of the 6 annas unencumbered share. The High Court dismissed the appeal but the Privy Council held that the property in fact sold was the encumbered share [*Lide Thakur Barmha v. Jiban Ram Marwan* (1)] and set aside the order of the Subordinate Judge.

The judgment-debtors then applied under sec. 144 of the Civil Procedure Code for restitution to them of the 6 annas unencumbered share with mesne profits. Petitions in reply were preferred by the decree-holders and auction-purchasers and the various contentions were heard by the Subordinate Judge who decided that the order of the Subordinate Court in December 1904, whereby the identity of the property actually sold was changed from the 6 encumbered annas to the 6 unencumbered annas share should be set aside, with all subsequent proceedings on the part of the auction-purchasers based thereon, and he ordered the restitution of the whole 6 annas share in the mahal to the judgment-debtors.

From this order the present Respondents appealed to the High Court at Patna. The learned Judges who heard the appeal (Roe and Jwala Prasad, JJ.) were of opinion that no restitution of

possession could be ordered until the auction-purchasers had been repaid with interest the amount of the purchase money and that such repayment should be made by the judgment-debtors and they made an order accordingly.

From this order the judgment-debtors appealed to His Majesty in Council.

Messrs. J. M. Dunne, K. C. and *Kennworthy Brown* for the Appellants (judgment-debtors) —The property which has been sold is the encumbered share and until that sale has been set aside the parties must hold to their bargain. No condition was imposed by the Board in setting aside the order confirming the sale and the auction-purchasers might have applied at once to have the sale set aside and then money restored to them.

The principle of " *caveat emptor* " applies to the auction-purchaser.

Sec. 144 of the Civil Procedure Code was never intended to apply to a question of avoiding entirety of action. Under that section no order can be made which is not consequential on the order of the Privy Council and that Tribunal is the only one competent to deal with the matter.

Messrs. DeGruyther, K. C. and *S. Hyam* for the Respondents (auction-purchasers) —*De facto* it was the unencumbered share which was sold although in 1913 the Privy Council decided that *de jure* that share was not saleable because it had not been attached.

If the sale is void then sec. 65 of the Contract Act applies and any benefit received must be restored. The Respondents should therefore receive back their purchase money.

There is no provision of the Civil Procedure Code applying in express terms to the present case, the only analogous section is sec. 144. I say analogous, because

(1) L. R. 41 I. A. 38; s. c. I. L. R. 41 Cal. 590; 18 C. W. N. 313 (1913).

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this is not a decree. There are, however, inherent powers in the Court to order restitution of anything improperly taken.

Mookond Lal Pal v. Mahomed Sami Meah (3) and *Rogers v. The Comptoir d'Escompte de Paris* (2).

If I am liable for mesne profits, I am also entitled to interest on my money for the same period.

Mr. Dunne, K. C., in reply.—Sec 141 of the Civil Procedure Code is directly applicable. This was an application in the suit and the order made was a decree. No interest was included in the decree. If the auction-purchasers considered themselves entitled to interest they should have applied to speak to the minutes of the decree.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD CARSON.—The question to be decided in this appeal arises out of an order on appeal made by His Majesty in Council, dated the 19th December 1913, which set aside an auction sale of certain landed property held on the 27th July 1904, in execution proceedings in the Court of the Subordinate Judge of Godda.

The case before this Board is *Thakur Barmha v. Jiban Ram Marwari* (1).

Rajah Thakoor Barma, since deceased, the predecessor in title of the Appellants Nos 1-5 (hereinafter referred to as the judgment-debtors) was the owner of a full 16 annas share of a village called Patsanda. Ten of the said shares were encumbered and six were unencumbered, save that two bonds had been executed by the Rajah in favour of one Gobardhan Das and others, which purported to create

a charge on a 3 annas share in the said mahal as security for the said Gobardhan Das for Rs. 23,965 and Rs. 532.

Six annas share of the encumbered property was attached for a judgment debt in execution of a decree obtained by the Respondents third party, and sold on the 27th July 1904. The Respondents first and second parties are the representatives of the original auction-purchasers and are hereinafter referred to as the auction-purchasers.

The purchase money was a sum of Rs. 1,12,000, and this sum was paid into Court and eventually distributed to various mortgagee decree-holders and others holding money decrees against the judgment-debtor whose debts were thereby discharged to the extent of such payments.

The auction-purchasers claimed to have purchased for the sum aforesaid the six unencumbered annas share, and on the 21st December 1904, a sale certificate was granted to the auction-purchasers, which declared the respective interest of the auction-purchasers in the six annas share, and also declared that such share was subject to the charge created by the aforementioned bonds, but was outside the 10 annas share hereinbefore described as the encumbered property.

On the 26th December 1904, the auction-purchasers were duly put into possession of the said six annas share and paid off on the 7th February 1905, the amounts covered by the two bonds. An appeal was subsequently made by the Rajah to the High Court of Calcutta against the order of the Subordinate Judge of the 21st December 1904, granting the said sale certificate, and when this appeal was dismissed he appealed further to His Majesty in Council, and this Board on the 25th November 1913,

(1) L. R. 41 I A 28; a. c. J. L. R. 41 Cal. 590; 18 C. W. N. 213 (1913).

(2) L. R. 2 P C 485 at p. 475 (1871).

(3) I. L. R. 14 Cal 484, 496 (1887).

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advised that the appeal should be allowed and that the order of the Subordinate Judge confirming the sale, together with the said certificate of sale of the 21st December 1904, should be set aside, and added "this will, of course, have the effect of setting aside all subsequent proceedings on the part of the auction-purchasers based thereon." In consequence of this order setting aside the sale the judgment-debtors applied to the Subordinate Judge claiming restoration to them of the said 6 annas share of the property, together with mesne profits.

The auction-purchasers resisted the said claim, and contended (1) that the auction-purchasers could not be asked to restore the property until (a) the amount which they had deposited in Court to complete the sale, and (b) the sum paid by them to satisfy the bonds given by the Rajah to Gobardhan Das had been refunded and they also claimed that Chaturi Ram Marwari, one of the auction-purchasers, who was a Respondent in the appeal before the Privy Council, had died before the hearing, and that therefore the order of His Majesty in Council could not affect his share, *viz.*, $\frac{1}{2}$ an anna of the 16 annas.

The Subordinate Judge overruled all the contentions of the auction-purchasers, and by an order dated the 20th August 1916, ordered restitution to the judgment-debtors of the said 6 annas share, together with the mesne profits from the date of delivery of possession of the said property, after the auction sale on the 27th July 1904.

From that order the auction-purchasers appealed to the High Court of Judicature at Patna, who, by order dated the 14th December 1916, set aside the order of the Subordinate Judge and in lieu thereof, ordered that the Subordinate Judge should ascertain :—

(1) "Whether Chaturi Ram died before the hearing of appeal by the Judicial Committee, (2) that he do ascertain the amount of mesne profits due on the share in respect of which restoration is to be made; and (3) that he set off the sum due to the judgment-debtors as mesne profits against the sum due to the auction-purchasers in recovery of their deposit and in the event of the sum due to the judgment-debtors being in excess of the sum due to the auction-purchasers he do restore possession of the property forthwith to the judgment-debtors and in the event of the sum due to the auction-purchasers being in excess of the sum due to judgment-debtor he do refuse to restore possession of the property until the deficit due to the auction-purchasers has been made up either by the decree-holders or by the judgment debtors themselves."

It is to be observed that the Court made no order as to the claim of the auction-purchasers to be paid as a preliminary to restoring possession the sum paid to Gobardhan Das in respect of the two bonds, creating a charge on 3 annas share of the unencumbered property sold to the auction-purchasers.

The Appellants (the judgment-debtors) have appealed to His Majesty in Council against the said judgment and decree of the High Court, dated the 14th December 1916, and the auction-purchasers (Respondents first and second parties) have entered a cross-appeal relating to the payments to Gobardhan Das as aforesaid. On the main question, *viz.*, whether the auction-purchasers are entitled to repayment of the deposit paid into Court as a condition precedent to their handing over possession to the judgment-debtors, their Lordships are in agreement with the judgment of the High Court, and think the order already referred to should on this point be affirmed. It is the duty of the Court under sec. 144 of the Civil Procedure Code to "place the parties in the

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position which they would have occupied, but for such decree or such part thereof as has been varied or reversed." Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly, according to the circumstances, towards all parties involved. As was said by Cairns, L. C., in *Rogers v. The Comptoir d'Escompte de Paris* (2). "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court,' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case." The auction-purchasers have parted with their purchase money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst creditors of the judgment-debtor who had attached the unencumbered property in question and could have realised their judgment debts by a sale of this property in execution and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction-purchaser the moneys which have been applied for his benefit.

It was argued that the remedy of the auction-purchasers was either to apply for a certificate of sale of the unencumbered property or to obtain from the judgment-creditors repayment of the sums paid out to them under the orders of the Court. Their Lordships cannot agree with either

of these suggestions, and for the reasons stated by the Judges of the High Court.

As regards the sums paid by the auction-purchasers to Gobardhan Das to clear off the bonds charged on the property they had intended to purchase, then Lordships are in agreement with the decision of the High Court that this payment stands on a different footing from the deposit of the purchase money. It was an optional payment, made without any order of the Court, and as it entitled them to stand in the shoes of Gobardhan Das as holders of the bonds, it entails no hardship, but however that may be, these payments cannot be made a condition of restoration to the judgment-debtors.

A question was raised before this Board as to whether the "mesne profits" on the one hand, and "the deposit" on the other, should under the order of the High Court carry interest. The order is silent upon this point, but in their Lordships' opinion, the equities of the case will be met by not allowing interest in either case.

There only remains the question as to the rights of Chaturi Ram who was one of the auction-purchasers at the said sale of the $\frac{1}{2}$ anna share of the mahal. It is alleged that he had died pending the hearing of the appeal before the Privy Council and that as his heir or personal representative was not brought upon the record, the order on the advice of then Lordships in the Privy Council cannot affect the $\frac{1}{2}$ anna share in his possession or that of his heir.

Their Lordships have no evidence before them of the facts alleged and no claim was presented on behalf of the said Chaturi Ram or his representative and they are of opinion that under the circumstances, the order in this case should be made without prejudice to the rights, if

(2) L. R. 3 P. C. 405 at p. 475 (1871).

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any, of Chaturi Ram, or if he is deceased, of his heir or legal personal representative.

Then Lordships are of opinion that the order of the High Court, subject to the modification last hereinbefore mentioned, should be affirmed, and that the appeal and cross-appeal should be dismissed with costs, including in the case of the appeal the costs of the petition to add certain documents to those set out in the record as originally printed, and they will humbly advise His Majesty accordingly.

Solicitors: Messrs Watkins and Hunter for the Appellants Nos 1 to 6.

Solicitors: Messrs Barrow, Rogers & Nevill for the Respondents (1st and 2nd parties).

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2033 OF 1921.

MOOKERJEE, J.

RANKIN, J.

1922,

Heard, 3, 10 and

11, August.

Judgment,

15, November.

BIRSWAR GHOSE,

Defendant, Appellant,

v.

PANCHKOURI GHOSE and

ors., Plaintiffs,

Respondents.

Suit for cancellation of ex parte decree and consequent execution sale, on the ground of fraud on the part of the decree holder—Suppression of notices in the suit and in the execution proceedings—Bonâ fide auction-purchaser for value without notice of the fraud, if necessarily protected—Civil Procedure Code (Act V of 1908), Or. 21, r. 90, cancellation of execution sale on the ground of irregularity or fraud in publishing it—Decision according to the principles of "justice, equity and good conscience," significance of—Burden of proving good faith on the purchaser.

The mourashi mokarari right of a tenant was sold in 1907 in ex parte execution of an ex parte decree of 1904 for arrears of rent. The purchaser, however, never

obtained possession through Court and never paid rent to the landlord, who again sued for rent, got an ex parte decree in 1913 and got the tenancy again sold in 1916 in execution thereof suppressing all notices, etc. The mourashi mokarari tenant on being dispossessed in 1917, sued for cancellation of the ex parte decrees and consequent execution sales on the ground of fraud on the part of the decree-holders.

Held per MOOKERJEE, J.—That an execution sale, which has been brought about by fraud of the decree-holder, is liable to be set aside on that ground, even though it is not established that the auction-purchaser has participated in or has been cognisant of the fraud.

KSHERODE SUNDARI v JYANENDRA NATH (5), NIMAI CHAND v DINA NATH (6) and other cases discussed.

The above principle has received legislative approval in Or. 21, r. 90 of the Civil Procedure Code, where provision is made for cancellation of an execution sale on the ground of material irregularity or fraud in publishing it, provided the applicant has sustained substantial injury thereby. The Code does not exclude specifically the application of r. 90 in cases where the purchaser is a bonâ fide purchaser for value without notice of the irregularity or the fraud and the Court may set aside the sale even in cases where the purchaser falls within the category of bonâ fide purchaser for value without notice.

PARLASHNATH v HARI CHARAN (17) referred to.

In the absence of specific statutory directions, the Courts are to act accord-

(5) 6 C. W. N. 283 (1901).

(6) 2 C. W. N. 691 (1898).

(17) I. L. R. 38 Cal. 622 (1911).

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ing to justice, equity and good conscience, and this has generally been taken to mean so much of the English law and usage as seem reasonably applicable in this country.

The doctrine of *bonâ fide* purchase is not a rule of property. It does not determine the question of title between the parties. It is in most cases available only by way of defence.

ABDUL HAI v. NAWAB RAJ (18), JUNGEE LALL v. SHAM LAL (30), CHITAMBAR v KRISHNAPPA (1), LALA BUNGSIDHAR v. BINDHESHREE (26) and other cases discussed.

The rule in the classic form, enunciated in ABDUL HAI v. NAWAB RAJ (18), approved.

In the application of that rule to a concrete case, it may be usefully borne in mind that a *bonâ fide* purchaser for value without notice has always been a favourite with Courts of equity. But to crystallise the rule further would only be to impair its utility.

Per RANKIN, J.—Judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice.

CHITAMBAR v KRISHNAPPA (1) referred to.

The burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. This is an essential feature of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but

that equity, where it can, will favour those who show that in innocence they have given value.

IN RE NISBET AND POTT'S CONTRACT (3) referred to.

This was an appeal from a decision of Babu Banwari Lal Banerji, Subordinate Judge, Hoogly, dated the 3rd September 1921, reversing that of Babu Hiran Chandra Mitra, Munsif, Howrah, dated the 31st January 1920.

The facts of the case are briefly as follows: The ancestors of the Plaintiffs-Respondents had *mourashi mokarani* tenancy right in a certain tract of land. They were sued for arrears of rent in 1904 and an *ex parte* decree was obtained for Rs 2-2 as No application for execution of the decree was made till 1907. A sale was held in November 1907, when one Behari Lal Das was the sole bidder present and purchased the tenancy for Rs 22. The purchaser, however, never obtained delivery of possession through Court and never paid rent to the landlords, who in April 1913 sued the widow of Behari for recovery of arrears of rent and got an *ex parte* decree in June 1913. A sale was held in November 1916, when one Bireswar Ghose, the present Appellant, purchased the tenancy for Rs. 50, but when he went to take possession, he came into conflict with the Plaintiffs. The Plaintiffs made an ineffectual attempt at resistance and their objection was rejected by the Court in June 1917. On enquiry they ascertained what had happened to their tenancy, and on the 31st May 1918, instituted the present suit for recovery of possession of the disputed land upon cancellation of the *ex parte* decrees and consequent execution sales, on the allegation that they had been brought about by fraud on the part of the decree-holders.

(3) [1905] 1 Ch. 891

(1) I. L. R. 26 Bom. 543 (1902).

(18) 9 W. R. 196, B. L. R. F. B. 911 (1907)

(26) 10 M. I. A. 454 (1896).

(30) 20 W. B. 120 (1878).

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According to the Plaintiffs, the fraud consisted in the suppression of all notices in the suits and in the execution proceeding and the submission of false returns of service to the Court. The landlords, the purchaser at the second sale, as also the widow of the purchaser at the first sale, were all joined as Defendants. The Court of first instance held that the charge of fraud was not established by the evidence and dismissed the suit. On appeal, the Subordinate Judge held that the suits and execution proceedings were fraudulent, that all notices were suppressed both in the suits and in the execution proceedings and that false returns of service were submitted to the Court by the officers concerned. Accordingly he held that the decrees and sales must be vacated and the property restored to the Plaintiffs. The purchaser at the second sale thereupon preferred the present second appeal to the High Court.

Dr. Dwarka Nath Mitter and Babus Bhupendra Kumar Ghose and Pramatha Nath Banerji for the Defendant-Appellant.

Babu Manmatha Nath Roy for the Plaintiffs-Respondents.

THE JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The subject-matter of this litigation is a tract of land which was taken by the ancestors of the Plaintiffs, on the 18th May 1897, in *mourashi mokarari* tenancy right from a family of Ghoses. The Plaintiffs, like their predecessors, were in possession by payment of rent to their landlords till they were dispossessed on the 13th February 1917 by the first Defendant who obtained delivery through Court on the allegation that he had purchased the land on the 21st November 1916, in execution of a decree for arrears

of rent. The Plaintiffs made an ineffectual attempt at resistance and their objection was rejected by the Court on the 11th June 1917. On enquiry they ascertained what had happened to their tenancy and the facts they discovered may be briefly narrated at this stage.

In 1901, the Ghoses sued the Plaintiffs for arrears of rent and obtained an *ex parte* decree for Rs. 2-2-0. No further details are available, as the records of the rent suit have been destroyed in accordance with statutory rules. No application for execution of this decree appears to have been made till the 2nd August 1907, when proceedings were instituted for realisation of the decretal amount and Rs. 3-3-0 as costs. A sale was held on the 21st November 1907 when one Behari Lal Das, since deceased, was the sole bidder present and purchased the tenancy for a sum of Rs. 22. The sale was confirmed on the 30th January 1908. The purchaser, however, never obtained delivery of possession through Court and never paid rent to the landlords. The result was that on the 14th April 1913, the Ghoses instituted a suit against Soudamini Das, widow of Behari Lal Das, for recovery of Rs. 15-7-6 as arrears of rent for four years from 14th April 1909 to 13th April 1913. The suit was decreed *ex parte* on the 24th June 1913. A sale was held on the 21st November 1916 when Bireswar Ghose, now Appellant before us, became purchaser of the tenancy for a sum of Rs. 50. The sale was confirmed in due course; and when the purchaser went to take possession, he came into conflict with the Plaintiffs, as already stated. The Plaintiffs thereupon instituted this suit, on the 31st May 1918, for recovery of possession of the disputed land upon cancellation of the *ex parte* decrees and consequent execution sales, on

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the allegation that they had been brought about by fraud on the part of the Ghoses. According to the Plaintiffs, the fraud consisted in the suppression of all notices in the suits and in the execution proceedings and the submission of false returns of service to the Court. The Plaintiffs further suggested that the ostensible purchaser was, on each occasion, a creature of the Ghoses who had managed to purchase a valuable property for an insignificant price. The Ghoses, the purchaser at the second sale, as also the widow of the purchaser at the first sale, were all joined as Defendants. The claim was, however, contested on paper at any rate by the second purchaser alone. He repudiated the charge of fraud and maintained that he had made the purchase on his own account. The Court of first instance held that the charge of fraud was not established by the evidence and dismissed the suit. Upon appeal, the Subordinate Judge has reversed that decision. He has held that the suits and execution proceedings were fraudulent, that all notices were suppressed both in the suits and in the execution proceedings, and that false returns of service were submitted to the Court by the officers concerned. In this view, the Subordinate Judge has held that the decrees and sales must be vacated and the property restored to the Plaintiffs. On the present appeal, the second purchaser has urged that he is a *bonâ fide* purchaser for value without notice and is entitled to retain the property, even though the suits and execution proceedings be held to have been fraudulent. In support of this proposition, reliance has been placed upon the decision in *Chitambar v. Krishnappa* (1). The Plaintiffs-Respondents have controverted this position, and have further

contended that the defence of purchase for value without notice, even if available, should have been specifically alleged and proved. In support of this proposition, reference has been made to *Attorney-General v. Biphosphated Guano Co.* (2) and *In re Nisbet and Pott's Contract* (3). We have not thought it right to overrule the plea of defence of purchase for value without notice on the ground that the question was not specifically raised in the pleadings or in the issues; the defect may be remedied, if necessary, by a remand on terms as to costs, specially as the defence has sometimes been entertained, when it has been pleaded in substance and is a just inference from the facts alleged; *Taylor v. Blakelock* (4). We shall consequently examine, whether the Defendant has a substantial answer to the claim.

It may be stated at the outset that in a long line of cases in this Court the view has been maintained that an execution sale, which has been brought about by fraud of the decree-holder, is liable to be set aside on that ground, by application to the execution Court, even though it is not established that the auction-purchaser has participated in or has been cognizant of the fraud. Thus in *Ksheroode Sundari v. Jnanendra Nath* (5), it was ruled that a judgment-debtor is entitled, by an application under sec. 244 of the Civil Procedure Code of 1882, to have an execution sale of his properties set aside, if he alleges and proves fraud on the part of the decree-holder though no fraud is alleged or proved against the auction-purchaser who is a stranger to the suit. Maclean, C. J., treated this proposition

(1) L. R. 11 Ch. Div. 227 (1879).

(2) [1895] 1 Ch. 397.

(3) L. R. 22 Ch. Div. 580, 585 (1898).

(4) 6 C. W. S. 243 (1901).

(5) I. L. R. 26 Bom. 542 (1907).

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as well settled by the decisions in *Nimai Chand v. Dina Nath* (6), *Rajani Kant v. Hossein Uddin* (7) and *Hiralal v. Chandra Kant* (8). Banerjee, J., referred in addition to the decision in *Bhuban Mohan v. Peari Mohan* (9) and assigned the following reason in support of his conclusion: "The sale in execution of a decree is brought about by the instrumentality of the Court, the Court being set in motion by the decree-holder. If the decree-holder is guilty of fraud in the conduct of the sale, the process of the Court must be held to have been abused by him in bringing about the sale; and it cannot be said that a sale obtained through the abuse of the process of the Court by the fraud of the decree-holder who set the Court in motion, should be upheld, merely because the auction-purchaser is innocent of the fraud. The auction-purchaser, of course, is entitled to have the purchase money paid by him refunded by the decree-holder; but he cannot insist upon a sale, brought about by fraud practised upon the Court and by the decree-holder, being maintained." Banerjee, J., adhered to this view in *Hangsha v. Tincouri* (10), when he was pressed with the decision in *Mohesh Chandra v. Dwakra Nath* (11) in which it had been held that however fraudulent the conduct of a Plaintiff in a suit may be, if the purchaser is not implicated in the fraud, the validity of the sale cannot be affected by the badness of the decree in execution of which the sale took place. Banerjee, J., observed that even if this

were conceded, a different rule should hold good where not only the decree but the execution proceedings are fraudulent. "If the sale is brought about fraudulently, that must be a sale brought about by abusing the process of the Court, and such a sale would be invalid, quite irrespective of the validity or invalidity of the decree, and the auction-purchaser cannot be entitled to maintain his purchase, notwithstanding that the proceedings by which he became a purchaser were fraudulent." This view was followed in *Ambika Prosad v. Whitwell* (12) which dissents from *Abu Baker v. Mubidin* (13) and refers to *Adharmam v. Manmatha Nath* (14). On the other hand, where the scope of the fraud is limited to the suit and does not pervade the execution proceedings as well, it has been held that an innocent purchaser, not a party to the fraud nor apprised thereof before he paid his money would be protected, *Bishun Chand v. Bijoy Singh* (15) and *Radha Madhab v. Kalpataru* (16).

There is thus a long and uniform series of decisions in this Court in support of the proposition that where an execution sale has been brought about by fraud practised on the Court by the decree-holder, the sale will be set aside on application to the execution Court, even though the auction-purchaser may not have participated in or may not have been cognisant of the fraud. This principle has received legislative approval in Or. 21, r. 90 of the Civil Procedure Code, 1908, where provision is made for cancellation of an execution sale on the ground of a material

(6) 2 C. W. N. 691 (1898).

(7) 4 C. W. N. 588 (1899).

(8) I. L. R. 26 Cal. 539 : s. c. 3 C. W. N. 403 (1899).

(9) I. L. R. 26 Cal. 324 : s. c. 3 C. W. N. 399 (1899).

(10) 8 C. W. N. 290 (1903).

(11) 24 W. R. 200 (1875).

(12) 6 C. L. J. 111 (1897).

(13) I. L. R. 20 Mad. 10 (1896).

(14) 6 C. W. N. 379 (1901).

(15) 15 C. W. N. 648 : s. c. 18 C. L. J. 588 (P. C.) (1911).

(16) 17 C. L. J. 209 (1912).

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irregularity or fraud in publishing it, provided the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. Under sec. 311 of the Code of 1882, which was replaced by Or. 21, r. 90 of the Code of 1908, an execution sale could be set aside on the ground of material irregularity in publishing or conducting it, provided the applicant has sustained substantial injury therefrom. On this rule, the judicial decisions engrafted the principle that an execution sale might be set aside on the ground of fraud under sec. 244. The consequence was a three-fold distinction between the two classes of cases: (1) when fraud was established, no question of substantial injury arose; (2) the period of limitation governing an application for cancellation of a sale on the ground of fraud was three years, whereas the period governing an application based on the ground of irregularity was 30 days; and (3) the decision on an application for cancellation of a sale on the ground of fraud operated as a decree, subject to a first appeal and a second appeal, while the adjudication on an application founded on allegation of irregularity, operated as an order subject to a first appeal only. These differences have been obliterated by the Code of 1908, and the two classes of cases have been assimilated. The Code, be it noticed, does not exclude specifically the application of r. 90 in cases where the purchaser is a *bonâ fide* purchaser for value without notice of the irregularity or the fraud and our attention has not been drawn to any judicial pronouncement, except the *dicta* in *Parashnath v. Hari Charan* (17) to show that the Court should, in the application of the provisions of Or. 21, r. 90, have regard to the fact that the purchaser is a stranger to

(17) I. L. R. 38 Cal. 622 (1911).

the proceedings. On the other hand, the statement contained in the referring order made by Pandit, J., on the 16th May 1867 in the case of *Abdul Hai v. Nawab Raj* (18) shows that a sale may be set aside on the ground of irregularity, however innocent the purchaser. It must further be borne in mind that by virtue of sec. 18 of the Indian Limitation Act, which extends the period of limitation in cases of fraud, a sale may have to be set aside under Or. 21, r. 92. The position then is that, subject to the conditions prescribed by Or. 21, r. 90, an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity, and that the exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bonâ fide* purchaser for value without notice. As Pandit, J., pointed out in the case mentioned, "a purchaser in execution is always an adventurer and knows that his purchase is attended with risk," the risk, amongst others, that his purchase may be nullified on the ground of material irregularity or fraud in publishing or conducting the sale.

We have next to consider the class of cases where the validity of an execution sale is impeached on the ground that the decree which is the foundation of the sale had been obtained by fraud. The question of the position of a *bonâ fide* purchaser for value without notice, in this connection, was reserved by Sir Barnes Peacock, C. J., in delivering the judgment of the Full Bench in *Nitmani v. Padmalochan*, (19). In that case, as also in *Ram Sundar v. Prasanna Kumar*

(18) 9 W. R. 196; B. L. R. F. B. 911 (1867).

(19) B. L. R. F. B. 379; 5 W. R. Act X Rulings 20 (1866).

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(20) it was ruled that a suit lies in a Civil Court to set aside a sale in execution of a decree fraudulently obtained in a revenue Court, under the Bengal Rent Recovery Act, 1859. This conclusion was rested on the ground that it is a cause of suit in the Civil Courts, which have jurisdiction to administer the rules of equity, justice and good conscience, to set aside decrees obtained by fraud and to restrain the parties to the fraud from reaping the fruit of such decrees. Peacock, C. J., then added the following observation —“ In this case, the revenue Court, upon review, set aside the judgment under which the tenure was sold, and passed a fresh judgment for a different amount. When that judgment was set aside, there was no judgment to support the sale which had taken place under it. It is unnecessary to say what would have been the effect of setting aside the decree under which the sale took place, if the purchaser at the sale had been a *bonâ fide* purchaser. It is sufficient to state that a decree set aside for fraud would not support a sale to a purchaser, in collusion with the parties to the fraud and acting as *benami* for one of them. This is the charge in the present case, and if the fraud alleged be made out, the Plaintiff is entitled to relief.” The question arose directly for decision in the case of *Abdul Hai v. Nawab Raj* (18). There, a decree was obtained against the Appellant in the Court of Behar and was transferred for execution to the Court of Surajgarh. The judgment-debt was paid into Court at Behar on the 14th January 1851. An intimation was sent to the Surajgarh Court that the decree had been satisfied and execution was no longer necessary. This, however, reached that Court after

the sale had been held on the 3rd February 1851, and the property had passed into the hands of a stranger. The judgment-debtor thereupon sued for cancellation of the sale. The trial Court dismissed the suit on the ground that the Plaintiff had no right to bring the action, and this was confirmed by the lower Appellate Court. Pandit, J., elaborately discussed the law on the subject, and with the approval of Bayley, J., referred the following question to a Full Bench for decision.—

“ Whether, with reference to objections urged by the purchaser, the sale should or should not be set aside, or, in other words, whether and how far in a regular suit, claims of a purchaser in execution of decrees are to be respected and protected on grounds of his innocence and ignorance ”

Peacock, C. J., with the concurrence of Bayley, Seton Kern, Phear and Macpherson, J.J., delivered the judgment of the Full Bench in the following terms :—

“ The substantial question of law which has been referred to for the decision of the Full Bench is, whether, having reference to the cases mentioned in the order of reference, *In re Sambunath Roy* (21), *In re Chandranath* (22), *In re Nadir* (23), *In re Ganga Prosad* (24) and *Bootan v. Bhagwan* (25), a *bonâ fide* purchaser for valuable consideration and without notice, at a sale in execution of a decree, is protected from having the sale set aside, under the present or former law. We are of opinion that the decisions do not go to the extent of saying that, under no circumstances, can a sale be set aside as against a purchaser. In each case, it will be for

(18) 9 W. R. 196; B. L. R. F. B. 911 (1867).

(20) B. L. R. F. B. 382; 5 W. R. Act X Rulings 22 (1866).

(21) [1847] Carrau 117; 2 Sum. Rep. 94.

(22) Carrau 39.

(23) Carrau 71.

(24) Carrau 74.

(25) [1849] Beng. S. D. A. 263.

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the Court which tries the case, to determine whether it will be in accordance with the principles of justice, equity and good conscience, that the sale ought to be set aside or not. Each case must be determined by the Court upon its own merits."

It must be noted at this stage that no reference is made, either in the order of reference or in the judgment of the Full Bench, to a *dictum* of the Judicial Committee in *Lala Bungsidhar v. Kunwar Bindheshree* (26), decided on the 26th February 1866, that is, after the judgment of the Full Bench in *Nilmani v. Padmalochan* (19), which was decided on the 5th February 1866, and before the order of reference in *Abdul Hai v. Nawab Raj* (18), which was made on the 16th May 1867. The appeal before the Judicial Committee arose out of a suit instituted by Bindheshwar Dutt Singh to obtain cancellation of an agreement, made by his step-mother and late guardian, whereby debts and obligations were incurred by her, which led to a decree against his estate during his minority and a consequent judicial sale. The Defendant judgment-creditor became the purchaser at that sale and his title was impeached on the ground that the agreement, the decree, and the sale were fraudulent and collusive. The history of the transactions is set out at length in the judgment of the Sudder Court pronounced in an appeal from the decision of the Principal Sudder Amin; *Lalla Bansidhar v. Kunwar Bindesree* (27). It was urged before the Sudder Court that the sale could not be reversed upon a late precedent of that Court; *Ali Hossain v. Badul Khan*

(28). Roberts and Batten, JJ., overruled this contention in the following terms: "But there is this peculiarity in this case, that the vendee is not an innocent purchaser, but one who has caused the sale of the property by his own dishonest and artful agency. Such sales, we have no doubt, ought to be cancelled, as the law will not allow a party to take advantage of his own wrong." This view was assailed before the Judicial Committee, and it was argued that there was no evidence to show that there was fraud and collusion between the guardian of the minor and the Appellant or that the sale was prejudicial to the estate of the infant. Lord Chelmsford observed: "You get a cognovit for Rs. 54,000 on an advance of Rs. 26,986, borrowed, according to your argument to save the estate, but under that cognovit, or confession of judgment, you force a sale yourself and actually buy in the minor's estate; can that stand?" Counsel for the Appellant answered: "The sale was by public auction under a decree of Court, whereby the payment of the Rs. 26,986, advanced to save the estate, was decreed: if the transaction as to the *ikharnamah* fails, yet the Appellant was a purchaser at an execution sale and a decree-holder: his rights were similar to a stranger purchasing: *Ali Hossein v. Badel Khan* (29)." Counsel for the Respondent urged that the whole transaction was shown by the evidence to be tainted with fraud; he was stopped by Lord Chelmsford with the observation: "We are satisfied on that point." The question, which the Judicial Committee was, in these circumstances, called upon to consider, was whether the Appellant could set up his purchase at the execution sale as a bar, though the entire transaction,

(18) 9 W. R. 196; B. L. R. F. B. 911 (1867).

(19) B. L. R. F. B. 879; 5 W. R. Act X Rulings 20 (1866).

(26) 10 M. J. A. 454 (1866).

(27) [1868] 2 N. W. P. Sud. Dep. 73.

(28) Decided 19th May 1863. Unreported.

(29) Decided 19th May 1863. Unreported.

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which he himself had brought about, was tainted with fraud. Sir James Colville held that the Courts below were warranted in their conclusion that the transaction was not only prejudicial to the estate, but had also the character of a fraudulent contrivance, and then added the following observation with reference to the question, whether the sale had interposed an effectual bar to the application of the more appropriate equity of restoration of the property to the minor than the remedy by appropriation of the surplus sale proceeds :—

“Their Lordships concur with the learned Judges of the Sudder Court in dissenting from the authority of the case which is stated to have been decided in 1847 (1863?) by two out of three of the then Judges of the Sudder Court of the North Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of the two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other. In the present case, the judgment by cognovit, the execution, and the sale are all tainted with the fraud which entered into the original transaction, the execution of the *ekrar*. All are parts of the contrivance by which the Respondent has been deprived of his property, and the Appellant has acquired it. Their Lordships, therefore, are of opinion that both the Courts below were right in decreeing that possession of

the property should be restored to the Respondent.”

It is manifest that the Judicial Committee were not called upon to examine, whether a *bond fide* purchaser for value without notice was entitled to retain the property which has vested in him by the sale, even though the decree and sale were tainted with fraud. The question was, whether, on the assumption that an innocent purchaser was entitled to special protection, a fraudulent purchaser could be included in the same category. The answer was in the negative, and the reason assigned was that he who has wronged the other party cannot be allowed to enjoy the fruit of his wrongdoing. It may be conceded that even a *dictum* of the Judicial Committee is entitled to great respect, but we cannot altogether overlook the circumstances of the litigation where the pronouncement was made.

Let us return to the decision of the Full Bench in *Ibdul Hai v. Nawab Raj* (18). The principle enunciated there was applied in *Jungee Lall v. Sham Lal Misser* (30). In that case, an *ex parte* decree was obtained against the infant members of a Mitakshara family under such circumstances that their interest in the estate could not be bound thereby. Before the decree was executed, the mother of the infants notified that she denied their liability and questioned the validity of the *ex parte* decree on the ground that they were not properly represented in that suit. Notwithstanding such notice, the Defendants purchased the property at the execution sale. It was ruled by Markby and Burch, JJ., that the purchasers were not protected by a decree which, by reasonable diligence, they might have discovered to be invalid. In such circum-

(18) 9 W. R. 196; R. L. R. F. B. 911 (1867).

(30) 20 W. R. 120 (1873).

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stances, the purchasers could not invoke the principle of the decision in *Jan Ali v. Jan Ali* (31), where no question of fraud was raised, and it was ruled that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree. The question came up for consideration again in *Mohesh Chunder v. Dwarka Nath* (32). There the suit was instituted to set aside an *ex parte* rent decree obtained under the Bengal Rent Recovery Act, 1859, and an execution sale consequent thereon. The trial Court found that the entire proceedings—the suit, the decree and the sale—were fraudulent, and cancelled the decree and sale, commenting adversely on the conduct of the purchaser, who was a pleader and a stranger to the suit. Upon appeal, the District Judge dismissed the suit as barred by limitation. On second appeal to this Court, Jackson and McDonnell, JJ., held that the suit was not barred by limitation and remanded the case for retrial with special reference to the question, whether the Defendants or any of them had been proved to have been implicated in the fraud, as found by the primary Court. It was observed that upon the authority of previously decided cases, it was clear that, however fraudulent the conduct of the Plaintiff in the rent suit might have been, if the purchaser was not implicated in the fraud, the validity of the sale would not be affected by the badness of the decree under which the sale took place. It may be stated that the previous decisions on the subject were neither mentioned nor discussed in the judgment. Amongst later decisions, reference has already been made above to the judgment of the Judi-

cial Committee in *Bishun Chand v. Bijoy Singh* (15). There, a suit was brought to set aside an auction sale on the ground that it was brought about by the fraud of the decree-holder and the judgment-debtor, and that the auction-purchaser was *benamidar* of the judgment-debtor. The trial Court found these allegations established and set aside the sale. On appeal to this Court, that decree was affirmed, as reasonably clear case of fraud and dishonesty, to which the purchaser was a party, had been made out. The Judicial Committee reversed the concurrent finding that the sale was fraudulent and collusive: Lord Robson held that the original debt and the decree thereon were genuine, that the auction-purchaser had made the purchase with his own money, and that the allegation of fraud and conspiracy made against the auction-purchaser had not been brought home to him. In such circumstances, the conclusion was inevitable that the sale could not be successfully impeached.

We have finally to consider the decision in *Chitambar v. Krishnappa* (1), where Jenkins, C. J. and Crowe, J., doubted the correctness of the Full Bench decision in *Abdul Hai v. Nawab Raj* (18) on the authority of the decisions in *Gore v. Stackpoole* (33), *Bowen v. Evans* (34), *Coldclough v. Bolger* (35), *Lala Bungsi-dhar v. Kunwar Bindheshree* (26) and *Jan Ali v. Jan Ali* (31). We have already referred to the decisions in *Lala Bungsi-*

(1) 1 L. R. 26 Bom. 543 (1902).

(15) 15 C. W. N. 648; s. c. 13 C. L. J. 588 (P. C.) (1911).

(18) 9 W. R. 196; B. L. R. F. B. 911 (1867).

(26) 10 M. I. A. 454 (1866).

(31) 1 B. L. R. 56; 10 W. R. 154 (1868).

(33) [1813] 1 Dow. 1^a.

(34) [1844] 1 J. & L. 178, 257; 6 Ir. Eq. Rep. 569.

(35) [1816] 4 Dow. 54; 16 E. R. 24.

(31) 1 B. L. R. 166; 10 W. R. 154.

(32) 24 W. R. 260 (1875).

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dhar v. Kunwar Bindheshree (26) and *Jan Ali v. Jan Ali* (31) and we shall presently consider the English and Irish decisions mentioned. We must not overlook, however, that the decision of the Full Bench is binding on us, until it is set aside by the Full Court or a contrary rule is enunciated by the Judicial Committee. The Appellant has, indeed, invited us to hold that the Full Bench decision, which, so far as we know, has not been challenged in this Court since 1868, is erroneous. We are not prepared to accept this contention. The decision, as we have seen, does not lay down an inflexible or inflexible rule; on the other hand, it enables the Court to determine each case upon its own merits, and to decide whether, in accordance with the principles of justice, equity and good conscience, the sale should or should not be set aside as against the purchaser. The principle that, in all cases for which no specific statutory directions are given, Judges should act according to justice, equity and good conscience, was expressly formulated in sec 93 of the Administration of Justice Regulation promulgated by the Governor-General in Council on the 5th July 1781. The rule was thereafter successively reproduced in sec. 21 of Reg. III of 1793, in sec. 24 of the Bengal Civil Courts Act, 1871, and in sec. 37 of the Bengal Civil Courts Act, 1887. Now, the decision of a case according to the principles of justice, equity and good conscience has generally meant decision according to the principles of English law applicable to a similar state of circumstances. This was justified in *Dada v. Babaji* (36) mentioned by Jen-

kins, C. J., in *Shierad v. Pundik* (37), on the authority of the judgment of the Judicial Committee in *Varden Seth v. Luckpathy* (38), but it is doubtful, whether the Judicial Committee really intended to enunciate the comprehensive rule attributed to their decision.

Lord Hobhouse, however, in the later case of *Waghela v. Masludin* (39) stated that "equity and good conscience" had been "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances." See also *Moharaja of Vizianagram v. Raja Setru Cherla* (40), *Mecnakshi v. Rama Iyer* (41), *Govindan Nair v. Achuthamenon* (42), *Kripasindhu v. Annada Sundari* (43) and *Gurdeo v. Chandrika* (44). In this connection, reference may be made to the observation of Sir Barnes Peacock, C. J., in *Rambaksh v. Madhusudan* (45), that where rights of parties are determined according to the general principles of equity and justice, this must be done without any distinction, as in England, between that partial justice which is administered in the Courts of law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of equity. This was adopted by Jenkins,

(37) 1 L. R. 26 Bom. 437; 4 Bom. L. 90 (1902).

(38) 9 M. I. A. 303 (321) (1862).

(39) L. R. 14 T. A. 89 (96); s. c. 1 L. R. 11 Bom. 551 (561), (1887).

(40) 1 L. R. 26 Mad. 686; s. c. 13 Mad. L. J. 83 (F. B.) (1903).

(41) 1 L. R. 37 Mad. 396 (1912).

(42) 1 L. R. 39 Mad. 433; s. c. 23 Mad. L. J. 310 (1915).

(43) 1 L. R. 35 Cal. 24; s. c. 11 C. W. N. 983; 6 C. L. J. 273 (F. B.) (1907).

(44) 1 L. R. 36 Cal. 193; s. c. 5 C. L. J. 611 (1907).

(45) B. L. R. F. B. 675 (679); 7 W. B. 377 (1887).

(26) 10 M. I. A. 454 (1866).

(31) 1 B. L. R. 56; 10 W. B. 154 (1868).

(36) 2 Bom. H. C. B. 36 (38) (1865).

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C. J., in *Debnarain v Chunilal* (46); see also the observation of Peacock, C. J., in *Khemamoyi v. Soshi Bhusan* (47). In these circumstances, it is not surprising to find that where, as in the present instance, there is no statutory provision directly conclusive on the question of the rights and liabilities of the parties, the only justice, equity and good conscience, which judges steeped in the principles of English jurisprudence can and do administer, in default of any other rule, is so much of English law and usage as seem reasonably applicable in this country. *Satis Chandra v Ramdayal* (18).

The principles applicable to cases of this character are concisely stated by Sir Edward Sugden (afterwards Lord St Leonards) in his classical treatise on the Law of Vendors and Purchasers (14th Edition, 1862, p 110):—

“If a decree is obtained by fraud, it may be relieved against, and it has been said that a purchaser is bound to see that, at least as far as appears on the face of the proceedings before the Court, there is no fraud in the case, but, if the Court itself be imposed upon, it would be strong measure to imply notice of the fraud to the purchaser, from the very proceedings before the Court. But it is a settled maxim that persons purchasing under decrees of the Court, as a general rule, are bound to see that the sale is made according to the decree. And this more specially applied to the Plaintiff in the case; of course, the purchaser making use of the machinery of the Court to obtain the estate fraudulently as against the persons entitled to the inheritance, although

with the concurrence of the tenant for life, cannot sustain his purchase; but a *bond fide* sale cannot be impeached simply because the suit was in fact instituted for the purpose of carrying it into execution. The tenant for life cannot be permitted in such a sale to obtain a benefit at the expense of the remainder-man, and if the purchaser permit him to do so, that may in some cases vitiate the sale, although the Court, if the transaction was not fraudulent, will struggle to correct the misapplication, and not rescind the sale.”

The principles upon which a Court of equity acts in setting aside a sale had under a decree, were elaborately discussed by Sir Edward Sugden, when Lord Chancellor of Ireland, in the case of *Bowen v Evans* (31), which was subsequently taken up to the House of Lords—*Bowen v Evans* (49). Reference was made to the decisions of Lord Redesdale in *Kennedy v Daly* (50) and *Giffard v Hort* (51), where purchases on the basis of fraudulent decrees were pronounced to be of no effect, as the purchaser was aware of, if not a party to, the fraud. To the same effect is the decision of Mannes, L. C., in *Blake v Foster* (52). On the other hand, in *Bennett v Hamill* (53), Lord Redesdale held that the purchaser was not affected by error in the decree and observed as follows:—“A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and that it has on that investigation properly decreed a sale; then he is to see that this is a decree binding the parties claiming the

(46) 1 L. R. 41 Cal. 187 (146); s. c. 16 O. L. J. 803 (1913).

(47) 9 W. R. 96 (1868).

(48) 1 L. R. 48 Cal. 288; s. c. 24 O. W. N. 982; 22 O. L. J. 94 (Spl. B.) (1920).

(49) 2 H. L. C. 257; 81 R. R. 136 (1848).

(50) [1804] 1 Sch. & Lef. 355, 377.

(51) [1804] 1 Sch. & Lef. 386 (393).

(52) [1813] 2 Ba. & Be. 387.

(53) [1806] 2 Sch. & Lef. 566.

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estate, that is, to see that all proper parties to be bound are before the Court; and he has further to see that taking the conveyance, he takes a title that cannot be impeached *aliunde*." This was substantially the view adopted by Manners, L. C., in *Lightburne v. Swift* (54). Amongst other cases mentioned by Sir Edward Sugden in *Bowen v. Evans* (34) are the decisions of the House of Lords in *Gore v. Stackpoole* (33), *Colclough v. Bolger* (35), *Colclough v. Sterum* (55) and *Bandon v. Beecher* (56). In each of these cases, relief was granted on the ground of fraud, and it was established that the purchaser, if not a party to the fraud, had notice thereof, actual or constructive, they will be found analysed by Sir Edward Sugden in his treatise of the Law of Property as administered by the House of Lords, 1849, Chap. VI, sec. iii, pp 679-720. In one of the cases, *Gore v. Stackpoole* (33), Lord Redesdale doubted whether even a purchase under the decree, without notice of the fraud, would be a protection, as he held it clear that a purchaser was bound to see that, at least so far as appeared on the face of the proceedings before the Court, there was no fraud in the case. Sir Edward Sugden hesitated to go as far as Lord Redesdale and observed in *Bowen v. Evans* (34): "That goes a great way, and I should act upon that opinion with very great precaution. If I found a purchaser buying, where fraud appeared clearly on the face of the decree, I should hold him to have notice of it; but I should have much

hesitation in visiting a purchaser with the consequences of what might be deemed implied notice of a fraud, which was not discovered by the Court, or the officers of the Court, or the Counsel concerned in the cause, whose duty it is not to permit the Court to make a decree not warranted by the facts of the case:" see also *Lansdowne v. Beauman* (57), where Hart, L. C., referred to the observations of Lord Redesdale in *Giffard v. Hort* (51) and expressed the opinion "that the utmost caution should be used in touching sales under decrees, and that nothing could be more dangerous than for the Court to strain the effect of notice, for the purpose of unsettling the transaction of an honest purchaser under a decree." In this connection, reference may be made to the decision of the House of Lords in *Mullins v. Townsend* (58), as an illustration of a case where the irregularities in connection with the sale were so grave and manifest that the Court had no difficulty in condemning the transaction as fraudulent and in cancelling the sale which had been made at an under-value. The cases of *Lloyd v. Johns* (59) and *Curtis v. Price* (60), which are mentioned in *Bowen v. Evans* (34), furnish instances, not of fraud but of irregularity in the proceedings, and it was accordingly held by Lord Eldon in the one case and by Sir William Grant, M. R., in the other, that the purchaser should not lose the benefit of his purchase. The decision in *Townsend v. Warren* (61),

(33) [1813] 1 Dow. 18.

(34) [1844] 1 J & L 178, 257; 6 Ir. Eq. Rep. 569.

(35) [1816] 4 Dow. 54; 16 R. R. 24.

(54) [1812] 2 Ba & Be. 207.

(55) [1821] 3 Bligh 181; 22 R. R. 1.

(56) [1835] 9 Bligh (N. S.) 532; 8 Cl & F. 479.

(24) [1844] 1 J & L 178, 257 6 Ir. Eq. Rep. 569.

(51) [1804] 1 Sch & Lef 386 (393).

(57) [1828] 1 Molloy 89 92.

(58) [1831] 2 Dow & C. L. 430; 5 Bligh (N. S.) 567.

(59) 9 Ves. 37 (1802).

(60) [1805] 12 Ves. 89 - 8 R. R. 303.

(61) [1812] 1 J. & L. 221; 6 Ir. Eq. Rep. 620.

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which was heard in the first instance by Manners, L. C., and subsequently affirmed by the House of Lords, was based upon very special facts, as explained by Sir Edward Sugden in *Bowen v. Evans* (34) and also in his *Law of Property*, p. 712. The sale was allowed to stand, though a fraud had clearly been practised on the inheritance and the purchaser was a party thereto, the case, however, was treated by Lord Chancellor Manners, erroneously as it subsequently transpired, as one of irregularity, and relief was confined to the award of the full and fair value of the property at the time of the sale. On the other hand, in *Thornhill v. Glover* (62), Sir Edward Sugden in 1842 set aside a sale which had taken place in 1808, as it appeared that the machinery of the Court had been resorted to to effectuate a sale made, not by the order of the Court, but by a contract entered into behind the back of the Court; and though he deplored that the Court should be required to interfere after such a lapse of time, he added that he must not, in the words attributed by Lord Harcourt to Twisden, J., in *Advocate-General v. Sutton* (63) "steal leather to make poor men shoes." We may add that in *Beioley v. Carter* (64), Selwyn, L. J., quoted with approval the following passage from the judgment of Sir Edward Sugden in *Bowen v. Evans* (34), which sets out succinctly the reason why a judgment and sale should not be permitted to be impeached to the detriment of an innocent purchaser:—

"First, there is *Lloyd v. Jones* (59)

84) [1844] 1 J. & L. 178, 257; 6 Ir. Eq. Rep. 569.

(59) 9 Ves. 87 (1803).

(62) [1842] 3 Dr. & War. 195.

(63) 1 P. Wms. 765.

(64) L. R. 4 Ch. App. 220, 229 (1869).

in which Lord Eldon held that the purchaser should not lose the benefit of his purchase by reason of an irregularity in the proceedings; that case has been explained by Lord Redesdale in *Bennett v. Hamill* (53) and by Sir W. Grant in *Curtis v. Price* (60). Lord Redesdale seems not to have entirely agreed with Lord Eldon, but, with great deference to the high authority with whom I am compelled to differ, I entirely subscribe to the doctrine of Lord Eldon. In *Curtis v. Price* (60), the Master of the Rolls, though not called on to decide the point, declared his opinion to be, that although accounts were not taken or inquiries directed which ought to have been taken and directed, yet that being the act of the Court it could not affect the purchaser; and he was also of opinion that a direction by the Court to pay the purchase money to a wrong person would not affect the purchaser. I entirely subscribe to that opinion. I think that though there may have been some advantage taken of the parties to the cause, it ought not of itself to constitute a ground for impeaching the sale; for it would be extremely dangerous to impress upon the minds of purchasers under decrees that that which had escaped the vigilance of the Court, of its officers, and of the Bar, would form a sufficient ground to set aside a sale. I could not lay down a rule more mischievous to the suitors of the Court and the interests of the public, for it is of the greatest importance that sales made under the authority of the Court should not be lightly set aside."

Reference may also be made in this connection to *Gavin v. Hadden* (65). We may take it, then that a judgment

(53) [1806] 2 Sch. & Lef. 566, 579.

(60) [1805] 12 Ves. 63; 5 B. R. 303.

(65) L. R. 3 P. C. 707 (1871).

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which has been obtained by fraud, either in the Court, or of one or more of the parties, can be impeached by means of an action, and can be set aside against those who procured it by fraud; *Toulmin v. Steere* (66), *Cammell v. Sewell* (67), *Coaks v Boswell* (68), *Boswell v. Coaks* (69) and *Schedden v. Patrick* (70) There is, however, at least one exception to this rule, for, as stated by Cozens-Hardy, L. J., in *Birch v. Birch* (71), although in most cases a judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud, this limitation does not apply to an action to set aside a judgment granting probate of a Will, inasmuch as a Will must be either good or bad against all the world.

Reference has sometimes been made in the discussion of this question, as in *Chitambar v. Krishnappa* (1), to the class of cases which hold that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree; *Chunder Kayt v. Bissesar* (72), *Jan Ali v. Jan Ali* (31), *Zainul Abidin v. Muhammad Ashgar Ali* (73), *Mukhoda v. Gopal* (74), *Indurjeet v. Pootee* (75), *Janakdhar Lal v. Gossain Lal Bhaya Gaywal* (76) and *Nagendra Nath v. Parbati Charan* (77). The princi-

ple which lies at the root of this class of cases was investigated in *Narendra Chandra v. Jogendra Narain* (78) and does not logically require extension to cases where a fraud has been committed on the Court itself. The rule that a stranger purchaser is not affected by the reversal of the decree for error or irregularity is based, as the cases show on grounds of public policy, though it operates harshly upon the person whose property has been sold, and who it may turn out in the end was not liable at all to the Plaintiff. It is at least questionable whether this rule should be made to comprehend within its scope the class of cases where fraud has been committed upon the Court, which, though established for the administration of justice, has been utilised by an unscrupulous litigant for the accomplishment of a dishonest purpose; such an extended application of the rule would undoubtedly tend to encourage fraud.

The question under consideration has, as may be anticipated, frequently come under examination in the Courts of the United States, and the balance of judicial opinion there favours the view that a *bonâ fide* purchaser, for value without notice, at an execution sale, is not affected by infirmities in the judgment or proceedings subsequent thereto, which do not appear on the face of the record, such as secret vices, frauds, defects or other infirmities; see *Freeman on Void Judicial Sales*, sec. 41; *Freeman on Judgments*, sec. 509, *Freeman on Executions* sec. 342; *Kleber on Void Judicial and Execution Sales*, sec. 369; *Rorer on Judicial and Execution Sales*, secs. 570, 1101. The adoption of the rule has been often challenged but has been defended on grounds which are best stated in the judgment of a Full Bench of the Supreme Court of

(1) I. L. R. 26 Bom. 543 (1902).

(31) 1 B. L. R. 56; 10 W. R. 154 (1868).

(66) [1817] 3 Mer. 210; 17 B. R. 67.

(67) [1858] 3 H. & N. 617; 117 B. R. 878.

(68) [1886] 11 A. C. 232.

(69) [1894] 6 B. 167 H. L.

(70) [1854] 1 Macqueen H. L. 535.

(71) [1902] Probate 180.

(72) 7 W. R. 812 (1867).

(73) L. R. 15 I. A. 12; s. c. I. L. R. 10 All. 105 (1867).

(74) I. L. R. 26 Cal. 734 (1899).

(75) 19 W. R. 197 (1878).

(76) I. L. R. 27 Cal. 107 (1900).

(77) 20 C. W. R. 819 (1914).

(78) 10 C. L. J. 499 (1914).

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California, in *Reeve v. Kennedy* (79) where Crockett, J., observed as follows:—

“No principle is better settled than that a purchaser at a judicial sale, without notice, under proceedings regular on their face, and had in a Court of competent jurisdiction, is not affected by any mere error of the Court, for which the judgment might be reversed on appeal, nor for any secret vice in the judgment, not appearing on the face of the record, and which can be made to appear only by the production of extrinsic evidence. He is bound at his peril to enquire whether it sufficiently appears on the face of the record that the Court had jurisdiction to render the judgment, and whether there is a valid execution. But nothing more is required of him. Unless the Plaintiff in the action be also the purchaser at the sale, the latter will not be affected by any mere error of the Court, even though the judgment be afterwards reversed for such error; nor can his rights be impaired by any secret vice in the proceedings, resulting from fraud or other similar cause, of which he had no notice. As between the parties to the action, a judgment fraudulently obtained will be set aside and held for naught when the fraud is made to appear. But there would be no security in titles acquired at judicial sales if the rights of a *bonâ fide* purchaser, without notice, could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record, which showed a due service on the Defendant, was in fact false. The repose of titles, and indeed every consideration of public policy, demands that a purchaser at a judicial sale without notice, under proceedings regular on their face, and by a Court of competent jurisdiction, should

be protected as against mere errors of the Court, and against secret vices in the proceedings founded on fraud, accident, or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. No prudent person would purchase at a judicial sale, if he incurred the hazard of losing his money, in case it afterwards should be made to appear that the judgment was obtained by perjury or other fraudulent practices, or that the record on which he relied, as proving a service on the Defendant, was in fact false. These propositions are too familiar to require the citation of authorities in their support, and we have been referred to none which appear to contravene them, unless it be two cases decided by the Supreme Court of Iowa. [*Hansby v. Blackman* (80) and *Bryant v. Williams* (81)]. The principle settled in those cases is, that a Defendant in an action, who was not a resident of the State, and was not served with process by publication or otherwise, and for whom an attorney without authority had entered an appearance, might afterwards, on proof of these facts, recover the property sold under the judgment from a *bonâ fide* purchaser without notice. It is unnecessary, for the purposes of this case, to examine the reasoning on which these decisions are founded. But if the peculiar facts of those cases should take them out of the general rule to which I have adverted, it would only prove that the rule, in its broadest sense, is not wholly without an exception, and would not impugn the rule itself. If an unauthorised appearance by an attorney, for a non-resident Defendant, who was not served with process, can be afterwards shown to invalidate the title

(80) [1885] 20 Iowa. 128.

(81) [1886] 21 Iowa. 539.

(79) [1878] 48 California 648.

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of a *bonâ fide* purchaser without notice, at the execution sale, it stands, so far as I am aware, as a solitary exception to the general rule, and the doctrine ought not to be further extended "

This was followed by the Supreme Court of Virginia in *Marrow v Brinkley* (82) and when an attempt was made to question that decision before the Supreme Court of the United States, the application for leave to appeal was rejected; *Marrow v Brinkley* (83). The question was again elaborately discussed by the Supreme Court of North Carolina in *Millsaps v. Estes* (84) and in *Yarborough v. Moore* (85) and the rule was re-affirmed that innocent purchasers at a judicial sale, who had no notice of any irregularity in the proceedings and the judgment under which the sale was made, would be protected in their purchase, where the Court had jurisdiction of the parties and subject-matter of the proceedings, and the judgment on its face authorised a sale. The rule has been enunciated in similar terms and recognised or applied without question in New York in *Clarke v. Davenport* (86), in Alabama in *Dunklin v. Wilson* (87), in New Jersey in *Wilson v. Hofman* (88), in Maryland in *Spindler v. Atkinson* (89), in Arkansas in *Carden v. Lane* (90), and in Missouri in *Hellenan v. Ragsdale* (91). The Courts in the United States have, however, struggled to avoid the manifest hard-

ship, if not injustice, of the application of the rule by the adoption of two principles: (i) they have drawn a distinction between judgments which are void and voidable, and they have ruled that if the judgment is void, even a *bonâ fide* purchaser does not acquire an unimpeachable title; *Rankin v. Schofield* (92), *McDonald v. Rankin* (93), *Taylor v. Savage* (94), *Mitchell v. Maxent* (95) and *Lamaster v. Keeler* (96); (ii) they have held that a person is not a *bonâ fide* purchaser, unless he purchases without notice, actual or constructive, of the title or equity claimed to be superior to his rights as purchaser, and knowledge sufficient to put a reasonably prudent man on enquiry is constructive notice; in other words, though an execution purchaser need not be in a mood to scent fraud, he need not have complete information of every fact material for him to know, he is bound to make enquiry when there is anything that would excite the suspicion of a prudent man and place him on his guard; *Barnes v. McClinton* (97), *Gibson v. Winslow* (98), *Tarr v. Sims* (99), *Lang Syne Gold Min. Co. v. Ross* (100) and *Pettis v. Johnston* (101). In this way, by a judicious application of the doctrine of constructive notice, the Courts of the United States have sought to avoid the harsh results which sometimes follow from the application of the stringent rule that the title of a purchaser in good faith and for value

(82) [1818] 85 Va. 55; 4 S. E. 605.

(83) [1899] 129 U. S. 178.

(84) [1904] 137 N. C. 525; 70 L. R. A. 170; 107 Am. St. Rep. 498; 50 S. E. 227.

(85) [1909] 151 N. C. 116; 65 S. E. 768.

(86) [1877] 14 N. Y. Sup. Court 95.

(87) [1879] 64 Alabama 162.

(88) [1901] 50 Atl. 592.

(89) [1852] 3 Maryland 409; 56 Am. Dec. 755.

(90) [1886] 48 Ark. 216; 2 S. W. 709; 3 Am. St. Rep. 228.

(91) [1906] 199 M. 375; 97 S. W. 890.

(92) [1906] 81 Ark. 440; 98 S. W. 674.

(93) [1909] 92 Ark. 173; 122 S. W. 88.

(94) [1843] 1 Howard 282.

(95) [1866] 4 Wallace 237.

(96) [1887] 123 U. S. 376.

(97) [1831] 3 Pen. & W. 67; 23 Am. Dec. 62.

(98) [1863] 46 Pa. St. 380; 48 Am. Dec. 552.

(99) [1832] Rich. Eq. Cas. S. C. 122; 24 Am. Dec. 396.

(100) [1888] 20 Nev. 127; 18 Pac. 358; 19 Am. St. Rep. 327.

(101) [1920] 190 Pac. 681.

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at a judicial sale should be considered invulnerable against an assault wherein it is attempted to be shown that the judgment was procured by fraudulent machinations and misrepresentations of others, provided he is neither chargeable with notice thereof nor guilty of participation therein

We are thus brought back to the rule enunciated by Sir Barnes Peacock in *Abdul Hai v. Nawab Raj* (18), namely, that in cases of this character, where a stranger has purchased, the Court should determine, whether it will be in accordance with the principles of justice, equity and good conscience to set aside the sale. The Court has, in fact, to reconcile two conflicting principles. On the one hand, as DeGrey, C. J., said in *R. v. Duchess of Kingston* (102), fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of the Courts of justice, and, in the words of Lord Coke, avoids all judicial acts, ecclesiastical and temporal. James, L. J., emphasised the same idea when he stated in *Vane v. Vane* (103), that a Court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language in *Trevelyan v. Charter* (104), affirmed by the House of Lords in *Charter v. Trevelyan* (105), from his children and his children's children, or, as was said in *Huguenin v. Basely* (106) and *Bridgeman v. Green* (107) from any persons amongst whom he may have parcelled out the fruits of his fraud, and will restore it to those

from whom it has been fraudulently abstracted. On the other hand, as Lord Loughborough said in *Jerrard v. Saunders* (108), against a purchaser for valuable consideration without notice, the Court will not take the least step imaginable, which is only a re-statement of the pronouncement of Lord Northington in *Stanhope v. Earl Verney* (109), that a purchase without notice for a valuable consideration is a bar to the jurisdiction of the Court; see also similar expressions, perhaps more cautiously phrased, by Lord Loughborough in *Strode v. Blackburne* (110), by Lord Eldon in *Wallwyn v. Lee* (111) and by Lord Romilly in *Advocate-General v. Wilkins* (112). On the facts of each case, the Court has to determine, which of these doctrines should prevail. In the solution of the problem, we have to bear in mind that the protection given to the *bond fide* purchaser had its origin exclusively in equity and is based entirely upon the conception that a Court of equity acts solely upon the conscience of litigant parties, by compelling the Defendant to do what, and only what, *in foro conscientie* he is bound to do. If the relations between the two contestants standing before the Court are such that, in equity and good conscience, the Plaintiff ought to obtain the aid which he asks, and the Defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief; if the relations are not of this character, then the Court will withhold its hand and will leave the parties where they stand. The protection given to the *bond fide* purchaser, therefore, simply means that

(18) 9 W. R. 192; B. L. R. F. B. 211 (1847)

(102) [1776] 20 How. St. Tr. 544; 2 Sm. L. C. 754.

(103) L. R. 8 Ch. App. 383 (307) (1878).

(104) 4 L. J. Ch. 209, 214 (1835).

(105) 11 Cl. & F. 714; 65 E. R. 505 (1844).

(106) [1868] 14 Ves. 278; 9

(107) [1756] Wilkes. 55; 3 Ves.

(108) [1791] 2 Ves. 454, 455

(109) [1763] 2 Eden 81 (85)

(110) [1793] 3 Ves. 222.

(111) [1808] 9 Ves. 24 (34); 7 E. R. 143.

(112) 17 Beave 295 (293); 22 E. R. 148.

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from the relations subsisting between the two parties, specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the Plaintiff in what he is seeking to obtain, because it would be unconscionable and inequitable to do so; that Court will not, in such an event, aid either party against the other. The doctrine of *bonâ fide* purchase is thus not a rule of property. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a Defendant, to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the Plaintiff in his suit, because, under the circumstances of the case, it would be unconscionable that the Plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the Plaintiff's behalf. We are not concerned here with the very exceptional cases where a *bonâ fide* purchaser is aided by affirmative relief, by reason of the fraud of the party holding the prior title or interest; these need not be exhaustively enumerated and classified for our present purpose, but examples are furnished by the decisions in *Savage v. Foster* (113), *Ibbottson v. Rhodes* (114), *West v. Jones* (115), *Dillon v. Costelloe* (116), *Hickson v. Aylward* (117) and *Wallade v. Lord Donegal* (118). But, apart from such special instances, the doctrine is applied for the protection of the Defendant in cases which have been grouped by Lord Westbury into three

classes in *Phillips v. Phillips* (119): (i) where an application is made to the auxiliary jurisdiction of the Court by the possessor of a legal title; (ii) where the Plaintiff, holding an equitable estate or interest, seeks to enforce it against a purchaser of the legal title; and (iii) where the Plaintiff seeks to enforce some equity, as distinguished from an equitable estate, as the reformation of a deed on account of mistake or its cancellation on the ground of fraud. In each case, it must be remembered that the doctrine is confined to Courts of equity and is in no sense a rule of property but is a rule of inaction. In such circumstances, the most convenient course to follow is obviously to enunciate the rule in an elastic form, adaptable to varied combinations of circumstances, as was done by Sir Barnes Peacock in *Abdul Hai v. Nawab Raj* (18). In the application of that rule to a concrete case, we may usefully bear in mind that a *bonâ fide* purchaser for value without notice has always been a favourite with Courts of equity. But to crystallize the rule further would only be to impair its utility. Thus alone can we give effect to the elementary truth that the law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society, though the progress of the law must be by analogy to what is already settled.

Tested in the light of these principles, how does the case for the Defendant stand? We have seen that in 1904, the landlords sued the present Plaintiffs to recover Rs. 2-2-0 as arrears of rent. It has not been investigated whether the claim was real or illusory. This much is known that the processes were suppressed.

(113) [1723] 9 Mod 35

(114) [1706] 2 Vernon 554.

(115) [1851] 1 Sim. N. S. 205; 89 R. R. 69.

(116) [1827] 2 Molloy 512.

(117) [1828] 3 Molloy 1.

(118) [1837] 1 Dr. & Wall. 461.

(18) 9 W. R. 196; B. L. R. F. B. 911 (1887).

(119) [1853] 4 DeG. F. & J. 209; 135 R. R. 97.

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sed, false returns were submitted to the Court, and an *ex parte* decree was obtained. The decree was not executed for three years. Processes were again suppressed, false returns submitted and the sale held on the 21st November 1907, when Behari Lal Das became the purchaser for an insignificant sum. The judgment-debtors were not present; there were no bidders; there was no competition. Any purchaser, however, optimistic, could, in such circumstances, have inferred that there must have been something wrong with the proceedings. Das, after his purchase, never obtained delivery of possession and never paid rent to the landlords: the original tenants were accordingly left in undisturbed occupation, as before. The landlords next sued the widow of Das—this time for recovery of Rs. 15-7-6—and obtained an *ex parte* decree on the 24th June 1913, as processes were suppressed, and false returns submitted to the Court. The sale was not held, till after the lapse of more than three years, on the 21st November 1916, when the Appellant Bireswar Ghose became the purchaser for a small sum. The processes in execution had not been served; there were no bidders; there was no competition. If the intending purchaser had made any enquiry, he would have found that, not the judgment-debtor, the widow of Das, but the original tenants were in occupation. This would have put a reasonable man on his guard; *Barnhart v. Green Shields* (120), *Mancharji v. Kongsoo* (121), *Hakeem v. Beejoy* (122) and *Radha Madhab v. Kalpataru* (16). The fact remains that the Appellant was able to secure the property

for an insignificant sum. We cannot hold, in these circumstances, that the *bond fide* of the first or of the second purchaser were as unquestionable as their good fortune in acquiring a property at a fraction of its value without contest or competition. In our opinion, it would be a well-merited reproach to the administration of justice if we were compelled to uphold execution purchases of this description, by the application, without discrimination, of the formula of *bond fide* purchase for value without notice.

We feel no doubt that the Subordinate Judge has rightly set aside the sale, and decreed the suit; his decree must consequently be affirmed and this appeal dismissed with costs.

RANKIN, J.—I agree in the view that this appeal should be dismissed with costs. The circumstances of the case as found by the lower Appellate Court—indeed the mere dates of the decrees and executions coupled with the fact that Behari Das was never in possession—convince me that the defence of “purchaser for value without notice” has no basis in the facts. There is simply no room for it. There is an express finding that he was not a *bond fide* purchaser: and in the circumstances detailed by the learned Subordinate Judge any other finding would have been inexplicable. Neither by this pleading nor by the way in which issues were taken at the trial, or points advanced on first appeal, has the purchaser done anything to entitle him to complain that the judgment of the Court below is an insufficient analysis of the facts as to this part of the case. It may be taken that there was some room for controversy upon the facts as the Courts below were not in agreement. But I see no error of law; and on the facts stated by the learned Subordinate Judge I see no es-

(16) 17 C. L. J. 309 (1912).

(120) 8 Moo P. C. 18 (1853).

(121) 6 Bom. E. C. R. 59 (1899).

(122) 22 W. R. 8 (1874).

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cape from his conclusion. The judgment of Jenkins, C. J., in Bombay case, *Chitambar v. Krishnappa* (1), decides merely that inadequacy of price, in the absence of notice of the fraud or defect in the proceedings, does not give rise to a right to have the sale set aside. It in no way throws doubt upon the proposition that judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice. The fact that the Court has been successfully deceived is one which, upon the issue as to the purchaser's good faith, must be of very different value in different circumstances. In the present case this consideration goes but a little way. In other cases, it may go almost all the way. But in all cases the burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. This, in my opinion, is an essential feature of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity where it can will favour those who show that in innocence they have given value [cf. *In re Nisbit & Pott's Contract* (3)].

J. N. R.

Appeal dismissed.

(1) I. L. R. 28 Bom. 3 (1902).
(3) [1905] 1 Ch. 391.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

MR. JUSTICE DUFF.

1922.

Heard, 14, July.

Judgment,

14, July.

BHOLANATH SEN,
Appellant,

v.

BALARAM DAS, since
deceased, and ors.,
Respondents.

Estoppel—Mortgagor if may deny title to property which he professes to mortgage and ask for a personal decree only against himself.

Whatever interest a mortgagor has in property which he mortgages is bound by the mortgage and it is not open to him to say that he has no interest in the property and that consequently the Court can pass a personal decree only against him.

This was an appeal against the decree of the High Court of Judicature at Fort William in Bengal, dated the 5th June 1917, which varied the decree of the Subordinate Judge of the Fourth Court, 24-Pargannas, dated the 29th May 1914 and made in Suit No. 128 of 1911.

The said suit was brought by the first Respondent (since deceased) and the Respondents Nos. 2 to 7 for a mortgage decree. The Subordinate Judge on the 14th May 1912, made a decree for sale as prayed but he subsequently re-called it and passed a fresh decree for the debt only. The High Court on appeal made a decree for sale in the ordinary form directing that a fresh account be taken, that a fresh date be fixed for payment and that in default of payment the property should be brought to sale.

The first Defendant alone preferred this appeal.

The mortgage in suit was dated the 25th September 1903, and it was execut-

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ed by Bholanath Sen, the first Defendant, and his brother Kalidas Sen, represented on the record by the second Defendant, in favour of the first Respondent who took it in the name of Shib Krishna Das. It was in the English form and contained a covenant to pay and also a covenant for title. The sum secured thereby was Rs 7,000 and interest, and the mortgaged premises are described in the schedule to the deed. A further sum of Rs 350 having been advanced by the mortgagee a deed of further charge was executed on the 8th January 1907. As stated below the interest of the mortgagors against which a decree was sought did not extend to the entire property described in the mortgage but only to a one-fourth part thereof of which they have been put into separate possession.

Concurrent findings established that the deeds were genuine, that they were taken by the first Respondent in the name of Shib Krishna Das as *benamudar*, that the consideration was received and that the Defendants are liable for the debt with interest.

The said Bholanath Sen and his late brother Kalidas Sen (who and whose representative are hereinafter referred to as the Sens) were the sons of the only daughter of one Rajbullabh who was the owner of the land comprised in the said mortgage. He died in 1870 leaving a widow Moti Dasi. The widow in professed exercise of a power contained in her husband's Will adopted first Jogendra and after his death (which took place in 1886) Amulya. The validity of each adoption was questioned, and the second was found by the High Court in 1905 to be invalid in a suit brought by Amulya in 1901.

In an administration suit in the High Court No 336 of 1890, the Sens above-

named made good their claims under their grand-father's Will to one-fourth of the land against the widow and executrix and their right thereto was not questioned by the Plaintiff in the said suit of 1901 nor by anyone before 1905. In 1903 Katyani, the widow of Jogendra above-named, sued as his heiress to recover the remaining three-quarters of the land. The Sens, who were among the Defendants, denied the validity of Jogendra's adoption and claimed the said three-quarter share of which they had taken possession as heirs of Rajbullabh on the death of his widow. The secured debts were apparently incurred by the Sens for the purposes of their defence. In 1905 by an amendment of her plaint Katyani made an additional claim for the Sens' one-quarter share and she obtained in the first Court a decree for the whole estate. Against this decree an appeal was preferred by the Sens in which they contended that they were entitled to the whole property or at any rate to a one-fourth share. The parties to the appeal arrived at a compromise under which a one-fourth share was secured to the Sens and it was provided with the concurrence of the mortgagee as follows.—

"That the said four-sixteenths parts or shares of the said estate so allotted to the said Appellants Bankim Chandra Sen and Bholanath Sen will remain subject to the charge and lien created by the indenture of mortgage executed by them on the 25th September 1903 in favour of the Respondent Shib Krishna Das, and the said Shib Krishna Das by the said petition of compromise abandoned all claim to the remaining twelve-sixteenths parts or shares of the said estate taken absolutely by the said Katyani Dasi and Kanai Lal Sen and the shares of the said Katayani Dasi and Kanai Lal Sen will be free of all liability

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or encumbrance, and the Respondent Shib Krishna Das will have the right and be at liberty to realise his dues only from the four-sixteenths parts or shares of the said estate which is to be and is hereby allotted to the said Bankim Chandra Sen and Bholanath Sen upon partition to be made in this case by the lower Court."

The Appellate Court, viz, the District Court of Alipur, on the 9th January 1907, passed a decree in conformity with the compromise, appointing arbitrators to effect a partition of the property and remitting the case to the lower Court to be finally disposed of. On the 10th September 1907, a final decree was passed by the lower Court giving effect to the compromise and to the award of the arbitrators for the partition of the estate and the Sems were thereafter in possession of a separate one-quarter share. Subsequently Rajlakshmi, (the daughter of the Plaintiff in the last mentioned suit) filed a suit alleging that she was not bound by the compromise; and on the 8th August 1910 she obtained in the High Court (in Appeal No. 389 of 1908) a decree declaring "that the consent decree made on the 9th January 1907 is void and inoperative as against her, and that she is no way bound by the partition proceedings which have taken place in execution of that decree." The learned Judges held that the said decree had been passed without jurisdiction but they did not by their decree make any further adjudication as to the rights of the parties.

The suit which gave rise to this appeal was filed on the 28th August 1911, against Bholanath Sen and the representative of Kalidas Sen, by the first Respondent, since deceased, the legal representatives of the said *benamidar* (who had died) being joined as formal Plaintiffs with the mortgagee. The plaint recited

the deeds above referred to and paras. 8 and 9 set out that the four annas share of the property described in the schedule was liable for the secured debts and make mention of the fact that this share of the Defendants had been separated as above stated.

The first Defendant, viz, the present Appellant put in a written statement alleging that the first Plaintiff had no right to sue because Shib Krishna was the nominal mortgagee, that the deeds were not genuine and that no consideration had passed, etc.

Issues were framed and the case came on for hearing on the 14th May 1912. The Defendants not appearing, after many postponements had taken place on the application of the first Defendant, the suit was decided *ex parte* and a decree for sale was made as prayed for the Plaintiffs.

On the 29th January 1912, the *ex parte* decree was set aside on the first Defendant's application and after many further postponements had taken place on his application, the suit came on again for hearing in May 1914 and the issues for trial were remodelled. Issues Nos. 1-4 are as follows:—

(1) Was Shib Krishna Das a *benamidar* of Balaram Das, as alleged by the latter? Is he not liable to pay costs to the Defendants?

(2) Do the properties in suit belong to the Defendants? If not, can the Plaintiff get any relief against the said properties?

(3) Are not the Plaintiffs bound by the decision in the Regular Appeal No. 389 of 1908, referred to in the plaint?

(4) Are the mortgage deed and deed of further charge in suit valid and genuine and still operative, and was the consideration money passed?

On the 29th May 1914, the Subordinate

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Judge delivered judgment in the case determining the first and fourth issues in favour of the Plaintiffs. On the second issue he said that the mortgagors' title had been extinguished by the declaration made by the High Court referred to above in para. 7 and for this reason he passed only a personal decree for the sums mentioned above in para. 4 with interest.

Against this decree an appeal was preferred by the Plaintiffs, the present Appellant taking no objection to the same.

The said appeal came on for hearing on the 5th June 1917. The learned Judges delivered judgment for the Plaintiffs, observing "The case is an extremely simple one. The mortgagors, having persuaded the mortgagees to lend them the money on the footing that they had a 16 annas share in the property, cannot turn round and say that because they have got only a four-annas share, therefore they are not liable on the mortgage at all." In the result they passed a decree that an ordinary mortgage decree for sale should be passed after the taking of a fresh account as above-mentioned in para. 2.

The present appeal was preferred against the said decree by the first Defendant alone.

The arguments submitted by Mr. E. B. Raikes for the Appellant are set out in the judgment.

Mr. Kenworthy Brown for the Respondents was not called upon.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—Their Lordships, having heard a full statement of the facts of the case, and everything that could be urged by learned Counsel for the Appellant, are satisfied that the decree appealed from must stand.

There are, in fact, on final examination,

but two points to be taken on behalf of the Appellant. The first is that the decree ought to have been a personal decree only and not a decree as in a mortgagee suit involving the mortgaged properties, the suggestion being that as the Appellant had no title to any part of the mortgaged property, there ought not to be an order against the mortgaged properties. The answer is that it does not lie in his mouth to say so. He has professed to have an interest in this property, and whatever interest he may have had has been bound by the mortgage, and, as far as he is concerned, must be enforced against him.

The second point taken is that the decree ought only to have been made in respect of 4 annas of the property, and it has, in fact, been made against 16 annas. The answer to that is that those who say this have misconstrued the decree. There is no doubt something in the language of the learned Judge of the High Court who delivered the judgment which would look as if he so thought, and possibly, as against the Appellant if the Judge had so thought it might have been said, that a decree had been passed against him in respect of any interest he might have in the 16 annas; but, however that may be, when the decree came to be carefully drawn up, it is quite clear that it only affects the four annas.

These two points, therefore, fail, and their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: Messrs. W. W. Box & Co. for the Appellant.

Solicitor: Mr. Douglas Grant for the Respondents.

G. D. M.

Appeal dismissed.

(INSOLVENCY JURISDICTION.)

No. 36 of 1922.

**SANDERSON, (C. J.) MADHORAM RAGHUMULL
RICHARDSON, J. v.**

1923,

[THE OFFICIAL ASSIGNEE

20, February.

and anr.]

Presidency Towns Insolvency Act (III of 1909), secs. 36 and 56—Assignment to a creditor by an insolvent before adjudication, when to be considered as "preference over the other creditors," sec. 56, sub-sec. n)—Assignment by creditor to another, onus on whom to prove consideration and good faith, sec. 56, sub-sec. i) Examination of insolvent and of creditor or of creditor's assignee under sec. 36, whether and when admissible in proceeding under sec. 56—Whether Court has jurisdiction to deal with application under sec. 56.

Where proprietors of a firm, unable to pay their debts, on being pressed for payment by X, one of their creditors, who was aware of their inability to pay, assigned debts due to them to X, and were, within two weeks thereof, adjudicated insolvent, and where X assigned the debts so assigned to him to M. R., a firm, and where after the examination of one of the insolvents, of X and of some of the proprietors of the firm of M. R., before the Registrar in Insolvency under sec. 36 of the Presidency Towns Insolvency Act, the Official Assignee applied to the Court in its insolvency jurisdiction for setting aside the two assignments as being fraudulent and void as against him:

Held per CURIAM.—That the Court had jurisdiction to entertain the application under sec. 56 of the Presidency Towns Insolvency Act and that the depositions of X and of the proprietors of the firm of M. R. taken under sec. 36 of the Presidency Towns Insolvency Act were admissible against themselves for the purpose of showing the circumstances in which they took their respective assignments.

Quære :—Whether the deposition of the insolvent taken under sec. 36 of the Presi-

dency Towns Insolvency Act is admissible in a proceeding under sec. 56 of the Act.

Per SANDERSON, C. J.—If the Official Assignee has to apply for the purpose of setting aside an assignment on the ground that it was fraudulent and void within the meaning of sec. 56 of the Presidency Towns Insolvency Act and he intends to rely upon depositions which have been made by parties before the Registrar in Insolvency, he should give notice of his intention to do so and such notice should specify the depositions on which he intends to rely.

Per CURIAM.—Repeated demands for payment or threats of legal proceedings by a creditor who knows that the debtor is unable to pay do not constitute bona fide pressure and do not prevent a transfer by the debtor to the creditor from being an undue preference over other creditors within the meaning of sec. 56 of the Presidency Towns Insolvency Act.

EX PARTE HALL (1) referred to.

Per SANDERSON, C. J.—After it has been established that the assignment by the insolvents to X was fraudulent and void as against the Official Assignee, the onus lay upon M. R., if they desired to bring themselves within the provisions of sec. 56, sub-sec. (2) of the Presidency Towns Insolvency Act, to show that not only did they give consideration for the assignment but also that they acted in good faith.

The facts of the case are as follows :—

On the application of one Kissen Chand Banthia, Surajmull Mongalchand were adjudicated insolvents and their estate vested in the Official Assignee of Calcutta.

Shortly before the adjudication order, that is to say, on the 2nd day of March 1921, the insolvents assigned over debts due to them from various persons to the

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extent of about Rs 67,000 in favour of Messrs. Raghunath Das Sewlal, one of their creditors and to whom a sum of about Rs. 32,000 was due from the said insolvents.

Thereafter on the 3rd day of May 1921 the Official Assignee as the assignee of the estate of the said insolvents wrote a letter to the said Messrs Raghunath Das Sewlal calling upon them to produce for his inspection the original deed of assignment.

Thereafter being advised that the said document was fraudulent and void as against the Official Assignee, Kissen Chand Banthia, an adjudicating creditor, applied for examination of Ramlal Pachisia the sole proprietor of the firm of Raghunath Das Sewlal under sec. 36 of the Presidency Towns Insolvency Act and Ramlal was examined.

The insolvent Mongalchand and the members of the firm of Madhoram Raghummull were also examined under sec 36 of the Presidency Towns Insolvency Act.

The Official Assignee then applied for an order declaring the two assignments as fraudulent and void as against him under sec. 56 of the Presidency Towns Insolvency Act Greaves, J., made the order asked for Madhoram Raghummull appealed.

Mr. A. N. Chaudhuri, Mr. K. P. Khaitan and J. M. Majumdar for the Appellants.

Mr. W. Gregory and Mr. Ashraf Ali for the Official Assignee

The JUDGMENT OF THE COURT was as follows :—

Sanderson, C. J.—This is an appeal by Madhoram Raghummull against an order which was made by my learned brother Mr. Justice Greaves on the 13th of June 1922, by which he declared that two as-

signments dated respectively the 2nd of March 1921 and the 29th of June 1921 were void as against the Official Assignee under the provisions of sec. 56 of the Presidency Towns Insolvency Act. The Appellants have appealed against that order, and it is necessary to state a few facts, about which there is no dispute.

The insolvents were Surajmull and Mongalchand. They traded under the name of Puran Chand Hurruck Chand. They were adjudicated insolvents at the instance of a creditor on the 15th of March 1921. On the 2nd March 1921, thirteen days before the adjudication, Surajmull and Mongalchand by a deed of assignment assigned to Raghunath Das Sewlal, a firm of traders in Calcutta who were creditors of the insolvents, certain outstanding debts which were alleged to be owing to the insolvent firm of Puran Chand Hurruck Chand. The debts are set out in the schedule to the deed, and amounted roughly speaking to about Rs 60,800. The proprietors of the firm of Raghunath Das Sewlal is Ramlal Pachisia. On the 29th of June 1921, Ramlal Pachisia assigned the outstanding debts which had been assigned to him by the insolvent firm to the Appellants for the consideration of Rs 30,000. A creditor, one Kissen Chand Banthia, who was the adjudicating creditor, had taken steps challenging the assignment from the insolvent firm to Ramlal Pachisia and, on the 3rd May 1921 the Official Assignee wrote to Ramlal Pachisia for inspection of the assignment to him. On the 20th of June, according to the affidavit which was before the learned Judge, Ramlal Pachisia appeared before the Registrar in Insolvency and applied for a week's adjournment to enable him to produce the deed of assignment as the same was with the

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munib gomostha who was then in his native village and absent from Calcutta. The result was that a week's time was granted to him. That week's time expired on the 27th of June, and, on the 27th of June he appeared again and asked for further time until the 29th of June, and that time was granted by the Registrar in Insolvency. On the 1st of July Ramlal Pachisia appeared before the Registrar in Insolvency and said that he was unable to produce the deed of assignment to him, inasmuch as he had on the 29th of June assigned his right, title and interest under the assignment of the 2nd of March to the Appellants for the sum of Rs 30,000. Then certain parties were examined under sec. 36 of the Presidency Towns Insolvency Act before the Registrar in Insolvency and, in order of date, Ramlal Pachisia was examined on the 1st of July 1921, Mongalchand, who was one of the insolvents, was examined on the 8th of August 1921; then one of the partners in the Appellants' firm, Raghunull, was examined on the 1st of September, then Gopaladas Modi, another partner in the Appellants' firm, was examined on the 19th of January 1922, and Nathmull, another partner in the Appellants' firm, was examined on the 20th of February 1922; and, on the 4th of April, the Official Assignee made the application to the learned Judge, who was taking insolvency matters on the Original Side, in respect of which my learned brother's judgment was passed.

The application was as follows. "Take notice that on the 1st day of May 1922 . . . an application will be made . . . for an order that the original deed of assignment of all debts due to the insolvents . . . and executed by them in favour of . . . Raghunath Das Sewlal on the 2nd day of March 1921 as also the

original deed of assignment executed by . . . Raghunath Das Sewlal by which they purported to assign their right, title and interest under the aforesaid deed of assignment, dated the 2nd day of March 1921, may be declared fraudulent and void as against the Official Assignee and the same may be delivered over to him or such other order may be made as to this . . . Court may seem fit." The grounds were stated to be, "Affidavit of Mulchand solemnly affirmed on the 4th day of April 1922 and the proceedings in this matter." Mulchand was a *gomostha* employed by Kissen Chand Banthia, the adjudicating creditor. We were informed by the learned Counsel for the Official Assignee that when this application was made to the learned Judge he directed that the Official Assignee should have control of the application. The result of the learned Judge's judgment was, as I have already stated, to set aside both these assignments as being fraudulent and void within the meaning of sec. 56 of the Presidency Towns Insolvency Act.

In the first place it was stated that there was some doubt as to whether the learned Judge had jurisdiction to deal with the application when it was made in the form which I have described. The learned Counsel appearing for the Appellants stated that he did not wish to argue that the learned Judge had no jurisdiction, on this occasion. Inasmuch as the learned Counsel stated that there was some doubt about it, in my judgment it is advisable to set that doubt at rest. In my judgment the learned Judge clearly had jurisdiction to deal with this application under sec. 56 of the Presidency Towns Insolvency Act: and, the only further point upon this part of the case is whether the learned Judge was entitled

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to act upon the evidence which was before him.

Now, as to this, the first point raised was that the learned Judge ought not to have admitted or considered the deposition of the insolvent Mongalchand (the deposition which the insolvent made before the Registrar in Insolvency) as against the Appellants; and, the same point was taken by the learned Counsel who appeared for Raghunath Das Sewlal the firm of which Ramlal Pachisia is the proprietor, and who are Respondents to this appeal.

I do not think it necessary to give any decision upon that part of the case, because I am of opinion that it is clear from the learned Judge's judgment that in arriving at the decision at which he did, he relied upon evidence which was independent of the deposition of the insolvent and, further because I personally do not intend to rely upon the evidence of the insolvent in my judgment when I deal with the facts of this case. As at present advised, however, I am of the opinion that the deposition of the insolvent was not admissible as evidence against the Appellants or Pachisia, but I do not decide this point and I leave that question open if it ever becomes necessary to decide it on another occasion.

The next point, which was urged by the learned Counsel for Ramlal Pachisia, was that the deposition of Ramlal Pachisia before the Registrar in Insolvency was not admissible against his client Ramlal Pachisia. I think he was constrained to admit in the end that that was admissible if it amounted to an admission by his client Ramlal Pachisia. In my opinion it was admissible: in the first place, because his evidence in my judgment, taking it altogether, practically amounted to an admission that he knew he was ob-

taining a fraudulent preference in his favour over the other creditors of the insolvent; in the second place, in any event it was admissible for the purpose of showing the circumstances in which he took the assignment from the insolvent.

The learned Counsel said that it was desirable that the practice of this Court should be laid down clearly. In my judgment the practice, which is adopted in England with regard to an application of this kind, should be followed. If the Official Assignee has to apply to the learned Judge for the purpose of setting aside an assignment, as in this case, on the ground that it was fraudulent and void within the meaning of sec 56 and he intends to rely upon depositions which have been made by parties before the Registrar in Insolvency at an enquiry held under sec. 36 of the Presidency Towns Insolvency Act, he should give notice to the opposite parties of his intention so to do. It will then be open to the opposite parties, if they so desire, to get copies of the depositions of which notice has been given. It is to be noted that in effect such notice was given in this case, inasmuch as the grounds of the application included not only the affidavit of Mulchand but also "the proceedings in this matter." In my judgment, however, the notice should be in a more definite form, and the applicant should specify in such notice the depositions, taken before the Registrar in Insolvency, on which he intends to rely.

I have dealt with the question of the learned Judge's jurisdiction and of the procedure to be followed upon such an application as this; I now propose to deal with the merits of the case.

The first question that arises is whether the learned Judge's judgment as to the transaction between the insolvent and

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Ramlal Pachisia is correct. The learned Judge said: "I think it is clear on the evidence of Ramlal Pachisia that the object of the assignment of 2nd March was to obtain a preference over other creditors which is clearly bad and void as against the Official Assignee under the provisions of sec. 56." This matter obviously goes to the root of the case, because if that finding is not correct, then of course the Appellants have no case to answer, because, if the assignment from the insolvents to Ramlal Pachisia stands, it follows that the assignment from Ramlal Pachisia to the Appellants also stands.

I am of opinion that the learned Judge was fully justified in coming to the conclusion that the assignment of the 2nd March was made with a view and for the purpose of giving Pachisia a preference over the other creditors, and was fraudulent and void within the meaning of sec. 56. The material part of that section is as follows:—"Every transfer of property, every payment made . . . by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee."

Now, there cannot be the smallest doubt on the evidence of Ramlal Pachisia that on the 2nd March 1921 the insolvents were unable to pay their debts as they became due from their own money. Nor is there any doubt that the insolvents were adjudged insolvents within three months after the date of the 2nd of March, and the only question is whether the assignment in this case was made by the insolvent with a view to give the creditor

Pachisia preference over the other creditors.

The learned Judge referred to certain parts of Ramlal Pachisia's evidence. I desire to refer to the same parts and other parts of his evidence as well.

"Q.—When did you first look into your books and find this out?

A.—I do not remember the date. When I heard that the business of the insolvents was about to fail and when I found that they would not pay me my dues inspite of repeated demands I looked into my 'books.'"

Then later on he was asked,

"Q.—Did you ascertain at the time that they were in insolvent circumstances?

A.—I found that out when I demanded the money.

Q.—You satisfied yourself that they were in insolvent circumstances?

A.—When I was demanding money they did not pay me. So my suspicion about their solvency was aroused and I put pressure on them to repay my money but no payment was made and I came to the conclusion that they were unable to pay. Thereupon the question of assignment of the insolvents' outstandings to me was broached by them. They said to me: 'We have no money to pay. We have outstandings due to us; you may take an assignment of them.'"

Further he was asked,

"Q.—You also made enquiries from people in the market that Surajmull and Mongalchand were unable to pay their debts.

A.—There was no occasion for me to enquire. I got tired of sending for my money. There would be rumours in the market if a dealer fails to meet his liabilities.

You ascertained that the insolvents

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were unable to pay their debts when they became due

A —Yes."

Then later on,

' Q —Did you look into their books?

A —No.

Q —How was the list prepared which was annexed to the assignment?

A —The insolvents prepared the list I never checked it. I was only too glad to get an assignment for what it was worth before other creditors came down.

Q —Everything was put through as hurriedly as possible?

A —Yes."

I think those are all the passages to which I need refer.

Now, first with regard to the question of pressure. It is to be noticed that Ramlal Pachisia did not specify in so many words what was the nature of the pressure which he alleged he put upon the insolvents. I take it from his evidence to have been no more than a constant demand for his money. He said that in spite of his repeated demands he could not get any money. In the second place, it is to be noticed that such pressure, whatever it was, was useless and failed. He says: "When I was demanding money, they did not pay me. So my suspicion about their insolvency was aroused and I put pressure on them to repay my money, but no payment was made and I came to the conclusion that they were unable to pay." In my opinion it is clear that there was no further pressure than mere demands, and when those demands were not complied with Pachisia came to the conclusion that there was no use pressing any further, and he took an assignment of all the outstanding debts of the insolvents.

My learned brother during the course of the argument drew the attention of

the learned Counsel to a passage in Sir George Jessel, M. R.'s judgment in *Ex parte Hall* (1) to which I refer for the purpose of illustrating what I mean with regard to pressure. The learned Master of the Rolls said at p. 585: "Can that delivery of the bills to Brown be said to have been made in consequence of *bond fide* pressure on the part of the Appellant? It is plain that it was the voluntary act of the bankrupt. It appears to me that it would be absurd to call it pressure. A man says to his creditor, 'I am about to become bankrupt or I shall stop payment in a week.' The creditor says, 'Pay me my debt, or I will sue you for it.' Can that be called *bond fide* pressure by the creditor? When you consider the matter, it seems to me that it would be absurd so to call it. And that is exactly what occurred in the present case. Of course it would be an entirely different matter if the creditor did not know of the state of his debtor's affairs." In the present case, there was an admission of Ramlal Pachisia that he satisfied himself that the assignors were in insolvent circumstances, that their business was about to fail and that his repeated demands were of no avail: and, I adopt what was said by the learned Master of the Rolls in the above-mentioned case, which in some respects has a considerable likeness to this, that it would be absurd to call what Pachisia did "*bond fide* pressure."

Having regard to these facts and to the reasoning adopted by the learned Judge, in my judgment it is clear that the assignment of the 2nd March 1921 was made with a view to give Ramlal Pachisia a preference over the other creditors. Consequently, inasmuch as the assignment was made at a time when the insolvents

(1) L. R. 19 Ch. Div. 590 (1876).

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were unable to pay their debts when they became due, and inasmuch as they were adjudicated insolvents within 13 or 14 days of the assignment, as between the insolvents and Ramlal Pachisia the assignment of the 2nd of March 1921 must be deemed to be fraudulent and void as against the Official Assignee.

Then arises the question as to whether the assignment of the 29th June 1921 by Ramlal Pachisia to the Appellants can stand.

In the first place, in my judgment, there can be no doubt that if the Appellants, after it has been established that the assignment by the insolvents to Ramlal Pachisia was fraudulent and void as against the Official Assignee, desired to bring themselves within the provisions of sub-sec. (2) of sec. 56, the onus lay upon them, the Appellants, to show that not only did they give valuable consideration for the assignment but also that they acted in good faith. I rely upon the terms of sub-secs. (1) and (2) of sec. 56, which in my opinion make it plain that the onus is upon the Appellants—the reason why the onus is laid upon the Appellants in the circumstances of this case may be found in the judgment of the Court of Appeal in the case, *Ex parte Tate* (2).

The next question which arises is whether the Appellants have discharged that onus. The learned Counsel Mr. Khaitan for the Appellants has urged that the onus has been discharged by reason of the affidavit of Gopaldas Modi, a partner of the Appellant firm, which was filed in these proceedings; and, he relied principally upon paras. 3 and 6. I will not read both the paragraphs in detail. The main allegations are contained in para. 3 which is as follows:—“That with reference to para. 7 of the said affi-

davit I say that my firm wanted to start a business of Commission Agency and for that purpose purchased the outstandings from Raghunath Das Sewlal for the sum of Rs. 30,000. The said amount has been paid by cheque and the *factum* of payment duly appears in the firm's Cash Book and Bank Pass Book.” The learned Counsel argued that that was the only evidence which the learned Judge was entitled to entertain with regard to this point. In my judgment that argument ought not to be adopted. In my judgment it was open to the Court to consider the depositions of the partners of the Appellants' firm for the purpose of ascertaining the circumstances relating to the assignment which they took on the 29th of June 1921, and for the purpose of ascertaining all the facts which are material to that question.

With regard to the payment of the Rs. 30,000 the learned Judge has found as fact that that was made. There is evidence that a cheque was drawn by one of the partners of the Appellants' firm and that that cheque was debited to the Appellants' firm's account in the Central Bank of India. The date of the cheque was the 29th June 1921 and was debited to the Appellants' firm's account in the Bank on the 2nd of July. There was some question raised during the examination of Nathmull, one of the partners of the Appellants' firm, whether there was sufficient money in the Bank to meet that cheque, and it was suggested in the examination by Mr. Chatterjee that there was only Rs. 12,756 to their credit on the 29th June. The answer was, “No, the balance was Rs. 44,668. We had the Pass Book before us. It was exhibited at the hearing before the learned Judge. It is obvious from the record of the examination that the above-mentioned question related

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to the Pass Book. On looking at the Pass Book it appears that there was on the 29th of June 1921, a debit balance of something like Rs 33,000. Both the learned Counsels are agreed that that is what is shown by the Pass Book itself. How these two sums of Rs 12,756 and Rs 14,668 were arrived at by the persons, who respectively mentioned these figures, no one was able to explain. The fact remains, however, that a sum of Rs 30,000 was debited to the Appellants' account on the 2nd of July. Though I have some doubt on the matter I assume that the payment by the cheque was a *bonâ fide* payment, there still remains the question whether the assignment was taken in good faith. The learned Judge came to the conclusion that it was not. In my judgment, in the evidence of the partners of the Appellants' firm, there is ample justification for that finding. Some of the evidence which justifies that finding may be referred to shortly. In the first place, it appears that when Gopaladas Modi was approached by a man called Gungadas Bhutter who was a *gomoshta* of Raghunath Sewlal, Gungadas Bhutter informed him that the outstanding debts would amount to about 65 or 66 thousand rupees, that Puran Chand Hurruck Chand had closed their business, had left Calcutta and had sold their outstanding debts to Raghunath Sewlal. He, Gopaladas Modi, admitted that that statement was made to him. He further admitted that when his firm took the assignment on the 29th of June, they got no papers, nothing but the assignment and 4 or 5 letters received by Raghunath Das Sewlal in reply to the letters of demand sent by them to the debtors. Beyond that they got no papers at all. He further admitted that he did not know the names of the partners of this firm but that he was told that they

had closed their business. He further stated that he had enquired whether they were insolvents.

"Q—You were told that they had closed their business.

A—Yes.

Q.—Did you not enquire whether they were insolvents?

A—I enquired and I was told that they had closed their business and left Calcutta."

What can that mean? When the enquiry was whether they were insolvents, and the answer was that they had closed their business and left Calcutta and sold their outstandings to one creditor, the conclusion to which any one would naturally come under the circumstances would be that the firm was insolvent.

Then he was asked again,

"Q.—What did you enquire?"

A—I enquired why Puran Chand Hurruck Chand had closed their business and sold the outstandings.

Q—Why had they closed?

A—I did not enquire.

Q—What did you enquire about?

A—I enquired about the insolvency of the debtors and came to know from two or three commission agents that I would be able to realise the amount from them.

Q—Did you enquire who the persons were who represented the firm of Puran Chand Hurruck Chand?

A.—No."

Again he was asked,

Q—Did you make any enquiries for the books of account of Puran Chand Hurruck Chand?

A—No."

He was asked again whether he examined the books. He said, "I did not examine the books. I was busy and I did not think it necessary either to examine the books."

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Q.—You were going to buy the outstandings, why did you not think it necessary to see how much was due?

A.—I looked into the assignment in favour of Raghunath Das Sewlal and I believed that everything was correct.

Q.—Then I take it that you made no enquiries as to whether the assets were realisable or not?

A.—I simply asked Raghunath Das Sewlal's man as to how much would be realised and what profit I would be able to make.

Q.—Who was the man of whom you made the enquiry?

A.—Gungadas Bhutter.

* * * *

Q.—What step did you take to get possession of the account books for the purpose of realising the outstandings?

A.—Up-to-date I have taken no steps.

Q.—Where are the books?

A.—I have now come to know that they are in the possession of the insolvent.

Therefore, it appears that he admitted that he had made certain enquiries but he got no satisfactory answers and that these enquiries were made sometime about April or May 1921. Puran Chand Hurruck Chand were adjudicated insolvents on the 15th of March 1921, and this assignment of the 29th of June 1921 was taken by the Appellants under the circumstances above-mentioned. It seems to me that it is impossible to say that this assignment of the 29th of June 1921 was an assignment taken by the Appellants in good faith.

There are other matters in the evidence of the Appellants which were relied upon by the learned Counsel for the Official Assignee; but in my judgment, it is not necessary for me to deal with them in detail. It is sufficient for me to say that in

view of the admission made by the Appellants in their depositions before the Registrar in Insolvency, which in my opinion were certainly admissible for the purpose of refuting the statements contained in the affidavit which was put in by one of the Appellants, in my judgment, the Appellants have not discharged the onus of showing that the assignment of the 29th June 1921 was taken by them in good faith.

It was urged on behalf of the Appellants on the question of procedure that injustice or hardship might be experienced by the Respondents to an application, if the procedure, which was adopted in this case is followed. I was not impressed by that argument because it appears that the learned Judge gave the learned Counsel who was appearing for the Appellants an opportunity of calling evidence if he so desired. The evidence in this case on which the judgment was founded, consisted of the depositions of Ram Lal Pachisia and the members of the Appellant firm. If any of their parties had desired to make any explanation or to give any further evidence in respect of the matters as to which they had been examined before the Registrar in insolvency they had ample opportunity of so doing.

Consequently, in my judgment, the learned Judge's judgment was correct and that this appeal ought to be dismissed.

The learned Counsel for the Official Assignee drew our attention to the order which the learned Judge made as regards costs. In the last line of his judgment will be found this direction, "The Official Assignee is entitled to the costs of this application including the costs of the examination under sec. 36." The learned Counsel pointed out that the Official Assignee did not conduct the proceedings under sec. 36, but that the adjudicating

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creditor did. In my judgment that order therefore ought to be altered, and should run as follows —“ The Official Assignee is entitled to the costs of this application, and in his capacity of Official Assignee on behalf of the adjudicating creditor to the costs of the examination under sec. 36.” With that variation, in my judgment, the learned Judge’s judgment and order should be sustained and this appeal dismissed.

The Appellants must pay the Official Assignee his costs of this appeal. The other Respondents, the firm of Raghunath Das Sewlal will pay their own costs of this appeal.

RICHARDSON, J —I agree. These proceedings under sec. 56 of the Presidency Towns Insolvency Act were commenced by notice of motion in bankruptcy served on the firm of Raghunath Das Sewlal, of which the sole proprietor was Ramlal Pachisia, and on the Appellants’ firm of Madhoram Raghumull.

The relief prayed for was that the assignment by the insolvent firm of Surajmull Mongalchand, dated 2nd March 1921, in favour of Ramlal Pachisia and the transfer by the latter on the 29th June 1921, of his right, title and interest under the assignment to the Appellants’ firm should be declared fraudulent and void as against the Official Assignee.

The questions of procedure which have been raised have been dealt with by my Lord and I have nothing to add.

As against Ramlal Pachisia his own deposition taken under sec. 36 of the Presidency Towns Insolvency Act is clearly admissible in evidence on these proceedings and no other evidence need be considered.

It was said that the assignment of 2nd March in his favour was not a preference within the meaning of sec. 56 of the Act

because it was induced by pressure put upon the insolvent so that he was not a free agent in the matter. The authorities, such as *Sharp v Jackson* (3) show that the word “preference” imports and involves freedom of choice and that no transfer which is not voluntary in the sense that it is a free act of the insolvent, is a preference which under the Act is to be deemed fraudulent and void as against the Official Assignee. But what did the pressure amount to, which is said to have been exercised in the present case? On his own showing Ramlal Pachisia knew at the time that the insolvent firm could not pay their debts. He admits that he was told what the position of the firm was. Though the exact form which the suggested pressure took is not stated, I may assume that it took the form of a threat of legal proceedings. But in such circumstances such a threat is meaningless and I will not again quote the language of the Master of the Rolls, Sir George Jessel, in *Le parte Hall* (1). I agree with my Lord that there is no pressure shown here which can be described as *bonâ fide* pressure by which the members of the insolvent firm were prevented from acting as free agents. In the result, therefore, I agree with the learned Judge that the assignment in favour of the Respondent firm by Ramlal Pachisia must be deemed to be fraudulent and void.

As to the Appellants’ firm, I will not deal with the facts again in detail. We have an assignment by the insolvent firm in favour of a creditor which is found to be a fraudulent preference. Here again, no evidence need be considered as against the members of the Appellant firm except their own depositions taken under

(1) L. R. 19 Ch. Div. 580 1876.

(3) L. R. [1899] A. C. 419.

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sec. 36. Confirming myself to those depositions as they stand, I cannot imagine that any honest business man would have entered into a serious transaction, involving the payment of a sum of Rs. 30,000, without making enquiries which as the learned Judge observed, these gentlemen deliberately abstained from making. The learned Judge has found, and I am willing to concede, that the sum of Rs. 30,000 was, in fact, paid by a cheque which was cashed at Ram Lal Pachisia's Bank. But like the learned Judge, even though this cheque was handed over the counter of the Bank and cashed, I am still far from being convinced that the Appellant firm have brought themselves within the protection of sub-sec (2) of sec 56 as persons making title in good faith and for valuable consideration through or under a creditor of the insolvent. We were referred by the learned Counsel to the definition of "good faith" which appears in cl (20) of sec 3 of the General Clauses Act of 1897. It is there said that "a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." But clearly an appeal to that definition begs the whole question which is here in issue. It is thus assumed that the thing here was done honestly. In my opinion, the Appellant firm, in the transaction with which we are concerned, did not act honestly or in good faith within the meaning of sec. 56, sub-sec (2).

The result, therefore, is that I agree with my Lord that this appeal should be dismissed.

Messrs. Khaitan & Co., Solicitors for the Appellants.

Mr. J. N. Chatterjee and *Mr. C. C. Bose*, Solicitors for the Respondents.

P. K. C.

ASSIGNEE.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL ORDERS

NOS. 222 AND 223 OF 1921

WITH

REV NO. 539 OF 1921.

C. C. GHOSE, J. *RAJA HEMENDRALAL PANTON, J.* *RAJA HEMENDRALAL SINGH DFO, Defendant, Appellant,*

1923,

Heard,

26, February.

Judgment,

2, March.

FAKIR CHAND DUTT and ors., Plaintiffs, Respondents

Compromise decree in mortgage suit—Decree, if may be executed without obtaining a decree absolute—Intention of parties—Waiver of privilege by mortgagor.

The mortgagor Defendant can waive the advantage of the rule of law requiring a preliminary decree to be made final before execution can be levied

Where upon an appeal from a preliminary mortgage decree, the parties compromised and a decree for a smaller amount carrying a reduced rate of interest and payable in two years was made

Held, on a construction of the decree—That the parties intended that the mortgagee would be competent to realise the amount by sale of the property immediately on the expiry of the two years.

This was an appeal preferred on the 5th of August 1921 against the order of Babu Nalini Mohon Banerjee, Subordinate Judge of Zillah Bankura, dated the 20th of July 1921.

The facts of the case and the arguments are fully stated in the judgment

Dr. D N. Mitra and *Babus Bankim Chander Mukherjee, Sukhamoy Chatterjee* and *Hemendra Nath Sen* for the Appellant.

Babus Ram Chunder Majumder and *Nagendra Nath Ghose* for the Respondents.

RAJA HEMENDRALAL SINGH DEO v. FAKIR CHAND DUTT.

The JUDGMENT OF THE COURT was as follows :—

The Defendant is the Appellant before us and the facts, which have given rise to this appeal, shortly stated, are as follows :—On the 17th April 1913, the Plaintiffs obtained a preliminary decree in a mortgage suit for Rs 1,08,964-9-5 ps against the Defendant in the Court of the Subordinate Judge of Bankura. An appeal was carried against the said decree to this Court, being appeal No. 39 of 1914, by the Defendant, Raja Mahendralal Singh Deo. This appeal came on for hearing before Mr. Justice Fletcher and Mr. Justice Shamsul Huda on the 10th January 1918, when a petition was put in on behalf of both parties to the effect that it had been agreed between the parties that the Plaintiffs would get a decree for Rs 70,000 inclusive of all costs and interest up to the said date, and that the said amount would be paid by the Defendant, Raja Mahendralal Singh Deo, within two years therefrom with interest at the rate of Rs 4-8-0 per cent. per annum till realisation, and that in default of payment within the said period of two years, the said amount of Rs 70,000 with interest at the said rate till realisation would be realised by the sale of the properties mentioned in the plaint. Thereupon it was ordered that the said petition should be filed as of record and that the Defendant and the Plaintiffs should give effect to and be bound by the terms thereof. The Plaintiffs were not paid any portion of the moneys due to them under the decree of this Court, dated the 10th January 1918, within two years from that date, but it appears that one of the Plaintiffs, Prayag Chandra Dutt, died on the 26th Jaistha 1326 B. S., corresponding with the 9th June 1919, leaving him surviving his sons, Radha Raman Dutt, Sham Sun-

der Dutt and Jalad Baran Dutt, as his heirs and legal representatives, and that the Defendant Raja Mahendralal Singh Deo died on the 3rd December 1920, leaving him surviving his son Hemendralal Singh Deo as his heir and legal representative. On the 3rd June 1921, the Plaintiffs applied for an order for the substitution on the record of the heirs of the deceased Plaintiff and of the heir of the deceased Defendant. The heir of the deceased Defendant, who was sought to be substituted on the record, opposed the application on the ground that it was barred by limitation, but on the 20th of July 1921, the learned Subordinate Judge by his order of that date held that having regard to the terms of the decree of this Court, which finally disposed of the suit instituted by the Plaintiffs, there was no pending suit in which the application for substitution of the heirs of the deceased Plaintiff and of the heir of the deceased Defendant was entertainable. The learned Subordinate Judge further held that the Plaintiffs might execute the decree by making proper substitution in an application for execution of the decree. Thereupon the Plaintiffs applied for execution of the decree in question and it was ordered on that application that after the necessary substitutions had been made, notices should issue under Or. 21, r. 22 of the Code of Civil Procedure.

Against the last mentioned order the Appeal No. 222 has been preferred while against the order previously referred to, Appeal No. 223 has been preferred. There is also a connected rule, being Rule No. 539 of 1921, under which further proceedings have been stayed. On behalf of the Appellant it has been contended before us that the decree made on the 10th January 1918 by Mr. Justice Fletcher and Mr. Justice Shamsul Huda

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was in substance and in form a preliminary decree in a mortgage suit and that a final decree had still to be made in the suit before the Plaintiffs could realise the moneys due to them by the sale of the properties mentioned in the plaint and that inasmuch as the deceased Plaintiff's heirs had not been brought on record within a period of six months from the date of the death (that being the period under the Limitation Act before the last amendment) and the deceased Defendant's heir had not been brought on record within three months from the date of the death (that being the period under the present Limitation Act) the Plaintiffs' remedies, if any, were barred. It is argued that assuming that a final decree had to be made, if the heir of the sole judgment debtor was not brought on the record within the time limited by law, Or. 22, r. 4 of the Code of Civil Procedure applies and the mortgage suit abates and in support thereof reference is made to the case of *Bhutnath v. Sashi Bhusan* (1). Our attention has also been invited to the case of *Dakoji Subbarayudu v. Musti Ramadasu* (2) as to the effect of the deceased Plaintiff's heirs not having been brought on the record within the time limited by law. It is further argued that if the application of the 3rd June 1921, referred to above, is treated as an application for execution of the decree, then time ran from the date of the decree made by this Court and not from the expiration of two years from that date and in support thereof the judgment of their Lordships of the Judicial Committee in the case of *Sachindranath Ray v. Maharaj Bahadur Singh* (3) was referred to,

(1) 25 C. W. N. 595; s. c. 13 C. L. J. 115 (1920).

(2) 1 T. R. 45 Mad. 872 (1921).

(3) L. R. 48 I. A. 335; s. c. I. L. R. 49 Cal. 208; 26 C. W. N. 858 (1921).

the contention being that the application was barred under the three years' rule. A further point was taken on behalf of the Appellant that having regard to the language of sec. 15 of the Indian Contract Act, one Plaintiff having died and his heirs not having been substituted, the entire suit had abated. On behalf of the Respondent it has been argued that the decree made by this Court on the 10th January 1918, was in no sense a preliminary decree in a mortgage suit as contemplated by Or. 34, r. 4 of the Code of Civil Procedure, it was in no sense a conditional decree and that the rule that the decree holder in a mortgage suit ought not to be ordinarily allowed without previous notice to the judgment-debtor to take out execution on the allegation that the condition or contingency has been fulfilled was excluded in this case by the consent of the parties. It was further contended that having regard to the terms of the compromise decree and having regard to the provisions of Or. 22, r. 12, C. P. C., it was unnecessary in execution proceedings to apply for substitution of the heirs of the deceased Plaintiff and of the deceased Defendant and that it was open to the Plaintiffs to proceed to levy execution immediately on the expiration of two years from the date of the compromise decree.

The question really depends upon the view which may be taken of the nature of the decree made by this Court on the 10th January 1918. If it was merely a preliminary decree in a mortgage suit, then obviously it follows that before execution could be levied, an order under Or. 34, r. 5, C. P. C., making the preliminary decree final had to be obtained and in that view of the matter the Plaintiff would no doubt be in considerable culty, having regard to the events

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which had happened. If, however, the ingredients of a preliminary decree in a mortgage suit are absent from the compromise decree in this case, if for the consideration of a reduction of interest from 12 per cent to $4\frac{1}{2}$ per cent. and of the principal and interest from Rs. 1,40,758 to Rs. 70,000 and for the further consideration of an unusual extension of the period of grace from six months to two years for the re-payment of the principal and interest due on the mortgage bond, the Defendant chose to waive the advantage of the rule of law requiring preliminary decrees to be made final before execution could be levied, then does it lie in the mouth of the present Appellant to argue that, without more, the compromise decree is incapable of execution? We are of opinion that the intention of the parties, as far as the same can be gathered from the compromise decree, was that immediately on the expiration of two years from the date of the decree, the Plaintiffs would be competent to realize the moneys due to them by the sale of the properties mentioned in the plaint. If that is so, it follows that under the provisions of Or 22, r 12, C. P. C., it was unnecessary to apply in the suit, which had come to an end, for substitution of the heirs of the Plaintiff and of the deceased Defendant and we think that the orders passed by the Subordinate Judge on the 20th July 1921, allowing the execution to proceed cannot be seriously objected to. In this view of the matter, it becomes unnecessary for us to discuss at any length the questions raised in the elaborate argument on behalf of the Appellant. We will content ourselves by remarking that in the special circumstances of this case the question of limitation in the form in which it was raised in the case in *Sachin-*

dranath Ray v Maharaj Bahadur Singh (3) has no application.

The result, therefore, is that these appeals fail and must be dismissed with costs, which we assess at 5 gold mohurs in each appeal.

The rule also fails and is accordingly discharged.

The records will be returned to the lower Court without delay.

N G

(CIVIL APPELLATE JURISDICTION)
APPEAL FROM APPELLATE DECREE
No. 1275 of 1918.

CHAIANYA KRISHNA
MANDAL, Plaintiff,

Appellant,

v.

SANDHYAMANI DAS and
ors., Defendants,
Respondents

TEUNON, J.
NEWBOULD, J.
1920,
6, July

*Suit for possession by purchaser from co-sharer—
Co-sharer's possession, if and when may be adverse.*

Where for 15 years before suit A, a co-sharer, ceased to live in the holding and for these 15 years B, the other co-sharer, kept the holding in her name paying rents and taxes and was in sole or exclusive possession thereof openly and to the knowledge of the first co-sharer:

Held—That B's possession being in assertion of a clear intention to terminate the co-tenancy and in open assertion of a hostile title to the knowledge of A, a suit for possession by the purchaser from A was rightly dismissed.

AIYENENUSSA BIBI v. SHEIKH ISUF (1)
and NARENDRA BHUSAN v. JOGENDRA
NATH (3) referred to.

(3) L. R. 48 I. A. 335. s. c. I. (L. R. 49 Cal
203; 26 C. W. N. 858 (1921)).

(1) 16 C. W. N. 849 (1912).

(3) 20 C. W. N. 1258 (1916).

CHAITANYA KRISHNA MANDAL v. SANDHYA AMANI DAS.

This was an appeal against the decree of Babu Sarat Chandra Ghosh, Subordinate Judge, 3rd Court of Zillah Mymensingh, dated the 13th of May 1916, reversing the decree of Babu Ananta Lal Mukerjee, Munsif, 2nd Court at Tangail, dated the 30th of April 1917.

The facts of the case will appear from the judgment.

Dr Sarat Chandra Basak and Babu Mukunda Behari Mallik for the Appellant.

Babus Sarat Chandra Ray Choudhury and Ramgati Sarkar for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit brought by the Plaintiff to recover possession of an 8 annas share of a certain holding on establishment of his title thereto. The holding in suit, it appears, originally belonged to one Sital. Sital died some 40 years before and thereupon the holding descended to his sons one Haran and one Naram. Naram and Haran lived jointly until the death of Naram some 25 to 36 years before suit. Naram died leaving a widow named Ramani who has a daughter Uma Sundari who again has two sons. They are Defendants Nos. 17 to 20 in this suit. Haran died 20 years before suit leaving a widow Sandhyamani who is Defendant No. 1. The findings are that after the death of Naram the two branches of the family and after the death of Haran the two widows lived jointly until at a time not less than 15 years before the suit the widow of Naram, *i.e.*, Defendant No. 17 became a Vaishnavi, left home of Sital, Haran and Naram and thereafter lived either on alms or in the house of her son-in-law, the husband of the daughter

of Uma Sundari, the Defendant No. 18. The Plaintiff in the suit is a purchaser from Defendant Nos. 17, 18, 19 and 20; but for the purpose of the present suit the purchase is of importance only as from the widow the Defendant No. 17, the other Defendants having no vested interest in the property. The question before the Subordinate Judge was, as the question before us in this appeal is, whether the title of the widow and, therefore, of the Plaintiff was barred by open assertion of hostile title to the knowledge of the widow and the Plaintiff for more than twelve years before suit. The findings of fact at which the Subordinate Judge has arrived is that the widow Ramani became a Vaishnavi not less than 15 years before suit, that having become a Vaishnavi she left her husband's house and lived thereafter by begging or in the house of her son-in-law. The holding remained first in the name of her husband's brother Haran and after his death in the name of Haran's widow who alone paid rents and taxes. For the 15 years preceding suit the widow Ramani paid no visit to her former home or to the widow of Haran and did not participate in the profits of the property. For these 15 years Defendant No. 1 was in sole or exclusive possession openly and to the knowledge of the widow Ramani. From these facts the learned Subordinate Judge has drawn the conclusion that Defendant No. 1's possession was in assertion of a clear intention to terminate the co-tenancy, and in open assertion of a hostile title to the knowledge of the Defendant No. 17. We are not, we think, entitled to say that on the facts which he has found the learned Subordinate Judge was not competent to draw this inference in law; and in that connection we may refer to the cases of

CHAITANYA KRISHNA MANDAL *v.* SANDHYA WANI DAS.

Ayenchussa Bibi v Sheikh Isuf (1),
Loke Nath Singh v Dhakeshwar Pro-
sad (2) and *Narendra Bhusan v Jogendra*
Nath (3) In this view, this appeal fails
 and must be dismissed with costs.

S. C. C.

[CRIMINAL APPELLATE JURISDICTION.]

A.P. No. 430 OF 1922.

NEWBOULD, J.
 SUHRAWARDY, J.
 1922,

7, December.

BILAS CHANDRA
 BANERJEE,
 Appellant,

v.

THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1899), sec.
235, joint trial for charges under secs 218 and 477A,
Indian Penal Code (Act XLV of 1860), for fram-
ing incorrect records and falsification of accounts,
legality of—(Question put to the Judge by the jury
not in open Court but in chamber, how far an ille-
gality and vitates trial—Criminal Procedure Code
(Act V of 1898), sec 303, duty of Judge to question
jury to ascertain verdict on each charge.

A prostitute, who by a registered deed of gift had given most of her properties to a certain person, died and a Sub-Inspector of Police took charge of the properties. The Sub-Inspector misappropriated some ornaments and changed the entries he had made in the Police General Diary regarding the said properties and inserted fresh pages showing that the property was never taken to the Thana. He was accordingly tried for criminal misappropriation, for criminal breach of trust under sec. 409, for framing incorrect records under sec. 218, and for falsification of accounts under sec. 477A, I. P. C., and he was convicted of offences punishable under secs. 218 and 477A:

Held—That all the charges being in

relation to acts which were so connected together as to form one transaction, they could be legally joined and tried at one trial. The facts constituting the falsification of records fell under two separate definitions of the law and the accused could be jointly charged and tried at one trial for these offences under sec 235, Cr. P. C.

Where the jury after retiring to consider their verdict saw the Judge in his chamber for direction on certain points of law and asked him one question on a point of law, and the Judge with the jury went into the Court room, where, in the presence of the pleaders, certain questions were put by the jury and the answers given by the Judge were recorded.

Held—That the fact that one question was put to the Judge not in open Court was no more than an irregularity and did not vitiate the trial.

Where the verdict was “not guilty” under secs 409 and 403, but “guilty” under secs. 218 and 477A.

Held—That that was a sufficiently clear verdict. The jury were rightly taken by the Judge to mean that they acquitted the accused on all charges under sec 409 and the charge under sec 403, I. P. C., and there was no necessity for any question to ascertain what their verdict was.

This was an appeal preferred on the 8th September 1922 against an order of the Additional Sessions Judge, Mymensingh (D. Vaughan Stevens, Esq.), convicting the Appellant under secs 477A and 218, I P. C. and sentencing him to undergo rigorous imprisonment for 12 months under each of the sections, sentences to run concurrently.

The facts of the case will appear from the judgment.

(1) 16 C. W. N. 840 (1912).

(2) 20 C. W. N. 51 (1914).

(3) 20 C. W. N. 1258 (1916).

BILAS CHANDRA BANERJEE *v.* THE KING-EMPEROR. I

*Babus Manmatha Nath Mukherjee and
Benoy Kumar Ghosh* for the Appellant.
Mr. Orr for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

The Appellant has been convicted of offences punishable under secs 477A and 218, I. P. C., and sentenced to 12 months' rigorous imprisonment for each offence, the sentences to run concurrently.

The Appellant was put on his trial on several charges, and it is contended that the trial is bad for misjoinder of charges. In order to understand this contention and the nature of the charges, the following facts may be shortly stated.—The accused was the Sub-Inspector in charge of the Netrokona Police Station. On the 7th February last a prostitute named Kamini died in Netrokona town at 2 P.M., in the afternoon. She had executed a registered deed of gift covering most of her properties to one Purna. The case for the prosecution is that on her death the Sub-Inspector took charge of the properties left by Kamini and removed them to the Thana shortly after her death. A telegram was sent to Purna who was 17 miles away and he came to the Thana on the morning of the 8th between 10 and 11. That evening he took away the properties claimed by him except three specific ornaments, a gold *gopahar*, a pair of gold *ananta*, and silver *rates*, which were retained by the Sub-Inspector. Entries had been made in the Police General Diary recording that this property of Kamini had been taken charge of, but the pages containing those entries were torn out and fresh pages were written from which it will appear that the property was never taken to the Thana and that it was made over to Purna at 10 P.M., on the 7th February.

On these allegations, the accused was charged, firstly, with having committed criminal misappropriation of the three ornaments belonging to Kamini which had not been delivered to Purna. He was, secondly, charged with having framed the record in a manner which he knew to be incorrect, namely, the entry No. 173 which related to the delivery of Kamini's property to Purna. He was, thirdly, charged under sec 477A with having destroyed the original entries in the General Diary and with having altered the entry No. 173 already referred to. Further there were three charges of criminal breach of trust by a public servant punishable under sec 409, the first relating to the properties left by Kamini and not covered by the deed of gift in favour of Purna, the second relating to the three specific ornaments already mentioned and the third relating to the properties mentioned in the deed of gift.

It is contended that the offence described as punishable under sec. 218 differs from the offence charged as punishable under sec 477A, I. P. C. Naturally there must be some difference in the charges as the facts are set out so as to make different sections applicable. In the former of these charges, the charge relates to the framing of the record in a manner known to be incorrect using the actual words of the section. In the charge under sec 477A the words of the section are again used and the accused is charged with having destroyed certain entries in the original pages and also having altered one entry. We think that as regards these charges they fall under two separate definitions of the law and the accused can be jointly charged and tried at one trial for these offences under sec. 235. We also think that the joinder of the other charges is covered by

BILAS CHANDRA BANERJEE v THE KING-EMPEROR.

the provisions of that section. All the charges relate to acts which are so connected together as to form one transaction. The charge of criminal misappropriation relating to the same articles as the charge of criminal breach of trust by a public servant and the other charges of criminal breach of trust in respect of the property covered by the deed of gift and those not covered by the deed of gift could be legally joined and tried at one trial.

It is also contended that there has been misdirection in stating to the jury what was the defence set up by the accused. The accused was defended and he made a statement in Court. In that statement the main line of defence was that he had several enemies and they had conspired to get him into trouble. But in his defence no answer was given to the specific allegations that were made against him. It is therefore not clear what his actual defence was on the points where there has been said to be misdirection. We find that during the course of his summing up the learned Judge made a mistake as regards a certain date and was corrected by the learned pleader for the defence and he admitted his error. We cannot understand if he had misdirected the jury as is now alleged that mistake should not have been corrected then and there. We are not satisfied there was any misdirection in this respect.

The other points taken in this appeal are based on an affidavit that has been filed by one of the pleaders who appeared on behalf of the Appellant at the Sessions trial. It appears that after the jury had retired to consider their verdict they wished for further direction on certain points of law. They were first seen by the Judge in his private chamber and they there asked him one question on a

point of law. The Judge then sent for the pleaders and on their arrival they pointed out to him that further directions to the jury should be made in open Court. The Judge and the jury then went into the Court room and certain questions which were put by the jury and the answers given by the Judge were duly recorded. We hold that this fact that one question was put to the Judge not in open Court was no more than an irregularity and did not vitiate the trial.

It is further contended that the Judge did not comply with the provisions of sec. 303, Cr. P. C., since he did not ask the jury questions to ascertain what their verdict was on the three charges under sec. 109, I. P. C. The verdict of the jury as recorded is "not guilty" under secs. 409 and 403, but "guilty" under secs. 218 and 177A. That seems to us a sufficiently clear verdict. The jury were taken by the Judge and rightly taken to mean that they acquitted the accused on all charges under sec. 109 and the charge under sec. 103, I. P. C. and there was no necessity for any question to ascertain what their verdict was. It is said in the affidavit that the learned Judge asked the jury some questions as to their reasons and they gave some answers which have not been recorded. This has been denied by the learned Judge and we must accept his statement. It is pointed out to us that in the judgment passed by the Judge after the verdict was recorded he has given the reasons of the jury for their verdict and that this indicates that the statement in the affidavit is correct. We are unable to accept this contention. The Judge remarks that the jury found the accused not guilty on charges under secs. 409 and 403, I. P. C., holding clearly that it is not possible to accept the evidence as to the particular way in which

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the items of property were disposed of by the accused. To us the words used by the Judge indicate that he is not repenting what he has heard from the jury but is stating what he believes to have been the motive which actuated them.

We hold therefore that there are no grounds for interfering with the verdict of the jury and dismiss this appeal.

J. N. R.

Appeal dismissed.

PRIVY COUNCIL

[APPEAL FROM BENGAL]

LORD ATKINSON.

SRIMATI SARAT-

LORD SUMNER.

KUMARI DAS,

LORD CARSON.

Appellant,

MR. AMERR ALI.

v.

1922,

AMULLYADHAN

Heard, 9, November.

KUNDU and ors.,

Judgment, 1, December.

Respondents.

Purdanashin lady, compromise on behalf of, alleged to have been made without authority—Onus to prove consent and knowledge—Consent if proved, because witnesses who denied it found unreliable—Circumstantial evidence—Pleader's responsibility in regard to compromise by purdanashin lady—Pleader's authority to compromise suit.

The principle that those who rely upon deeds and powers executed by purdanashin ladies should satisfy the Court that they had been explained to and were understood by them applies to agreements to compromise litigation, though it may be sufficient in such a case to show that the general result of the compromise, as distinct from the details and legal technicalities involved, was understood by her and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it.

TACORDEEN TEWARRY v. NAWAB SYED ALI HOSSEIN KHAN (2), SHAMBATI KOERI

(2) L. R. 1 I. A. 192 at p. 206, 13 B. L. R. 427; 21 W. R. 340 (1974).

v. JAGO BIBI (3) and SUNITABALA DEBI v. DHARA SUNDARI DEBI CHOWDHURANI (4) relied on.

Where in a suit by a purdanashin lady to set aside a compromise entered into on her behalf, as having been made without her authority, no evidence was given of the affirmative proposition that the compromise was made and entered into with the knowledge and consent of the lady, and it was denied by the lady and her witnesses, but the High Court upheld the compromise because the depositions of the lady and her witnesses were in its opinion unreliable.

Held—That an affirmative proposition is not established by showing that the evidence of witnesses who depose to a contradictory negative proposition is not reliable.

Duty of a pleader acting for a purdanashin lady, when a compromise is proposed to be made on her behalf, indicated.

A vakalatnama authorising a vakil to argue the case, to inspect the records, execute documents and deposit and withdraw monies and do all such other acts, the same to be accepted and ratified as acts done by her, does not give the vakil authority to compromise the suit.

This was an appeal from a judgment and decree of the High Court in Bengal, dated the 27th February 1920, which reversed a judgment and decree of the Court of the Additional Subordinate Judge of Howrah, dated the 17th April 1919.

The facts which are fully set out in the judgment of the Board may be shortly stated as follows:—

(3) L. R. 29 I. A. 181; a. c. 6 C. W. N. 662 (1903).

(4) L. R. 46 I. A. 272; a. c. I. L. R. 47 Cal. 185; 24 C. W. N. 227 (1919).

SRIMATI SARATKUMARI DASÍ v. AMULLYADHAN KUNDU.

In 1913 the Appellant purchased from Dharma Das Kundu some 7 bighas of land.

In the following year Dharma Das died and his heirs denied the Appellant's right to the property. The latter accordingly filed a suit to have her title declared and was granted a decree by the Subordinate Court. From that decree an appeal was made to the High Court (Fletcher and Richardson, JJ.) and during the hearing thereof a compromise was alleged to have been entered into on the 7th July 1914 in accordance with which the appeal was decided.

On being informed of the compromise the Appellant who was a *pardanashin* lady alleged that it had been made without her knowledge or consent, and filed the present suit asking for a declaration that the said compromise was void and inoperative as against her.

The suit was tried by the Additional Subordinate Judge of Howrah who accepted the Appellant's evidence and passed a decree in her favour directing the cancellation of the deed of compromise.

The Respondents appealed from that decree to the High Court in Bengal (Richardson and Huda, JJ.), who reversed the decree of the lower Court and held that the compromise was binding on the Appellant.

From this decree the Appellant appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and B. Dubé for the Appellant contended that the strongest and most satisfactory proof ought to be given that the transaction was fully understood and approved of by the Appellant, and submitted that the Respondent had failed to discharge the onus upon him.

They referred to *Sajjad Hussain v. Wazir Ali Khan* (5)

Mr. A. Maqūd for the Respondents.—The onus is on the Appellant to show that she did not consent to the compromise [*Kali Bakhsh Singh v. Ram Gopal Singh* (6), *Sunitabala Debi v. Dhara Sundari Debi Chowdhurani* (4) and *Bhut Nath Sircar v. Ram Lal Sircar* (7)].

The amount payable by the Respondent under the compromise was paid into Court.

The Appellant has appropriated part of this sum to furnish security for her costs of this appeal, and by so doing has admitted that she is willing to accept the amount in Court as satisfaction of her claim.

Their LORDSHIPS' JUDGMENT was delivered by

LORD AIKINSON.—This is an appeal from a judgment and decree, dated the 27th February 1920, of the High Court of Judicature at Fort William in Bengal which reversed a judgment and decree, dated the 17th April 1919, of the Additional Subordinate Judge of Howrah. The main question for determination by the Board is whether or not the compromise of a certain suit instituted by the Appellant to recover possession of certain lands theretofore purchased by her from one Dharma Das Kundu, since deceased, purporting to have been made and entered into on the 7th February 1917, had in fact been so made and entered with her full knowledge and consent or the

(4) L. R. 46 I. A. 272; s. c. I. L. R. 47 Cal. 195; 24 C. W. N. 297 (1919).

(5) L. R. 89 I. A. 156 at p. 160; s. c. 16 C. W. N. 889 (1912).

(6) L. R. 41 I. A. 23; s. c. I. L. R. 26 All. 81; 18 C. W. N. 282 (1918).

(7) 6 C. W. N. 82 (1900).

SRIMATI SARATKUMARI DAS v. AMULLYADHAN KUNDU.

contrary. The Appellant is a *parda-nashin* lady aged about 43 years. She has two sons, Raman and Srish, the latter of whom appears to be competent to some extent to transact business, and two brothers named Satish, about 47 years of age, and the other, Sailadhar, who is younger. She can write and read in Bengali, can sign her name, and from her evidence, would appear to be a person of some intelligence. The trial Judge found on the evidence before him that this compromise was not made and entered into with the knowledge and consent of the Appellant. The Appellate tribunal found on the evidence the affirmative proposition that it was so made, though that proposition was denied by the Appellant and not proved directly by any document or by any witness. Their Lordships are not for the reasons to be stated hereafter able to take the view of the evidence upon this point which commended itself to the Appellate Court. They think this latter view was erroneous and incline to think that this was due to the fact that the two learned Judges, Richardson and Shamsul Huda, dealt with the case without keeping sufficiently before their minds that an affirmative proposition is not established by showing that the evidence of witnesses who depose to a contradictory negative proposition is not reliable. The proposition that the Appellant consented to the compromise entered into is an affirmative proposition. She and one of her brothers practically deny that she ever consented to it. No witness gives direct and positive evidence that she did consent to it. Yet these learned Judges consider that as the circumstantial evidence given in the case would go to show that the evidence of the Appellant and her brother on this point was not reliable,

they are therefore entitled to hold the affirmative proposition that she did give her consent to the compromise was proved. Of course, if there was a conflict of evidence on this point, some witnesses asserting that the Appellant did consent to this compromise, some the contrary, it would be perfectly legitimate to take into consideration the circumstantial evidence with a view to show that evidence of the first class of witness was true and that of the second false. But on this case, as will presently be shown, there is no conflict of evidence of this kind. The facts of the case may be shortly stated as follows. .

On the 15th November 1913, the Appellant bought from the said Dharma Das Kundu certain land for the sum of Rs. 9,500. He died on the 6th of February following. He left three sons and three grandsons him surviving who are all Respondents in this appeal. The Appellant did not get possession of the land she purchased, and on the 11th July 1914, she instituted against the above-mentioned sons and grandsons of Dharma Das Kundu a suit for a declaration of her title to the land purchased and for the recovery of the possession thereof. The eldest son of the deceased, Amullyadhan, and the three grandsons denied her claim and contested the validity of the sale, but the two younger of the vendor's sons filed a written statement admitting that her claim was just and well-founded. The Subordinate Judge of Howrah who tried the case made on the 23rd August 1915, a decree allowing the Appellant's claim with mesne profits and costs. From that decree the eldest son Amullyadhan and the three grandsons of the deceased appealed to the High Court at Fort William in Bengal. The Appellant executed a power-of-attorney appointing several per-

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sons, namely, Babu Probodh Kumar Das amongst others her vakils to argue her case, to inspect the records, execute documents and deposit and withdraw monies and do all such other acts, the same to be accepted and ratified as acts done by her. It has been well-established and is not, as their Lordships understand, questioned in this case, that a vakil appointed under such a power-of-attorney as this is not endowed with power or authority to compromise the suit he is thus retained to argue. The appeal came on in the High Court before Fletcher and Richardson, JJ., on the 6th February 1917. One Babu Haradhan Chatterjee appeared as vakil for the Respondents, and the Appellant appears to have been represented in addition to vakil Probodh Kumar Das by a well-known barrister, Mr. B. Chakravarti. After the hearing had proceeded for some time the learned Judges suggested that the appeal might well be compromised. The Appellant's vakil at this juncture desired to consult her Counsel, Mr. Chakravarti, but that gentleman's attendance could not be procured, apparently because he was engaged in another Court. The vakil then asked for time to consider the suggestion made, and in compliance with that request the terms of the compromise were embodied in the following document, written in English which was on the 7th February 1917, signed by the vakils of both parties and duly filed in Court. It ran thus:—

It may be ordered by consent that Defendant No. 1, Amullyadhan Kundu, do pay to the Plaintiff, Saratkumari Dasí, Rs. 13,500 (thirteen thousand and five hundred only) within 22nd February, 1917. On such payment being tendered and deposited in this Honourable High Court to the credit of the said Saratkumari Dasí on the said date, the Plaintiff, the said Saratkumari Dasí, do convey to the Defendant No. 1, the said Amul-

lyadhan Kundu, at the Defendant No. 1's cost, the property in dispute in this appeal, free from all encumbrances, if any, created by the Plaintiff since the purchase of the said property by her on the 15th November 1913, and subject to all encumbrances existing before the date of purchase by the Plaintiff (Sm Saratkumari Dasí). If such payment be not tendered within 22nd February, 1917, the appeal stands dismissed with costs.

It is not pretended that the effect of this document was ever explained to the Appellant by her vakil or by any other person. She never signed it, or a copy of it, or any document which would show that she was acquainted with its existence, contents or effect. It is written in the English language, which neither the lady nor her vakil understands. She positively swears that she never authorized a compromise of her suit to be entered into, and, as will presently be shown, when she ultimately was informed that this had been done her conduct and action were much more like that of a woman who felt that her confidence had been betrayed, and her interests sacrificed, than that of one who was struggling to break a bargain made on her behalf of the nature of which she was well aware and of which she at first approved.

Being a *pardanashin* lady she apparently authorised her brother Satish Chandra to attend the Court in which her action was about to be heard and look after the proceedings in the suit, but as will presently be shown there is no evidence to establish that she either expressly or impliedly clothed him with plenary authority to compromise, on her behalf, this suit which she had instituted to recover possession of the land she had purchased.

On the 21st February 1917, the principal Defendant, the eldest son of the

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vendor, tendered to the Appellant's vakil, Babu Probodh Kumar Das, the sum mentioned in the document of compromise, Rs. 13,500. He refused to receive it. The matter was brought before the High Court on the following day, the 22nd February 1917, when it was by that Court ordered that the money should be brought into Court. This has been done. On this same day, the 22nd February 1917, she states in her evidence that she first heard of the compromise of her suit. In her evidence in the present suit she gives the following account of the way in which she came to know of it. She says: "My brother Satish not having come to my house for 15 or 16 days I sent for him through my son Srish. He came to see me on the 10th Falgun 1323 (i.e., the 22nd February 1917). I having inquired of him about the case, he said that the case had been compromised. On hearing that news I had a quarrel with my brother. After that I filed through my son a petition to the High Court for setting aside the compromise." She adds: "Since the quarrel with my brother he did not come to my house. I would suffer loss if I made the compromise for Rs. 13,500 because Rs. 17,000 or Rs. 18,000 have been spent by me on account of the purchase of the land and litigation expenses."

On the 28th March 1917, one month and six days after she had as she swears, first heard of the compromise she took the proceedings indicated in the foregoing passage of her evidence. She had an application made to the High Court for a review of the proceedings in the suit in which the compromise had been entered into, with the view of having the latter set aside on the ground that it had been entered into without her authority or consent. This application was, on the

11th May 1917, for some reason not fully explained, refused. Whereupon the Appellant on the 25th July 1917, instituted the present suit. The grounds upon which the High Court apparently based their decree which is appealed from are expressed concisely in the following two passages from their judgments. Mr. Justice Richardson said: "I am satisfied that the Respondent's brother Satish acted as her accredited agent throughout, and that the compromise of the 7th February was entered into on her behalf and with her consent. The Respondent agreed at the time to a settlement not unjust to her but changed her mind afterwards. The bargain cannot be undone. *Neal v. Lennox* (1)." And Mr. Justice Huda said: "As I have said before the evidence of Probodh Babu and Haradhan Babu places the fact of her consent to the compromise beyond any doubt. I therefore hold that Saratkumari did consent to the compromise and now has come forward to repudiate it falsely." It will be observed that the conclusions at which the learned Judges have arrived do not agree. Mr. Justice Richardson held that the Appellant's consent to the compromise was given, not by the Appellant directly, but by her brother, her agent, fully authorized on that behalf. In the case of the second learned Judge it is very doubtful whether he comes to the same conclusion as does his brother Judge, or to the conclusion that though as he admits there is no direct evidence of consent by the Appellant, the circumstantial evidence of it is very strong. He says he rejects the evidence of Satish and Saila, the Appellant's brothers, as wholly unreliable. He then deals with the circumstantial evidence upon which he relies in this fashion. He says:—

(1) L. R. [1902] A. C. 466.

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Satish, as I have said, was acting in the interest of his sister. On the 6th he and his brother were both present in Court. When the Court suggested a compromise, time was given to enable Satish to consult his sister. They were not living far off. Satish was living at Pataldanga and Saratkumari at Bagbazar. The distance between the two places is only about a mile. It is inconceivable that neither of the two brothers went to Saratkumari to take instructions from her about the compromise. According to Probodh Babu, Satish saw him in the evening and told him his sister would like to get a little more money, that accordingly the next day he was able to induce the learned vakil on the other side to raise his offer to Rs 13,500. Admittedly both Satish and Saila were present in Court and I have no doubt they consented to the compromise on behalf of their sister.

This line of reasoning is directed to show that Satish and Saila sought for and obtained from their sister on the 6th February authority to consent to the compromise after they had duly informed her of the suggestion that had been made, while Mr. Justice Richardson held, to use his own words, that "Satish was the accredited agent of his sister throughout (which their Lordships presume means from the first) and that the compromise of the 7th of February was entered into by him on her behalf and with her consent."

The very fact that time was given to consider the compromise suggested by the Court is the best proof that Satish was not given from the first and not taken to have been so given such dominion and control over the litigation as would have entitled him to compromise the suit without consulting his sister.

Such being the apparently inconsistent conclusions at which the two learned Judges arrived, it is necessary to examine the evidence to endeavour to discover whether there was any evidence before

them from which these conclusions as inferences from established facts, not mere conjectures or suspicions, or surmises could legitimately be drawn. Turning to the evidence of the Appellant one finds that in her evidence in chief she deposes as follows:—

My name is Saratkumari Dasi. My husband's name is Beni Madhab Dawn. My age is 43 or 44 years. The house in which I have been giving deposition is my own house. I, Plaintiff, have instituted suit in the Howrah Court Amullya filed, in the Honourable High Court, Appeal No. 393 of 1913 against me. Satish Dutt is my eldest uterine brother. He used to look after the said appeal case of mine. I gave no authority to my said uterine brother to compromise the said appeal. I made no Solehnama in the case at High Court. I did not give to my said brother consent to file any Solehnama, relinquishing the property on taking Rs 13,500. I did not give to the vakils, who were engaged on my behalf in High Court, any authority to compromise the said appeal case. My eldest brother Satish or youngest brother Saila or my son Srish did not show any Solehnama to me, nor read out the same to me. I did never, through my brother Saila and Satish or my son Srish, apprise my vakils at High Court of my consent to make Solehnama. I did never, through those persons, tell them to make Solehnama on taking Rs 16,000 or on taking Rs 13,500 exclusive of the amount due under the mortgage to Prandhan Babu. My eldest brother Satish never brought and read out the draft of any Solehnama to me, nor showed the same to me. My eldest brother Satish never informed me of the fact that a talk of compromise was going on in High Court. If I had heard of the Solehnama, I would not have given consent to same.

She was subjected to a long, tedious and mainly irrelevant cross-examination. Nothing discrediting her evidence in chief was elicited, while she added that her brother and sons engaged her vakils; that she had no interviews with any of

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them and that the quarrel with her brother Satish to which she referred was not "very abusive between brother and sister, but an altercation," that she said to him, "Why did you do this without my consent?" Their Lordships find nothing in any part of her evidence to sustain the suggestion of the second learned Judge that this lady got sorry for having consented to the compromise, changed her mind and came forward to repudiate it falsely.

Satish, when examined, proved that he was a trader, accustomed to look after his sister's case upon appeal, and then alleged that the compromise was made without reference to her, that on the morning of the 6th of February, Dr. Mitter commenced his argument about noon, that about 2-30 or 3 P. M., Probodh Babu (the Appellant's vakil) spoke to him on the verandah of the Court, saying that the Judges had suggested that the case should be amicably settled, that he was not agreeable to this, and then this vakil asked him to come to his, the vakil's, residence at night when he would speak about the matter. The Court was adjourned, but he says he does not know whether that was before or after the conversation. He says that he did not communicate (*i.e.*, about the proposal) with his sister, that he went to the vakil's residence that night and told him (the Babu) he was not willing to compromise; that this Babu then asked him to come to Court on the following day, the 7th, which he did. The Appellant's sons, he says, were not present in Court on the 6th of February; that Dr. Mitter resumed his argument on the 7th; that about 1 o'clock this same vakil asked his brother Saila who was with him to call on Mr. Chakravarti, which his brother went to do. The witness further says that Probodh Babu

asked him to come to the verandah of the Court, which he, the witness, then did, when the former told him that if the suit was dismissed by Mr. Justice Fletcher they would be put in a great difficulty, so it would be better to compromise it. That he, the witness, replied he could not say anything about the matter; that he, the vakil, might do what he thought best, that he, the witness, did not agree to the vakil compromising the case. When witness's brother had returned he said the vakil had gone back to the Court room and talked there with Dr. Mitter and Haradhan Babu when Dr. Mitter took a paper and wrote down something in English, which language the witness does not understand, that Probodh Babu then asked the witness to sign it, which he, the witness, refused to do, saying that before he could sign it, it was necessary his sister should consent to it. That the paper was then signed by the two vakils and filed by Dr. Mitter. The Appellant's sons were not, the witness says, in the Court on the 7th, and then he states that he, the witness, did not go to inform the Appellant of the compromise as he apprehended she would disapprove of what had been done. He is cross-examined, but nothing to shake his evidence in chief would appear to their Lordships to have been elicited from him. He adds that he did not inquire what had been written by Dr. Mitter, that the terms of the compromise were not read over or explained to him, but that Probodh Babu told him that on the Defendant in the suit paying Rs. 13,500, the case would be compromised. If this witness had from the first plenary authority to compromise this suit, as Mr. Justice Richardson apparently holds, or if during the adjournment he had obtained from his sister authority to consent to the com-

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promise, as apparently Mr. Justice Huddell holds, it is difficult, if not impossible, to suggest any rational explanation of his refusal to sign the document. Owing to the secluded life *purdanashin* ladies live, and the consequent inexperience in the conduct of business, legal or other, the law throws its protection around them.

In the case of *Tacoodeen Tewarry v Nawab Syed Ali Hossein Khan* (2), Sir Montague Smith stated the law upon the point thus: "According to the principles which have always guided the Courts in dealing with sales or gifts made by *purdanashin* ladies the strongest and most satisfactory proof ought to be given by the person, who claims under a sale or gift from them, that the transaction was a real and *bonâ fide* one and was fully understood by the lady whose property is dealt with." In *Shambati Koeri v Jaqo Bibi* (3), Sir Andrew Scoble said: "It is a well-known rule of this Committee that in the case of deeds and powers executed by *purdanashin* ladies it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them." And in *Sunitabala Debi v Dhara Sundari Debi Chowdhurani* (4), this principle was applied to an agreement to compromise litigation, but it was held to be sufficient to show that the general result of the compromise, as distinct from the details and legal technicalities involved, was understood by her, and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it.

Nothing of this kind was shown in this

(2) L. R. 11 A. 192 at p. 204; 13 B. L. R. 427; 21 W. R. 340 (1874).

(3) L. R. 29 I. A. 131; s. c. 6 C. W. N. 682 (1902).

(4) L. R. 46 I. A. 272; s. c. I. L. R. 47 Cal. 195; 24 C. W. N. 297 (1919).

case. There is no proof that the lady knows English. Satish proves that the document filed was written in English. He is not contradicted on this point. The lady's vakil, it appears to the Lordships, failed in his duty towards her; he never saw her, never spoke to her in reference to this compromise, nor had he any communication with her touching it. Had he acted properly and explained this compromise to her, after which she approved of and consented to it, she would in all probability have signed it, and all this litigation would have been avoided.

The learned Judge also says in his judgment: "The evidence both of Probodh Babu and Haradhan Babu places the fact of the Appellant's consent to the compromise above any doubt." It is essential then to examine the evidence of these witnesses with great care. They were examined by the Court and not by the vakils of the parties.

The evidence of Babu Haradhan Chatterjee ran as follows —

"Q—Will you state as shortly as possible your recollection as to what happened on the 6th and what happened on the 7th February?

"A—Dr. Mitter, who was leading me, was arguing and discussing the evidence.

"Q—Were you addressing the Court?

"A—No. Dr. Mitter was addressing. I was present. I was seated by his side. I was instructing him. Then Mr. Justice Fletcher threw out a suggestion, whether my client is willing to purchase the whole property, that is to say, the Defendant No. 1. Dr. Mitter asked me whether the client was willing to do so. Previously we thought that if there was a suggestion to purchase the property, we would accept it. Dr. Mitter said 'we are agreeable to purchase the property.' Upon that, Mr. Justice Fletcher asked the other side, Probodh Kumar Das, whether he is agreeable to compromise the suit, and asked Dr. Mitter what the terms will be. Dr. Mitter suggested

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that we were agreeable to pay the purchase-money with compound interest and that was the suggestion asked by Mr Justice Fletcher, whether that would be agreeable to the other side. Probodh Babu said 'I cannot say without asking my clients.' Both the brothers Satish and Sula were standing behind him and they held a consultation amongst themselves. After that they said, 'we cannot say anything to that, we shall speak about this matter to-morrow; unless we consult the client we cannot say anything to it.' On that day it was arranged for 13,000 plus the mortgage money. This matter was adjourned at that time. Satish was standing behind Probodh Babu, and Mr Justice Fletcher, addressing him, told him, 'Tell your sister that the compromise will be to her benefit. I have thoroughly understood the case, and in my opinion it is a benami transaction.'

"Q.—We want to know exactly what happened on the 7th?

"A.—On the 7th they wanted more. Afterwards it was settled at 13,500.

"Q.—Afterwards—when? On the same day or the next day?

"A.—On the 7th, after some consultation with Dr Mitter, myself on one side and Probodh Babu and Satish and Sula on the other side. Then the draft was made recording the terms. Probably I drew out the draft in consultation with Dr Mitter and Probodh Babu. This draft was taken away by Satish to show to somebody, but I do not know to whom. He said 'I will show it to some friend of mine.'

The evidence of Babu Probodh Kumar Das ran as follows:—

"Q.—Can you tell us as briefly as possible what took place first on the 6th and then on the 7th?

"A.—So far as I remember the arguments were going on when there was a suggestion made by the Court, viz., Mr. Justice Fletcher, to Dr. Mitter, whether he was willing to purchase the whole property. Dr. Mitter said that he would accept that and that he would pay compound interest. On that, Mr. Justice Fletcher asked me whether my client would be agreeable to that. I asked my client, Satish and his

brother Sula whether they agreed to it. They had a consultation among themselves as to whether that would be profitable to them and that did not take more than two or three minutes. After that Satish asked me to take time to consider the matter and that was also necessary because I was appearing for a *pardanashin* lady and had to take her instructions in the matter. I said to him, 'You had better go and consult about the matter and come to me at night at my house.' So he went away and came at night on that very day at my house and told me that his sister would like to have a little more than was offered. I said that I would ask Dr Mitter whether his client is agreeable to that. The next morning when the case was called on at 11 a.m., then I told Dr Mitter that my client would require something more because the amount which was offered was barely sufficient to cover expenses. Then Dr Mitter consulted or did something and then within a few minutes Dr Mitter said, 'we can offer so much.' I told my client that that was the utmost that he could get. He could do what he liked. Then Dr Mitter asked for some time from the Court. Time was given. I went away on another case which was called on at that time.

"Q.—That was on the 6th?

"A.—That was the next day, the 7th.

"Q.—On the 6th night your clients came and told you that they required something more?

"A.—Yes, on the 7th when I came to Court they told me to try and get something more. I said to Dr Mitter that unless something more was offered my client was not agreeable to the compromise.

"Q.—And Rs 500 more was offered?

"A.—Yes.

"Q.—Did you ask your client to go and fetch Mr Chakravarti?

"A.—I do not remember if I did.

"Q.—No occasion arose for any argument?

"A.—So far as I remember no occasion arose for argument on the 7th.

"Q.—Were you present at 2.30 when the petition was put in?

"A.—Yes. Dr Mitter handed something

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to Haradhan Babu. He read out and I handed it over to my client who took it away and went away.

"Q—You distinctly remember you never sent for Mr Chakravarti?"

"A—I cannot be positive about it, it is so old"

Nothing of importance beyond this was elicited

The Appellate Court insisted quite properly upon the examination of these two vakils. They treat their evidence as so much in conflict with the evidence not only of the two brothers of the Appellant but of the Appellant herself as to utterly discredit her and them as witnesses, and yet it never apparently occurred to the learned Judges that it would have been well if the brothers of the Appellant had had an opportunity of cross-examining these vakils on the portion of their evidence in conflict with their own. No such opportunity was given. Again, the evidence of these vakils deals only with what occurred in the Court. It may show that they, the Appellant's brothers, had an opportunity of informing her of the fact that a compromise was proposed and of obtaining her consent to it. It may even go so far as to raise a suspicion that she was informed of it and did consent to it. It may tend to discredit the evidence of the brothers which was in conflict with it. It is, however, inconsistent with the assumption that Satish had from the first plenary authority from his sister to compromise the suit in any way that seemed good to him. In that case asking for her consent to the compromise proposed would have been quite unnecessary. But in their Lordships' view it is quite insufficient in face of the distinct denial of the Appellant to establish the affirmative proposition that she did in fact consent

to this compromise, the burden of proving which rests upon the Respondents. In their Lordships' view they have failed to discharge that burden.

There is one matter that may account for the unbusiness-like manner in which this compromise was arranged and carried out. The Appellant was cross-examined at length apparently to show either that the money she paid for the lands she purchased was not her own or that she gave or lent money to her brother Satish to purchase them for himself. Mr Justice Fletcher suggested from the Bench that the purchase might have been a *benami* transaction, and Babu Probodh Kumar Das in his evidence called Satish his client. At one part of his evidence he uses the words "my client Satish," at another, "I handed it (the compromise paper) to my client, who took it away with him." It may possibly be that he believed that the property was purchased for Satish, that he was the real owner of it, and that he, therefore, thought it was unnecessary to take the precautions which he probably would have taken if he had believed this *pardanashin* lady, the Appellant, was the real owner.

The case of *Neale v Gordon Lennor* (1) referred to, has no application to the present case.

The Respondents rely upon another point.

It is this. The Appellant after having obtained leave to appeal to His Majesty in Council, applied to the Court for, and on the 2nd of September 1920, obtained an order that Rs 4,000 (portion of the Rs. 13,500 paid into Court), should be held as security for the costs of the Respondents in the appeal to this Board. It was contended that this transaction amounted to an adoption by the Appellant

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of the decree while at the same time she was impeaching it, and was, therefore, estopped from doing so. If the Appellant should fail in this appeal, the money lodged in Court will belong to her. If she succeeds in the appeal the money lodged in Court will be returned to the Respondents, subject, however, to any claim she may successfully establish to have any costs awarded to her paid out of it. In their Lordships' view, the point is entirely unsustainable. On the whole, therefore, their Lordships are of opinion that the appeal succeeds, that the judgment and decree appealed from were erroneous and should be reversed, that the judgment and decree of the Additional Subordinate Judge were right and should be restored, and that the Respondents should pay to the Appellant her costs of the appeal to the High Court and of this appeal, and they will humbly advise His Majesty accordingly.

Solicitors Messrs Barrow, Rogers & Nevill for the Appellant

Solicitor Mr John Tucker for the Respondents
G. D. M

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 98 OF 1922.

SANDERSON, C. J.

RICHARDSON, J.

1923,

26, February.

NURSING DASS

KOTHARI, Appellant,

v

CHUTTOO LALL

MISSER, Respondent

Calcutta Improvement Trust Act (Bengal Act V of 1911) as amended by Bengal Act III of 1917, sec 63, sub-sec. 2—Notice published affecting premises—Premises sold, buyer and seller not aware of the notice—Whether sale may be set aside—Indian Contract Act (IX of 1872), sec. 20—"Mistake as to a matter of fact essential to the agreement"—Whether ignorance of said notice is such

mistake—Transfer of Property Act (IV of 1882), sec 55 (1) (a)—Seller's duty of disclosing "material defect" in property sold

The Defendant who had been appointed Receiver of a certain property by Court sold the same by public auction to the Plaintiff who, being the highest bidder at such sale, deposited a certain sum with the Defendant in part payment of the purchase-price. Before the date of the auction, notice had been given by the Calcutta Improvement Trust under the Calcutta Improvement Trust Act, sec 63 (2), of a proposed public street, passing, inter alia, through the said premises whereof neither the Plaintiff nor the Defendant had any personal knowledge on the date of the auction. The Plaintiff, on discovering that a notice had been so given, instituted this suit for a declaration that the agreement of sale was void and for return of the deposit.

Held—That the notice given by the Calcutta Improvement Trust created a liability to restriction upon the user of the premises by the purchaser and was therefore a matter of fact essential to the agreement within the meaning of sec 20 of the Indian Contract Act and that the Plaintiff and the Defendant having been both ignorant of the said notice, the agreement of sale was void, and the Plaintiff was entitled to get back the deposit.

This was an appeal preferred on the 25th July 1922 against the judgment and decree of Mr Justice Buckland, dated the 27th June 1922 passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case will appear from the judgment of Buckland, J. The notice by the Calcutta Improvement Trust referred to in the judgment was as follows:—

"The Calcutta Improvement Trust.

Notice under sec 63 (2) of Bengal Act, V of 1911.

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Plan of proposed public street—Burra-bazar.

Alignment—South East Section.

Notice is hereby given under sec 63 (2) of Bengal Act, V of 1911, as amended by Bengal Act, III of 1915, that the Board of Trustees for the Improvement of Calcutta has prepared a plan of a proposed public street in Wards Nos. 5 and 7 known as proposed public street, Burra-bazar Alignment, South East Section

The plan provides for a series of roads of a width varying from 10 to 60 feet in the area bounded on the north by Banskotta Street, on the east by Lower and Upper Chitpur Road, on the south by Harrison Road and on the west by the proposed Burra-bazar Improvement Scheme

The proposed public street will pass through the following Municipal holdings. —

[Here the numbers of Municipal holdings and the names of streets affected are set out.]

The plan of the proposed public street and the particulars of the land through which the proposed public street will pass may be inspected at the office of the Trust, 5, Clive Street, on week days between the hours of 11 A.M. and 4 P.M., Saturdays 11 A.M. and 2 P.M. Copies of this notice may be obtained on payment of a fee of two annas per copy and of the plan at a fee of eight annas per sheet.

Objections to the said plan may be submitted on or before the 31st March 1919."

BUCKLAND, J.—On the 29th November 1919 the Defendant who was a Receiver appointed by this Court sold by public auction the land and premises No 43 Burtolla Street which formed part of the property in his charge At such sale the Plaintiff was declared the highest bidder at the price of Rs 1,41,000 of which sum in accordance with the conditions of sale he deposited

Rs. 36,000 with the Defendant The Plaintiff subsequently discovered that at the time when the auction was held there had been already published a notice under sec. 63 (2) of the Calcutta Improvement Acts, 1911 to 1915. That notice was published on the 18th December 1918 and states that the Board of Trustees for the Improvement of Calcutta has prepared a plan of a proposed public street in Wards Nos 5 and 7 known as proposed public street, Burra Bazar Alignment, South East Section The plan according to the notice provided for a series of roads within an area specified in the notice, and among other Municipal holdings the public street would pass are the premises No 43 Burtolla Street. Notice was further given that the plan and the particulars of the land through which the proposed public street would pass might be inspected at a time and place stated and that objections might be submitted on or before the 31st March 1919

The section under which that notice was given is one providing that the Board may make plans of proposed public streets and when that has been done a notice giving information such as this notice contains shall be published in the Calcutta Gazette and forwarded among other persons to persons whose names appear in the Municipal Assessment Book as being primarily liable to pay certain rates in respect of any land included within the proposed public street In due course the Board after hearing objections may either withdraw the plan or apply to the Local Government for sanction thereto with or without modification but with a statement of objections and representations made Notice of such application for sanction has to be published in the Calcutta Gazette and the Local Government may grant or refuse sanction. If it does so, the fact has to be announced by notification and thereupon the proposed public street is to be deemed a projected public street until certain events occur with which I am not concerned Subject to certain exceptions building on the area within the street alignment or building line of a projected public street may only be undertaken after application made to and sanction

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granted by the Chairman of the Board who is bound to give sanction where the applicant complies with the conditions of the section in that behalf. The actual details of this section in this respect are not of great importance, it suffices for the present purpose to say that the rights of an owner of the property to build on his land are seriously curtailed thereby. The street may not be made for a long time and provision for executing the plan of a street scheme, though not as such, is made by other sections of the Act. The object of the section is to lay down alignments of streets to be made in a given area so that meantime owners shall not encroach upon the building lines of the street and when the time arrives to make the streets find themselves in the position of having erected buildings which have to be demolished for which the Board has to pay compensation.

The Plaintiff has alleged his own ignorance and fraudulent suppression on the part of the Defendant of the notice but that has been abandoned. It has, however, been admitted by the Defendant's counsel that the Defendant found a copy of this notice among other papers which he received after the sale from the Official Receiver whom he succeeded in the Receivership of this estate. Personal knowledge is not imputed to the Defendant but the Plaintiff contends that the Defendant must be taken to have known all about the proposed public street as affecting this property, that it was his duty to disclose the notice and that if the Defendant is not held to have had such constructive knowledge of the proposed public street there was a mutual mistake of fact on an essential matter and therefore the contract was void. In either event, he claims the return of the Rs 36,000 paid on the day of the sale. The Defendant on his part contends that the Plaintiff must by reason of the public notice be taken to have known of the proposed public street, though actual personal knowledge is not imputed, and that therefore he bought the property with his eyes open. In any event, he denies the Plaintiff's right to the return of the money as he contends that the notice did not affect the Plaintiff's rights in the property purchased. It has also been argued that if

there was a "burden" on the property it was in the nature of an easement subject to which the property was bought and that requisitions and objections had to be made within seven days from the delivery of the abstract of title under the conditions of sale, which I understand, it is not contended was done.

Before land is acquired for the purpose of the improvement of Calcutta an improvement scheme has to be prepared by the Board and sanctioned by the Local Government. There are elaborate provisions in that behalf contained in sec 36 and subsequent sections of the Act. When those have been complied with the Board may acquire the land necessary for giving effect to the scheme under the Land Acquisition Act, 1894. Those sections and sec 63 are independent and there is no section in the Act connecting them so that any projected public street shall, of necessity, form part of an improvement scheme. As a matter of practice that may and probably does occur but I am not concerned with that. It is open to the Board to reject a projected public street in framing an improvement scheme and the existence of a projected public street is no guarantee according to the Act that such street will ever be made. Still less is that the case as regards a proposed public street the distinction between which and a projected public street will appear when I deal with another part of the argument to which it has more application. I think that this disposes of that part of the argument which treats of the notice as resulting eventually in the requisition of half of the property sold, for that practically is the quantity affected by the notice. It is not in my opinion open to the Plaintiff to contend that what he bought was half of the property and the right to claim compensation for the acquisition of the other half.

The remaining arguments addressed to me on behalf of the Plaintiff are based upon sec. 55 (1) (a) of the Transfer of Property Act and sec 20 of the Indian Contract Act. The Plaintiff according to both of these contentions is to be taken to have had no knowledge of the notice: as regards the Defendant, if he had constructive knowledge of

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the notice, it is contended that it was his duty under the former section to make disclosure, if he had not constructive knowledge it is contended that there was a mutual mistake as to an essential fact in which case the latter section applies. It is common to both of these contentions that the fact of the notice and its consequences, whatever they may be, are essential matters, and if they are essential it does not seem to me that the question of constructive knowledge on the part of the Defendant is of much consequence.

Whether or not the fact of the notice and its consequences are essential matters must depend on the Calcutta Improvement Act and the Act alone I cannot take into consideration what may happen according to the practice of the Board. I have already shown that under the Act itself sec 63 is dissociated from the sections providing for improvement schemes resulting in the acquisition of land for their execution. In fact, the arguments which I am now considering depend upon the terms of sec 63 itself and the limitations upon an owner's use of his own property which the section imposes. But those limitations are not imposed until a proposed public street becomes a projected public street. That metamorphosis takes place when the Local Government has sanctioned the plan of the proposed public street and announced the fact by notification which it is required to do by sub-sec (7). In the course of argument it was stated that such sanction had been given subsequently but I have to consider the facts as they existed at the time when the sale by auction took place. At that time nothing more had been done than to prepare a plan of a proposed public street and to publish the requisite notices, and, possibly, to apply to the Local Government for sanction, but as to that no information has been forthcoming, nor would it affect the matter. The result is that at the time of the sale by auction the land sold was subject to no disabilities or burden or restrictions on the owner's use, whatever may be the most appropriate form of expression. I do not think that in such circumstances it was the duty of the Defendant to disclose the existence of a notice which in fact might not and does not

in law as a necessary consequence result in detriment to the purchaser of property by curtailing his rights as owner. Had the proposed public street become a projected public street, I am not prepared to say that I should take the same view, but the question does not arise in this instance and it must be considered in conjunction with the facts of each particular case. In this view of the matter the question of the Plaintiff's constructive knowledge is immaterial and I also leave that open, for how far a man who enters a sale-room as a member of the public is bound by a public notice and whether as between himself and, in this instance, the Board, or as between himself and a person who may be deemed to have had special notice, are aspects of the point which have not been fully argued.

I find that the Plaintiff was not entitled to refuse to complete by reason of the notice under the Calcutta Improvement Act, sec 63 (2).

I find that it was not the duty of the Defendant to disclose such notice prior to the sale.

For reasons stated I express no opinion on the first part of the 3rd issue as to whether the parties were in ignorance of the said notice, but I hold that even if they were, the contract was not void.

As a result of my findings the suit must be dismissed with costs on Scale No 2.

Sir A. Chaudhuri, Mr S. C. Bose and Mr S. M. Bose for the Plaintiff-Appellant.

Mr S. R. Das, Advocate-General and Mr S. N. Banerjee for the Defendant-Respondent.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS:—

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Buckland who dismissed the suit of the Plaintiff with costs.

The suit was brought for the purpose of obtaining a declaration that a certain agreement for the purchase of the land and premises No. 43, Burtolla Street,

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Calcutta, is void and inoperative, and to recover a sum of Rs. 36,000 with interest which the Plaintiff had deposited as part payment of the purchase-price.

The date of the agreement in question was the 29th of November 1919. The Defendant was a receiver appointed in a certain suit by this Court, and he sold by auction the property in pursuance of an order of the Court. The Plaintiff was the highest bidder, and purchased the property for Rs. 1,41,000 and made a deposit, as I have already said, of Rs. 36,000. Subsequently, the Plaintiff discovered that a notice had been published under sec. 63, sub-sec. (2) of the Calcutta Improvement Act, which affected these premises. That notice had been published on the 18th of December 1918; and, objections to matters contained in the notice had to be put in by the 31st of March 1919, so that, if it is material for the consideration of this case, it is to be noted that the time for making objections had expired before the date of the sale to the Plaintiff. No mention of this notice was made in the sale notification. The facts relating to this matter are to be deduced from the memorandum which was agreed to by the parties in the trial Court. It is as follows:—

"With reference to the question of knowledge it is stated by Mr. Mitter on behalf of the Plaintiff that he does not impute personal knowledge to the Defendant and accepts the Defendant's denial in regard thereto until after the contract was entered into. He, however, imputes to him prior constructive notice of the intended acquisition by reason of the public notification and by reason of the fact that particular notice had been served on the Official Receiver who preceded him as a Receiver. Mr. Das on behalf of the

Defendant similarly says that he does not impute personal knowledge to the Plaintiff and accepts the denial with regard thereto, but he relies upon the constructive notice of the intended acquisition afforded by the public notification. Mr. Das also admits that the property which formed the subject-matter of the notice was about half the property in suit and was not an insignificant amount."

"The Defendant was not the first Receiver in this matter. It appears that the Official Receiver had been appointed Receiver, and the Defendant was appointed as a Receiver to succeed the Official Receiver and, the learned Judge in his judgment stated—"It has, however, been admitted by the Defendant's Counsel that the Defendant found a copy of this notice among other papers which he received after the sale from the Official Receiver whom he succeeded in the Receivership of this estate." So, it is clear that the Defendant himself did not know of this notice until after the sale of November 1919. The Plaintiff refused to complete the purchase. The result was that the Receiver put up the property for sale again and on that occasion it fetched one lac and six thousand rupees. We were informed that at this sale the notice, which had been published by the Improvement Trust Board, was referred to.

The learned Judge came to the conclusion that under the provisions of sec. 63 of the Calcutta Improvement Act, nothing more had been done than to prepare a plan of a proposed public street and to publish the requisite notices, and possibly, to apply to the Local Government for sanction, but as to that no information had been forthcoming nor would it affect the matter, and that the result was that at the time of the sale by

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auction the land sold was subject to no disabilities or burden or restrictions on the owner's use, whatever might be the most appropriate expression. The learned Judge further said that he did not think that in such circumstances it was the duty of the Defendant to disclose the existence of a notice which in fact might not and did not in law as a necessary consequence result in detriment to the purchaser of property by curtailing his right as owner.

The learned Counsel on behalf of the Plaintiff urged in the first place that a possible result of the notice, which had been published by the Improvement Trust, was that half the premises might be taken by the Improvement Trust for the purposes of the Act. It is not necessary for me to go through the provisions of sec. 63 in detail. It is sufficient for me to say that it seems to me on the facts of this case that the position may be stated as follows:—Proceedings had been put in train by the Improvement Trust which, if brought to completion, might result in a restriction being placed upon the use of the property by the purchaser and that that restriction might apply to no less than half the property which was admitted in the above-mentioned note to be "not an insignificant amount."

The learned Counsel for the Appellant argued in the first place that such a liability constituted a material defect in the property within sec. 55 (1) (a) of the Transfer of Property Act. The section runs as follows:—"The seller is bound to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover." The learned Counsel argued further that the seller, *i.e.*, the Defendant, must be taken to have been aware of

the material defect in the property, and consequently it was his duty to disclose it to the Plaintiff, the buyer.

In my judgment, the learned Counsel cannot bring the Plaintiff's case within that section. It is admitted that at the time of this sale the Defendant was not in fact aware of the notice, constituting the alleged defect—if it may be so called—in the property. The learned Counsel, however, said that inasmuch as the Defendant's predecessor, the Official Receiver, had express notice of the proceedings instituted by the Improvement Trust, the Defendant also must be taken to have had notice of such proceedings and, he referred to the definition of "notice" in sec. 3 of the Transfer of Property Act. I am not prepared to accept that argument.

In the first place, I do not understand how the seller can be called upon to disclose that of which he is not aware, and, in the second place, when I look at the last sentence of sec. 55, I find this provision: "An omission to make such disclosures as are mentioned in this section, para. (1), cl. (a), para. (5), cl. (a), is fraudulent." Consequently, if the seller does not disclose to his buyer any material defect in the property of which he is aware and of which the buyer is not aware and which he could not discover with ordinary care the omission is declared by the provisions of the section to be fraudulent. Consequently, in my judgment, having regard to the facts of this case and to the fact that the Defendant had no knowledge of the notice at the time of the sale, the Plaintiff's case does not come within that section. It is not therefore necessary for me on this appeal to consider or decide whether the facts, to which I have referred, constitute a material defect in the property. The first point, therefore, upon which the

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learned Counsel for the Appellant relied, fails.

The second ground upon which the learned Counsel for the Appellant relied, was that the case comes within sec 20 of the Indian Contract Act. That was considered by the learned Judge, and he came to the conclusion that the alleged defect in the property was not essential to the agreement for the reasons which I have already mentioned and which were the basis of his judgment. It is necessary, therefore, for me to consider this question.

It appears to me that the notice issued by the Improvement Trust and the liability to restriction upon the use of the premises, to which I have already referred, consequent upon the proceedings initiated by the Improvement Trust may be said to be "a matter of fact essential to the agreement." The learned Advocate-General argued that it did not follow that, because proceedings under sec 63 had been initiated by the Improvement Trust, any further steps to carry out street improvements would be taken. That is true. On the other hand, the converse is equally true, and the proceedings under sec 63 having been initiated, the Improvement Trust might eventually carry out street improvements which would affect the premises. That essential matter of fact was unknown both to the Plaintiff and the Defendant at the time of the Plaintiff's purchase; consequently by reason of the provisions of sec 20 of the Contract Act, the agreement is void. The words of the section are "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." For these reasons, and on the above-mentioned ground, I am of opinion that the Plaintiff is entitled to the decla-

ration for which he asked, namely, that the agreement is void, and he is further entitled to a decree for the return of the deposit of Rs 26,000.

The result is that the appeal is allowed, the learned Judge's judgment and decree are set aside. A declaration will be made that the agreement is void and there will be a decree in favour of the Plaintiff for rupees thirty-six thousand.

The Defendant must pay the costs of the Plaintiff in this Court and in the trial Court.

RICHARDSON, J.—I agree. It is common ground that neither party knew of the defect consisting in the liability created by the notice in the Gazette. An attempt was made by the learned Advocate-General by a close examination of the provisions of sec 63 of the Calcutta Improvement Act as amended by Act, III of 1915, to minimise the liability to which the property is subject. He said that every house in Calcutta is subject to a possibility that it may be acquired under the Improvement Act for the purposes of the Act and that the notice issued by the Board of Trustees under sec 63 stating that a plan had been made of a proposed public street which would pass through this particular house carried the liability of the house to be acquired under the Act very little further. There were other stages to be gone through and the premises could not be acquired until the proposed public street had first become a projected public street and had then found its way into an improvement scheme sanctioned by the Local Government under sec 48 of the Act. But, in my opinion, the notice in the Gazette did crystallize the general liability to which this property, in common with other properties in Calcutta, is subject in such a way as to entitle the buyer to say that he

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would not be getting a property of the description which at the time of the sale he thought he was getting. He would be getting a property which he might not be able to keep and instead of which he might in the result be entitled merely to a sum of money by way of compensation. Where sec 20 of the Contract Act is in question it may not always be easy to say whether a mistake has been made as to a matter of fact "essential to the agreement." In my opinion, however, the present case falls within the section, and with great respect to the learned Judge, I am of opinion that this appeal should be allowed.

Mr. N. C. Bose, Solicitor for the Plaintiff-Appellant.

Mr. S. C. Mittler, Solicitor for the Defendant-Respondent.

P K. C.

(CIVIL APPELLATE JURISDICTION.)

PRIVY COUNCIL APPLICATION

No. 35 OF 1920.

HARIDAS DEBI,

SANDERSON, C. J. Appellant to England,

RICHARDSON, J.

v.

1922,

GOPESHWAR PYNE and

10, April.

ors., Respondents to
England.

Court Fees Act (VII of 1870), sec. 19 (xx) or Art. 1, Sch II, which of them applies to an application to High Court for refund of money deposited for costs of preparation of paper-book of the Privy Council appeal.

An application to the High Court for refund of money deposited in Court towards costs of preparation of paper-book of a Privy Council appeal is not an application for payment of money due by Government to the applicant within the meaning of sec. 19, cl. (xx), of the Court Fees Act and is hence not exempt from payment of court-fees. It is an applica-

tion or petition which was presented to the High Court and consequently it comes within the provisions of Art. 1, Sch. II of the Court Fees Act and hence liable to a fee of two rupees.

This was an application for refund of the money deposited for preparation of the paper-book in connection with the above appeal to His Majesty in Council.

The facts will fully appear from the judgment.

Babu Prokash Chandra Palnishi for the Petitioner.

The JUDGMENT OF THE COURT was as follows.—

SANDERSON, C. J.—This is an application made by the learned vakil in respect of a petition presented by the Appellant to England in an appeal to the Judicial Committee of the Privy Council. The petition is as follows. It is addressed to "The Hon'ble Sir Lancelot Sanderson Kt., K. C., Chief Justice and his companion Justices of the said Hon'ble Court."

"1. That your Petitioner put in Rs. 100 as a deposit towards costs of preparation of paper-book in the above-mentioned appeal."

"2. That on 11th July 1921 the said appeal was dismissed for default for non-payment of the balance of the costs."

"3. That nobody appeared for the Respondents in the said appeal." The prayer was for "the refund of the said sum of Rs. 100 or any sum that is in deposit to the credit of Petitioner after deducting the necessary costs incurred by the office in connection with the said appeal or to pass such other order as to your Lordships may seem fit and proper."

When this petition was presented the officer of the Court informed the vakil that it required a court-fee of two rupees.

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The learned vakil objected to the payment of the two rupees and the matter has been referred to the Court for decision. The learned vakil based his argument upon sec. 19 (xx) of the Court Fees Act of 1870, which he informs us has not been altered by the new Act dealing with court-fees. That section provides that "Nothing contained in this Act shall render the following documents chargeable with any fee," and cl. (cc) runs as follows: "Application for payment of money due by Government to the applicant." The learned vakil has argued that this petition is an application for payment of money due by Government to the applicant. The balance of Rs. 100 hundred, we are informed, is lying in the Bank to the credit of the Registrar of the Court. In my judgment this is not an application for payment of money due by Government to the applicant within the meaning of sec. 19, cl. (cc). On the other hand in my judgment it is an application or petition which was presented to this Court, consequently it comes within the provisions of Sch. II of the Court Fees Act, Art. 1, "application or petition when presented to a High Court—two rupees." It is clearly a petition which was presented to the High Court and in my judgment is liable to a fee of two rupees. I am confirmed in my judgment by the information, which I have received, that this is in accordance with the established practice.

For these reasons the petition will be returned to the learned vakil for the purpose of the payment of the proper fee, viz., two rupees.

RICHARDSON, J.—I entirely concur.

J. N. R.

CIVIL APPELLATE JURISDICTION.

APPEALS FROM APPELLATE DECREES.

Nos. 1396 AND 1457 OF 1920.

GREAVES, J.

PANTON, J.

1922,

8, February.

OSMAN MONDAL,

Defendant, Appellant,

v.

RADHIKA MOHON ROY,

Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 50 (2), tenant is entitled to benefit of presumption under, when the land was permanently settled after 1793 — "Permanent Settlement," whether exclusively means the Settlement of 1793.

Where rent was sought to be enhanced in respect of land which was permanently settled not in 1793 but in 1905.

Held—That the words "permanent settlement" in sec. 50 refer to the Permanent Settlement of 1793. To gain the advantage of sec. 50 therefore the Defendant has to show that the rate of rent has not been changed from the time of the Permanent Settlement of 1793.

Though rent has not been changed during 20 years prior to the institution of the suit, a finding that the jama was created long after 1793 is a finding to the contrary within the meaning of the concluding part of sub-sec. (2) of sec. 50, so that no presumption can arise that the tenant has held at the same rent from the time of the Permanent Settlement.

• TAMASHA BIBI v. ASHUTOSH DHUR (1) and KHETTERMANI DASSI v. JIBAN KRISHNA KUNDU (2) referred to.

NITYANANDA PAL v. NANDA KUMAR CHOWDHURI (3) distinguished.

These were appeals preferred on the 31st May, 1920, against the decree of Babu Banamali Sen, Officiating Subordinate Judge, 2nd Court of Zillah 24-Par-

(1) 4 C. W. N. 513 (1900)

(2) 21 C. L. J. 315 (1914)

(3) 13 C. L. J. 415 (1910)

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gannas, dated the 1st March 1920, affirming the decree of Babu Sarat Chandra Roy Chowdhury, Munsif, 1st Court at Barupur, dated the 26th of February 1919.

The material facts of the cases will appear from the judgment.

Babu Ramgati Sarkar for the Appellant.

Babus Surendra Chandra Sen and Raj Kumar Chakrabarti for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

These two appeals are by the Defendant against decisions of the Subordinate Judge of 24-Pargannas, affirming the decisions of the Munsif of Barupur.

The main point that arises for our decision in these appeals is whether the tenant Defendant who is an occupancy raiyat is entitled to the protection of sec 50 of the Bengal Tenancy Act. Now, what has been argued before us is that despite the definition of permanent settlement contained in sec 3, sub-sec 12 of the Act, the decisions of this Court go to show that the words "permanent settlement" as used in sec 50 are not to be confined to the Permanent Settlement of 1793 and it is said that inasmuch as the land in suit was not permanently settled until 1905 we should hold that the words "permanent settlement" as appearing in sec. 50, sub-sec. 1 and also in sub-sec. 2, refer not to the Permanent Settlement of 1793 but to the Settlement of 1905 when the land itself was permanently settled. Now, no decision has been cited to us which would show that the words "permanent settlement" in sec 50, sub-sec. 1 of the Bengal Tenancy Act do not relate to the Permanent Settlement of 1793. But so far as sub-sec. 2 is concerned we have been referred

in support of the argument addressed to us to the case of *Tamasha Bibi v. Ashutosh Dhur* (1) and to the remarks of Sir Francis Maclean at p 514 in that case when he says discussing sub-sec 2 of sec 50 that he sees no reason for restricting the operation of the section to the Permanent Settlement of 1793. We have been further referred to a passage in Mr Justice Banerjee's judgment at p 515 to the same effect. The other case to which we have been referred is the case of *Khettermann Dass v Jiban Krishna Kundoo* (2), which cites and follows the decisions in *Tamasha Bibi v. Ashutosh Dhur* (1). Now, as we read the decision in *Tamasha Bibi v Ashutosh Dhur* (1), neither of the learned Judges who decided that case say that the permanent settlement in sec 50, sub-sec 2, does not mean the Permanent Settlement of 1793. But what they say is this that the presumption of the subsection still applies even if the rent was permanently settled at a later date than 1793. That seems to us to be the real *ratio decidendi* of the decisions in both the cases to which we have been referred. Accordingly it does not seem to us that there is any force in the first contention raised before us with regard to the meaning of the words "permanent settlement" in the two sub-sections of sec. 50 to which we have referred. To gain the advantage of sec 50 therefore the Defendant has to show that the rate of rent has not been changed from the time of the Permanent Settlement of 1793. But there is an express finding that the *jama* was created some 70 years ago. Accordingly it is not the fact that the rent has not changed since 1793. Then again so far as sub-sec 2 is concerned no doubt

(1) 4 C. W. N 518 (1900)

(2) 21 C. L. J. 315 (1914).

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there is a finding of the Munsif that the rent has not been changed during the 20 years prior to the institution of the suit, and this is a finding to the contrary within the meaning of the concluding part of the sub-section as the origin of the *jama* has been found to be some 70 or 75 years ago.

A further point was urged before us, namely, that assuming that sec 50 has no application, from the fact that uniform rent has been paid for a period of 20 years the Court might draw a presumption in favour of the Defendant and we were referred to the case of *Nityananda Pal v Nanda Kumar Chowdhuri* (3) in support of this proposition. Now, there is no doubt that this is so. But so far as the present case is concerned this point was never raised in the lower Appellate Court, and although it is true that there is a finding of the Munsif that the tenant paid rent at a uniform rate for more than 20 years we have no express finding of the lower Appellate Court with regard to this, although he does refer to the payment of uniform rate of rent for a period of 24 or 25 years. But even if there were such a finding we should not be prepared from the length of time or under the facts and circumstances of the present case to draw the presumption which we were asked to draw.

One further point was argued. The Munsif enhanced the rent under the provisions of sec 30, sub-sec (b) by two annas in the rupee. The learned Subordinate Judge has increased the enhancement by six pies in the rupee. It is said that there is nothing to show how he arrived at this figure. But he does state that the Plaintiff is entitled to get an enhancement by 3 annas 6 pies in the

3) 13 C. L. J. 415 (1910).

rupee. Therefore we must take it that he has applied his mind to the necessary materials under sec 30, sub-sec (b) in granting the enhancement of 2 annas 6 pies in the rupee which he has allowed.

In the result these appeals fail and must be dismissed with costs.

J N R

Appeal dismissed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 59 OF 1923.

NEWBOULD, J.
SUHRAWARDY, J
1923,
14, March

MAKBUL AHMED,
Complainant,
Petitioner,
v.
A. J. L. ALLEN,
Accused, Opposite
Party.

Criminal Procedure Code (Act V of 1898), sec. 454 and 451 (2), European British subject's right in a warrant case to claim trial by jury any time before he is called on to enter upon his defence—Previous waiver of the right, if irrevocable

In a warrant case the accused, a European British subject, said at an early stage that he did not want to be tried by a jury. After the framing of the charge, the accused claimed to be tried by a jury.

Held—That sec 454 read with sec 451 (2), Cr P C, gives an accused European British subject the right to claim trial by jury any time before he is called on to enter upon his defence, and he is entitled, in exercise of that right, to reconsider and cancel a previous waiver, provided he does so within the time allowed.

EMPEROR v SULLIVAN (1), BARINDRA KUMAR GHOSH v EMPEROR (2) and QUEEN-EMPRESS v BARTLETT (3) referred to.

This was a Rule granted on the 15th January 1923 against an order of the

(1) I. L. R. 24 All. 511 (1902).

(2) I. L. R. 37 Cal. 467. s. c. 14 C. W. N. 1114 (1909).

(3) I. L. R. 16 Mad. 308 (1892).

MAKBUL AHMED v. A. J. L. ALLEN.

Additional District Magistrate of Aliput (Mr. D. K. Mitter), dated the 8th January 1923, refusing the application of the Petitioner for cancellation of his previous order granting the claim of the Opposite Party to be tried by jury.

The facts will fully appear from the judgment of Newbould, J.

Mr. K. N. Chaudhuri and *Mr. A. S. W. Akram* for the Petitioner.

Babu Bir Bhusan Dutt for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

NEWBOULD, J. — On the complaint of the Petitioner, the Opposite Party *Mr. A. J. L. Allen* was summoned to answer a charge of having committed an offence punishable under sec. 297, I. P. C. The case was on the file of *Babu J. P. Dass*, Sub-Deputy Magistrate. Before him on the 24th October, before any evidence was taken, the Opposite Party claimed to be tried by a European Judge. He was required to adduce evidence that he was a European British subject. On the 4th November, he satisfied the trying Magistrate on this point and the records were submitted to the District Magistrate. On the 11th November, the case came up for hearing before *Mr. D. K. Mitter*, Additional District Magistrate, and the Opposite Party there said that he did not want to be tried by a jury. Prosecution witnesses were examined in chief on different dates. On the 13th December, the accused was examined and a charge framed and the case adjourned to the 6th January for cross-examination of prosecution witnesses. On that date the charge was slightly amended and the Opposite Party claimed to be tried by a jury. The case was therefore adjourned and jurors were summoned for the 2nd

February. On the 8th January, the Petitioner objected to the Opposite Party being allowed to exercise the right of claiming trial by jury. This objection was overruled and it is against this order that the Petitioner has obtained the present Rule.

On behalf of the Petitioner reliance is placed on the provisions of sec. 451, Cr. P. C. The portion of the section relevant to this contention runs as follows:—“If a European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried he shall be held to have relinquished his right to be dealt with as such European British subject and shall not assert it in any subsequent stage of the same case.” It is contended that the Opposite Party having expressly waived his right to be dealt with as a European British subject on the 11th November is prevented by the provisions of this section from claiming this right at a subsequent stage of the case on the 6th January.

For the Opposite Party it is contended that sec. 451, Cr. P. C., must be read with sec. 451, cl. (2) which provides for a warrant case like the present:—“If a claim is made under sub-sec. (1) . . . at the time when the Magistrate calls upon the accused under sec. 256 to enter upon his defence, the Magistrate shall forthwith issue the necessary orders for trial by jury as aforesaid.” It is urged that this gives an accused European British subject the right to claim trial by jury any time before he is called on to enter upon his defence. Under sec. 256, Cr. P. C., he cannot be called on to enter upon his defence until after all the prosecution witnesses have been examined, cross-examined and re-examined. The Opposite Party's claim on the 11th November was therefore made within the time pro-

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vided by law and was rightly allowed by the Magistrate.

We hold that this contention on behalf of the Opposite Party should prevail. Sec. 451, Cr. P. C., does not in express terms deal with a case like the present where the claim has been made but subsequently withdrawn. The section clearly applies to the case where no claim has been made which would be valid under sec. 451, Cr. P. C. Where the law allows an accused to reserve his claim until he is called on to make his defence we see no reason why he should not be allowed to reconsider and cancel a previous waiver, provided he does so within the time allowed. On behalf of the Petitioner several rulings were cited but none of them have any bearing on the only point that arises in this Rule, the right of an accused European British subject to cancel a waiver. The Opposite Party's contention is however supported by a decision of the Allahabad High Court, *Emperor v. Sullivan* (1).

We, therefore, hold that the Magistrate's order was right and discharge this rule.

SUHRWARDY, J. I agree. Reading secs. 451 and 454, Cr. P. C., together, it seems to me that the latter section is an explanatory corollary to the former. Their joint import may be thus expressed—A European British subject may claim to be tried by a jury at any time before he enters on his defence but if he does not do so, he must be considered to have relinquished such right and shall not be allowed to assert it again. The latter provision may be deduced from the wording of sec. 451 itself but the Legislature by enacting sec. 454 intended to make *ex cautela* the meaning of this special legislation clear by saying that the right, per-

(1) I. L. R. 24 All. 511 (1902),

sonal to the accused, would be lost if not asserted before a certain point of time. There is no express provision of law that the right once waived cannot be asserted at any time before the accused is called upon to enter on his defence but what the Code lays down is that once he has allowed that opportunity to pass, he cannot avail himself of the privilege again. I am fortified in my view by the provisions of cl. (3) of sec. 451. If the accused asserts the right at any earlier stage of the proceedings, *i.e.*, before he enters on his defence, the Magistrate shall adopt the special procedure if he finds that there will be a sufficient case to go before a jury. If express waiver at an earlier stage was intended to be irrevocable, there should have been some corresponding procedure laid down. But the law is silent about express waiver and it has been found necessary to determine judicially that the right may be expressly waived. *Barindia Kumar Ghose v. Emperor* (2) and *Queen-Empress v. Bartlett* (3).

I agree in discharging this rule.

J. N. R.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 27 OF 1923.

NEWBOULD, J.	ILAL MOHON BHATTACHARJEE, Complainant,
SUHRWARDY, J.	v.
1923,	NONI ILAL SARKAR and
15. March.	ors., Accused.

Criminal Procedure Code (Act V of 1898), secs. 204 and 369—Magistrate ordering issue of process under sec. 204, and then on a counter complaint rescinding that order and ordering enquiry under sec. 202, legality of—Order under sec. 204, if a judgment.

On a complaint being made, the Magistrate ordered issue of process under sec.

(2) I. L. R. 37 Cal. 467; s. c. 14 C. W. N. 1114 (1909).

(3) I. L. R. 16 Mad. 308 (1892).

LALIT MOHON BHATTACHARJEE v. NONI LAL SARKAR.

204 Subsequently on that date a cross complaint being laid, the Magistrate rescinded the order and sent both the cases to a Subordinate Magistrate for local enquiry and report.

Held—That the order passed by the Magistrate under sec. 204 was not a judgment to which the provisions of sec. 369, Cr P. C. would be applicable. There is nothing in the Code which forbids a Magistrate to reconsider an order of this kind on sufficient grounds. The order passed by the Magistrate was a right and proper order and it was not made without jurisdiction.

This was a Reference under sec. 438, Cr. P. C., dated the 6th March 1923, made by the District Magistrate of Howrah, recommending that either the order of Babu R. L. Acharja, Sub-Deputy Magistrate of Uluberiah, dated the 22nd December 1922, directing issue of summons on Nomi Lal Sarkar and another under secs. 379 and 427, I P. C., or the subsequent order of the same date rescinding the issue of summons be set aside for reasons therein set forth.

The facts of the case are briefly as follows:—The Petitioner lodged a complaint before the Sub-Deputy Magistrate of Uluberiah and he passed an order directing that the two accused persons be summoned. Subsequently on another party appearing later in the day with a complaint which was taken to be a counter case to the complaint on which summons had issued, the Magistrate rescinded the order of summons and referred this case for enquiry under sec. 202. Thereupon the Petitioner moved the District Magistrate of Howrah, who made the following Reference:—

"In this case the Magistrate taking cognizance of a complaint ordered the issue of a summons on the accused. This can

only be done under sec. 204, Cr. P. C. Subsequently on another party appearing later in the day with a complaint which was taken to be a counter case to the complaint on which summons had issued, the Magistrate rescinded the order of summons and referred this case for enquiry to the gentleman to whom the counter case had been referred under sec. 202, Cr. P. C., for enquiry.

The whole of the second order passed on 22nd December 1922 on the complaint of Lalit Mohon Bhattacharjee

A Magistrate having formed an opinion warranting the order for issue of a summons under sec. 204, Cr. P. C. cannot rescind that order and hold an enquiry under sec. 202, Cr. P. C., in view of doubts aroused as to the truth of the complaint before trial after summons have been ordered.

Either that the Magistrate's order, dated 22nd December 1922 directing issue of a summons on Nomi Sarkar and another under secs. 379 and 427, I P. C. should be set aside on the ground that the Magistrate should at the time of passing this order have entertained a doubt as to the truth of the complaint or that the Magistrate's order, dated 22nd December 1922 rescinding issue of this summons be set aside and that it be directed that process be issued and the case taken up on such dates after the appearance of the accused as the trying Court may think fit."

Babus Debendra Narain Bhattacharjee and Bibhuti Bhusan Lahiri for the Accused.

The JUDGMENT OF THE COURT was as follows:—

This is a Reference from the District Magistrate of Howrah recommending that in the alternative one of the two orders

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by the Sub-Deputy Magistrate of Uluberiah be set aside. A complaint was made before that officer on the 22nd December and he passed an order directing that the two accused persons be summoned. Subsequently on that date one of the persons against whom summons had been ordered to be issued appeared and laid a cross complaint. The Magistrate then rescinded the order passed by him and sent both the cases to a Subordinate Magistrate for local enquiry and report. The learned District Magistrate recommends that either the order directing the issue of summons or the order rescinding that order should be set aside on the ground that the Magistrate having formed an opinion that summons should issue under sec 204, Cr P C cannot rescind that order and direct the holding of an enquiry under sec. 202. We are unable to accept the recommendation of the learned District Magistrate. The order passed by the Magistrate under sec 204 was certainly not a judgment to which the provisions of sec. 369, Cr P C would be applicable. There is nothing in the Code which forbids the Magistrate to reconsider an order of this kind on sufficient grounds. In the present case we think that the order passed by him was a right and proper order and that it was not made without jurisdiction. We accordingly are unable to accept this reference.

Let the papers be sent down at once

J. N. R

Reference not accepted.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

1922,

Heard, 11 and

12, May.

Judgment,

30. June.

KUNWAR SARDAR

SINGH and ors,

Appellants,

v.

KUNJ BEHARI LAL

and ors, Respondents.

Hindu law - Alienation by female owner with limited interest for religious purpose, how far binds the reversion. Necessary and optional religious acts, limits within which each is binding - Dedication of a small fraction of the estate for continuous benefit of the soul of deceased owner, validity of

Hindu law recognises the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner.

The Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased and the periodical performance of obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and, if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case, she can alienate a small portion of the property for the pious or charitable purpose she may have in view.

KUNWAR SARDAR SINGH v KUNJ BEHARI LAL.

This was an appeal from a decree of the High Court at Allahabad, dated the 6th June 1918, reversing a decree of the Subordinate Judge of Moradabad, dated the 23rd August 1915.

The suit out of which this appeal arose was brought by Laltu Singh, the predecessor of the present Appellants, to recover possession of a portion of the property of Raja Gun Sahai of whom he claimed to be the reversionary heir.

The object of the suit was to set aside an alienation made by the widow of Raja Gun Sahai, a Hindu *purdanashin* lady, in favour of the temple of Jagga-nath. The property alienated comprised about one-seventy-fifth of the total estate.

The Subordinate Judge passed a decree in favour of the Plaintiffs on the grounds that the alienation was not for necessity, and that the widow had ample means to defray the expenses of a pilgrimage to holy places and to cover the cost of any offerings that she desired to make, without encroaching on capital.

The High Court on appeal (Piggot and Walsh, JJ.) reversed this decision holding that, although the alienation was not strictly necessary, yet it was an alienation for religious and pious purposes, not made solely with a view to benefit the alienor, but in order that the spiritual merit likely to accrue from the same might benefit herself, her late husband, and her sons.

The learned Judges also pointed out that the alienation covered only a small portion of the estate, which owing to her careful management passed to the reversionary heir probably with an increase in value.

From the decree of the High Court the Plaintiffs appealed to His Majesty in Council.

The facts are fully set out in the judgment of the Board.

Messrs L. DeGruyther, K. C. and B. Dubé for the Appellants—The pilgrimage was made by the widow after her husband's death and was of no benefit to the last male heir. The deed of gift was not executed by the widow and there is no evidence that the executant had her authority--nor is there evidence that the lady who was *purdanashin* had an intelligent appreciation of the act. The gift was *ultra vires* because there was no necessity to part with the corpus and the religious duty was purely optional.

The rule is laid down in *Sarkar's Vyavastha Chandrika*, Vol. 1, p. 138, sees 105 and 106, and is supported by the following decisions—

The Collector of Masulipatam v. Cavalry Encata Narrainpah (1), *Raj Lakhoo Daben v. Gokool Chunder Chowdhry* (2), *Kartik Chunder v. Gour Mohan* (8), *Raj Chunder Deb Biswas v. Sheeshoo Ram Deb* (9), *Mahomed Ushruf v. Brojes-sahee Dassie* (10), *Mutteeram Kowar v. Gopal Sahoo* (11), *Ranjit Ram Koolal v. Mahomed Waris* (12), *Puran Dai v. Jai Varan* (13), *Rama v. Ranga* (3), *Lakshminarayana v. Dasu* (14), *Vuppuluri Tatayya v. Ramakrishnamma* (5), *Ram Kewal Singh v. Ram Kishore Das* (4), *Churaman Sahu v. Gopa Sahu* (15).

(1) 8 M. L. A. 529 (1861).

(2) 13 M. L. A. 209 (1869).

(3) I. L. R. 8 Mad. 552 (1885).

(4) I. L. R. 22 Cal. 506 (1895).

(5) I. L. R. 34 Mad. 288 (1910).

(8) 1 W. R. 48 (1864).

(9) 7 W. R. 146 (1867).

(10) 19 W. R. 426; 11 B. L. R. 118 (1878).

(11) 20 W. R. 187; 11 B. L. R. 416 (1878).

(12) 21 W. R. 49 (1873).

(13) I. L. R. 4 All. 482 (1882).

(14) I. L. R. 11 Mad. 288 (1887).

(15) I. L. R. 37 Cal. 1 s. c. 13 C. W. N. 994 (1909).

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Khub Lal Singh v. Ajodhya Misser (6) and *Vijbhukandas v. Bai Parvati* (16)

Reference was also made to—MacNaughten's Principles of Hindu Law (1874), p. 211.

Sir George Lowndes, K. C. (with him *Mr. Kenworthy Brown*) for the Respondents—The duty of a Hindu to make gifts to temples and Brahmans is recognised throughout *Manu, c g*, Chap. 2, verse 6, Chap. 7, verse 85.

The only question that can arise is the amount of such gift.

There is no authority for the view that a widow must first exhaust the amount of her income before making an endowment out of capital . . .

(He was stopped.)

THEIR LORDSHIPS' JUDGMENT was delivered by

MR. JUSTICE ALLI—This is an appeal from a judgment and decree of the High Court of Allahabad, dated the 6th June 1918, and arises out of a suit brought by the Plaintiff Lattu Singh, since deceased, in the Court of the Subordinate Judge of Moradabad on the 13th September 1913. The object of the suit was to set aside an alienation purporting to have been made for a religious or pious purpose by a Hindu lady of the name of Rani Kishore on the 8th January 1876. The point involved in the determination of the appeal relates to the powers of a Hindu female on whom property devolves upon the death of the husband, son or father, as a limited estate, to alienate any part of the property for religious purposes. Rani Kishore was the widow of Raja Gur Sahai, who died in 1868 and was at the time of his death possessed of a considerable estate, yielding an annual

income of some Rs. 60,000. He left two minor sons, both of whom died in infancy in 1873, five years after the death of their father. The property then devolved on Rani Kishore in succession to her sons. The Rani died on the 16th August 1907, when succession opened to the reversioners of Raja Gur Sahai. There was some litigation as to the right of reversion, which was finally adjudged in favour of Lattu Singh, the Plaintiff, and he, as stated before, brought the suit on the 13th September 1913, to set aside the alienation referred to above. It appears, upon the evidence, that after the death of her sons the widowed mother, according to the custom of pious Hindus, especially females, made pilgrimages to different sacred cities, among them Benares, Gya and Puri. She appears to have visited Puri in the year 1875, and there made a *sankalpa* or vow to create a dedication for the observance of *bhoy* or food offerings to the presiding deity, and for the maintenance of the priests (*pandas*) who were charged with the performance of that duty. In 1876 she gave effect to her *sankalpa* by executing, as it is alleged on behalf of the Defendants, a document purporting to be a gift for the purpose referred to. That document, so far as is material for the purposes of this judgment, is in the following terms:—

"I, Musammat Rani Kishori Kunwar, widow of Raja Gur Sahai, deceased, by caste a Jat, 'rais' and resident of Moradabad, do declare as follows:—

"Whereas I, according to the custom prevailing among the Hindus, happened to go on a pilgrimage to Prayag and Kashiji and on a visit to Jagannath in 1282 Fasli, and at the time of paying a visit to, and performing the worship of, Jagannathji Maharaj, made a charitable gift and 'shankalp' of a moiety of a 'pucca' built house facing the east in muhalla Sambhal Darwaza in Moradabad and of a 15 biswa 9 biswansi 2 kach-

(6) I. L. R. 43 Cal. 574 (1915).

(16) I. L. R. 32 Bom. 26 (1907).

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wansi 3 tanwansi share in mauza Sherpur, a 15 biswa 9 biswansi 2 kachwansi 3 tanwansi share in Sarai Kazi, a 15 biswa share in Rustampur Hayat and a 15 biswa share in Sahjahanpur Hayat, the zamindari villages in pargana Hasanpur, together with all the culturable and unculturable lands, 'abadi' houses that are let on rent, artisan's cess, grazing charges, barren land, water produce, tanks, lakes, groves, fruits and timber trees, i.e., all the inherent and adventitious rights and interests in the revenue paying zamindari property in the said villages and also of two pucca 'havelis' (houses) in mauza Sherpur aforesaid in favour of Jagannathji Maharaj, installed in the temple at Jagannathpuri and of Anant Ram son of Gobardhan, 'khurd' (junior), resident of Puri aforesaid, and Jai Ram, son of Bhawani Das, resident of Durgapur, appertaining to Puri aforesaid, district Katak, both the Pandas of Jagannathji Maharaj. But no document was executed at the time the 'shankalp' was made. Now this document is executed with the following conditions—Both the Pandas aforesaid should enter into possession and make management of the aforesaid property and after paying the Government revenue and village expenses out of the annual income, spend half of the net profits on the daily 'bhog' (food offering) of Jagannathji Maharaj, and bring the other half to their own use, in equal shares. After them their descendants and successors should enter into possession and enjoyment, generation after generation, and should, in due order, distribute the profits, according to the specification given above and daily spend money on the 'bhog' of Maharaj. Whoever will be my successor and representative after me shall have no claim or objection to the gifted and endowed property, by reason of the execution of this deed. If, perchance, they bring any claim it shall not be entertainable by the Court, inasmuch as the property of which I have made a charitable gift and 'shankalpa' is of the nature of 'devatra' (i) and 'tulsipatra' property. According to the Hindu law, the income of the said property is not such as may be brought by me or my successors to our own use. The said property is the self-acquired

and exclusive property of my deceased husband, Raja Gur Sahai. I have made a charitable gift and 'shankalp' of the property for the salvation of my husband and his family members and for my own salvation. The gift property is worth Rs. 2,500. I have, therefore, executed these few presents by way of a deed of gift, so that they may serve as evidence and be of use when needed."

It purports to have been executed for the lady by her general attorney Ajab Singh, and a question was raised on behalf of the Plaintiffs that the deed of gift was fraudulently executed by Ajab Singh in collusion with the donees, and was not the act of the Rani herself. In the view he took of the case the Subordinate Judge did not deal with the question of the authenticity of the document, but the High Court, on the examination of the evidence, came to the conclusion that the deed was the deed of Rani Kishore. The contention against the genuineness of the document has not been pressed before the Board, and their Lordships think upon the evidence there is no real foundation for the charge that it was not the act of the Rani. Before the first Court the trial proceeded on the question of the power of the lady to make an alienation, the Plaintiff contending that it was invalid, while the Defendants urged that it was fully within her competency. The Subordinate Judge decided in favour of the Plaintiffs on two grounds—first, that it was not competent for the lady to make the alienation, as it was not for the performance of any religious duty, which amounted to a necessity under the Hindu law, the second ground of his decision was that the lady had abundant means for giving effect to her pious intention, the *sankalpa*, to which she refers in the deed of gift, and that consequently the gift was invalid.

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He accordingly made a decree in favour of the Plaintiffs. On appeal the High Court came to a different conclusion. They held that her alienation, although not in performance of a necessary duty, was nevertheless a pious act and was, therefore, valid. They held also that the lady had inherited a large estate, and that the dedication covered a very small fraction of the property, something like one-seventy-fifth. They accordingly dismissed the Plaintiffs' suit.

On appeal to the Board the question has been argued with great ability and fullness by Counsel for the Appellants who are Laltu Singh's representatives.

The earlier cases bearing on the question cited from Sutherland's Weekly Reporter, extending from 1864 to 1873, no doubt give colour to the view taken by the Subordinate Judge, and then Lordships have little doubt that he was largely influenced in his conclusion by the notion that justifiable necessity for the validity of religious alienation must be of the same character as in the case of alienation for secular purposes. This idea seems to be predominant in the minds of the learned Judges who decided the cases reported in the Weekly Reporter. Their Lordships cannot help regarding the criticism of the High Court on the Subordinate Judge's judgment as unduly severe. In support of the Plaintiffs' contention the Board were referred to the para 105 in the Vyavastha Chandrika, Vol. I, p. 138 —

"Without the consent of her husband's reversioners a widow is, however, competent to sell so much, and no more, of his property as may be required for the performance of the indispensable duties (nitya karma). If such acts cannot be performed without selling the whole property the whole may be sold by her for that purpose, because such duties must be performed. But for the performance

of an optional religious act (kamya karma) she may, without their consent, dispose of only a small portion of the estate."

Then follows para 106, which, it is contended, imposes a further limitation on her power —

"It, however, the expenses for those acts including maintenance could possibly be defrayed with the accumulated wealth, or with the income of the estate, left by the deceased, then his widow cannot sell any part of his estate for the performance of any such act, much less on account of any debt contracted by her for her own purpose."

The commentator's note to para 105 is as follows. —

"An indispensable act or duty (nitya karma) is that which must be performed, and cannot be neglected without sinning, as the first shaddha of the father or of the husband, the marriage of his daughter, or the like. And an optional religious act is such as the performance of it rests upon option, and there is no sin on the non-performance, but religious merit (punya) on the performance thereof, as pilgrimage to Benares and the like."

Reference was also made to the dictum of their Lordships in the case of *The Collector of Masulipatam v. Cavalry Venkata Narraimapai* (1), where the Board pointed out the difference between alienations made by a widow for secular purposes and those made with religious motives. The Master of the Rolls, who delivered the judgment in that case, says as follows —

"It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity."

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In *Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (2), the Board gave expression to the same opinion. In *Rama v. Ranga* (3), the Madras High Court laid down that alienation by a Hindu widow for religious purposes must be confined to ceremonies indispensable for spiritual benefit, such as funeral obsequies and the periodical ceremonies incidental to those obsequies. But the learned Judges went on to add —

“We cannot recognise a sale by a Hindu widow as valid against her husband's reversioner, when it is made in view to raise money for doing pious acts which are not in the nature of spiritual necessities, unless such sale is reasonable in the circumstances of the family and the property alienated is but a small portion of the property inherited from her husband.”

The case of *Ram Kawal Singh v. Ram Kishore Das* (4) has no analogy to the present. There the alienation was not for the maintenance of an idol which had been established by the husband of the widow, and the dedication was *prima facie* for the widow's own spiritual welfare and not for the husband.

There can be no doubt upon a review of the Hindu law, taken in conjunction with the decided cases, that the Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. In the later cases this distinction runs clearly through the

views of the learned Judges. The confusion which has arisen in this case arises from mixing up the indispensable or obligatory duty with a pious purpose which, although optional, is spiritually beneficial to the deceased.

With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case, she can alienate a small portion of the property for the pious or charitable purpose she may have in view. In the present case the High Court has found that the lands alienated form a small fraction of the whole estate. Had the Ram made the alienation for the purpose of defraying the expenses of the pilgrimage itself, while she possessed ample means for the performance of the journey and other acts connected therewith, there might have been some substance in the objection that she was not entitled to alienate any part of the immoveable property having ample means at her disposal. But the alienation she has purported to effect was for the perpetual performance of acts recognised in the Hindu system as pious. It was a dedication of a very small fraction of the property. The law with reference to this part of the case appears to then Lordships to have been set out with considerable clearness in a recent judgment of the Madras High Court, [*Vuppuluri Tatayya v. Garimulla Ramakrishnamma* (5)], where the learned Judges, after an ex-

(2) 13 M. I. A. 209 (1869).

(3) I. L. R. 8 Mad. 552 (1885).

(4) I. L. R. 22 Cal 506 (1895).

(5) I. L. R. 34 Mad. 288 (1910).

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mination of the authorities on the point, say as follows —

“We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner. We are obliged to express ourselves somewhat guardedly because almost every gift according to Hindu notions is as such calculated to promote spiritual merit and the occasions for the performances of ceremonies calculated to bring spiritual reward are so innumerable that almost any expenditure not for a sinful object and any alienation by way of gift may be attempted to be justified as ministering to spiritual benefit.”

In the case of *Khub Lal Singh v Ajodhya Misser* (6), a widow had raised money upon immoveable property for the purpose of excavating a tank in connection with a temple founded by her husband, and a suit was brought by a reversioner to set aside the alienation. Mr. Justice Mookerjee referred to the words of Lord Gifford in the case of *Cossinauth Bysack v Hurrosonnderj Dossce* (7), that it was absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes,

“because it must depend upon the circumstances of the disposition whenever such disposition shall be made, and must be consistent with the law regulating such disposition;”

and held that the alienation for the purpose of excavating the tank could not be impeached by the reversioner.

In the present case the purpose for which the alienation was made was un-

doubtedly not for the performance of obsequial rites, or any such duty as might be regarded as obligatory under the Hindu law. But at the same time there can be no question, that it was a pious act in the Hindu system. The estimation in which the deity installed in the temple of Jagannath is held throughout the Hindu world is set out in Hunter's Gazetteer, Vol. II, under the title ‘Puri Town,’ where it is said as follows. —

“The true source of Jagannath's undying hold upon the Hindu race consists in the fact that he is the god of the people. The poor outcast learns that there is a city on the far eastern shore, in which priest and peasant are equal in the presence of the ‘Lord of the World.’ In the courts of Jagannath, and outside the Lion Gate, 100,000 pilgrims every year join in the sacrament of eating the holy food, the sanctity of which overleaps all barriers of caste, race and hostile faith. A Puri priest will receive food from a Christian's hand. The worship of Jagannath, too, aims at a Catholicism which embraces every form of Indian belief and every Indian conception of the deity. He is Vishnu, under whatever form and by whatever title men call upon his name. The fetichism of the aboriginal races, the mild flower-worship of the Vedas, and the lofty spiritualities of the great Indian reformers have alike found refuge here. Besides, thus representing Vishnu in all his manifestations, the priests have superadded the worship of the other members of the Hindu Trinity in their various shapes, and the disciple of every Hindu sect can find his beloved rites, and some form of his chosen deity, within the sacred precincts.”

In their Lordship's opinion the Hindu law recognises the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner. It is clear in this case that the act which the Rani did was fully in accordance with Hindu religious senti-

(6) I. L. R. 43 Cal. 574 (1915).

(7) 2 Morley's Digest 198 Clarke's Rules and Orders, 1834, p. 91.

KUNWAR SARDAR SINGH v KUNJ BEHARI LAL.

ment and religious belief, and was not, therefore, in excess of her powers having regard to the fact that the dedication related to one-seventy-fifth of the property made specially for the creation of a permanent benefit. The dedicated property has now passed into other hands. What the legal position of the Defendants, who are assignees from the original grantees, may be with reference to the obligations created by the deed of gift is a matter that does not arise in the present case, and on that their Lordships do not express any opinion.

On the whole, their Lordships are of opinion that there is no substance in the present appeal and that it should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitor Mr Henry S L Polak for the Appellants.

Solicitors Messrs. T L Wilson & Co for the 1st Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

VISCOUNT HAIDANE.

VISCOUNT CAVE.

LORD PARMOOR.

1922,

Heard, 21 and

22, June.

Judgment, 10, July.

E. D. SASSOON & Co.,

Appellants,

v.

RAMDUTT RAMKISSEN

DAS, Respondents.

Indian Arbitration Act (IX of 1899), secs. 9 (b), 14 and 15—Agreement by contracting parties to refer dispute to arbitration under terms inconsistent with sec. 9 (b)—Arbitration under the section, ultra vires—Award if may be questioned by suit—Enforcement of award in execution, if bars such suit—Consent order to abide by decision of Judicial Committee—Objection to jurisdiction if entertainable upon appeal from order.

By eleven contracts, bearing various dates, Appellants agreed to buy from the Respondents a number of bales of jute of

certain specified quality. The contracts were all in a form approved by the Calcutta Baled Jute Association and provided that any disputes shall be referred to arbitration in accordance with the Rules and Bye-Laws endorsed on the contracts, under one of which, where one of the parties to a dispute failed to appoint an arbitrator within the time limited, the Chairman of the Association was to appoint an arbitrator on behalf of the defaulting party. The contracts further provided that both arbitrators and umpire must be persons engaged in the Baled Jute Trade and that their award shall be final, subject only to a right of appeal to the Committee of the Association:

Held—That this agreement was quite inconsistent with sec. 9 (b) of the Indian Arbitration Act, under which, on the failure of one party to appoint an arbitrator, the decision is to be by a single arbitrator chosen by the other party only, whereas under the agreement in question in every case of such failure—which includes a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed—there were always to be two arbitrators, one appointed by the parties and the other by the Chairman on behalf of the other party. Under the agreement, moreover, the decision was to be by a domestic tribunal constituted of men engaged in the trade and the decision was to be subject to an appeal to the Committee of the Association.

That an award made by a single arbitrator appointed by the Appellants alone, upon the failure of the Respondents to appoint an arbitrator as required by the terms of the agreement, acting under sec. 9 (b) of the Arbitration Act, was without jurisdiction.

Any objection to an award on the

E. D. SASOON & Co. RAMDUTT RAMKISSEN DAS.

ground of misconduct or irregularity on the part of the arbitrator ought to be taken by motion to set aside the award. But where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose.

The fact that the award has been enforced by execution under sec 15 is no bar to a suit to have it declared void and for consequential relief.

Where the High Court on appeal having declared the award void, with the consent of parties, ordered the Appellants to repay to the Respondents a sum of money which the Respondents had paid to them in execution of the award upon an undertaking by the Respondents to return the amount if the award should be found valid by the Judicial Committee on appeal.

Quære -- Whether any technical objection as to the jurisdiction of the Court to question the award could be maintained before the Judicial Committee having regard to the fact that the order appealed from was to some extent a consent order and contemplated that the question of the validity of the award should be finally determined by the Judicial Committee.

This was an appeal from a judgment and decree of the High Court in Bengal, dated the 13th December 1920, reversing a judgment and decree of the said Court in its Original Civil Jurisdiction, dated the 15th March 1920.

The suit out of which the appeal arose was instituted by the Respondent for a declaration that certain awards were void and inoperative and that the Defendants (Appellants) had acquired no rights thereunder.

The Appellants purchased from the Respondents certain quantities of jute of a

fixed standard of quality under eleven separate contracts. On delivery, the buyers contended that the jute was not of the quality contracted for and the matter was referred to arbitration in terms of the contracts.

The arbitrator appointed by the Respondents eventually withdrew from the reference and, after notice to the Respondents to appoint another arbitrator and the failure of the latter to comply therewith, the Appellants' arbitrator heard the references *et parte*, and on the 26th September 1916 awarded to the Appellants damages amounting to over Rs. 68,000.

On the 17th November 1916 the Appellants after due notice to the Respondents filed the awards in the High Court. The awards thus became decrees of Court and on the 12th December 1916 the Appellants applied for and obtained an order for execution of the decrees.

The Respondents thereupon instituted the present suit for the above-mentioned relief. The facts are more fully set out in the judgment of the Board.

The suit came on for trial before Ghose, J., who held that the suit was maintainable as framed even though the Plaintiffs did not ask for the awards nor for the execution proceedings to be set aside, but that the appointment of a sole arbitrator was valid and that the awards were made within time and were operative, and he dismissed the suit with costs.

From this judgment and decree the present Respondents appealed to the High Court in its Appellate Jurisdiction and the objection was taken for the first time that the award was bad as having been made by a single arbitrator and the procedure laid down by Bye-Law 15 of the Bye-Laws of the Baled Jute Association, incorporated by the parties in their contract, had not been observed.

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The learned Judges who heard the appeal (Sanderson, C. J. and Richardson, J.), upheld the objection and allowed the appeal.

From this decision the Defendants appealed to His Majesty in Council.

Sir John Simon, K C and Mr S Hyam (with them Mr R L Wright, K C) for the Appellants - The suit is not maintainable as the awards have become decrees and have been executed, and the matter is now in the hands of the Court.

The letters of the 27th and 31st July 1916 amounted to an agreement that the arbitration was to proceed according to the Arbitration Act. Moreover the Respondents having denied the relevance of the Baled Jute Association's contract cannot now rely on its terms. A new agreement was formed by those letters to which sec. 9 of the Indian Arbitration Act is applicable. Moreover cl. 15 applies only to the original appointment.

Mr Dunne, K C for the Respondents - No case of estoppel has been raised before, nor is it correct.

The only two points are —

(1) The appointment of a sole arbitrator was illegal and without jurisdiction.

(2) The time for making the awards had expired and consequently the awards were invalid.

This was a matter of "want of jurisdiction" and is properly the subject-matter of a suit.

Oppenheim & Co. v. Mahomed Haneef Sahib (1).

Mr Hyam replied.

Then LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVENDISH - This is an appeal from a decree of the High Court of Judi-

cature at Port William in Bengal, in its Civil Appellate Jurisdiction, reversing a decree of the same Court in its Ordinary Original Civil Jurisdiction.

The Appellants and Respondents are merchants in Calcutta. By eleven contracts in writing, bearing various dates between September 1913 and December 1914, the Appellants agreed to buy from the Respondents a number of bales of jute of certain specified standards of quality. The contracts were all in a form approved by the Calcutta Baled Jute Association, most of them containing what is called a "home guarantee" (that is to say, a guarantee as to quality, condition and weight on terms contained in the London Jute Association contract), and all of them containing an arbitration clause in the following terms:—

"15 In the event of any dispute whatever arising out of, or in any way relating to, this contract or to its construction or fulfilment between the parties hereto, and whether arising before or after the date of expiration of this contract, the dispute shall be referred to arbitration in accordance with the Rules and Bye-Laws endorsed on this contract. Each party to the dispute shall appoint one arbitrator, and such arbitrators shall have the power to appoint an umpire. Both arbitrators and umpire must be persons engaged in the baled jute trade, and their award shall be final, subject only to right of appeal to the Committee. The Association's Rules and Bye-Laws as printed on the reverse, form part of this contract."

The Rules and Bye-Laws referred to in the above clause include the following:—

Rule 27 "The Committee may, at their discretion, and upon payment of the prescribed fees, hear appeals against

(1) L. R. 49 I. A. 174, 180; s. c. 26 C. W. N. 642 (1922).

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arbitration awards, provided they proceed in conformity with the Bye-Laws of the Association."

Bye-Law 15. "Where one of the parties to a dispute shall fail to appoint an arbitrator within 48 hours after having been called upon to do so, the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator."

The Association referred to in the contract, Rules and Bye-Laws is the Calcutta Baled Jute Association, and the Committee referred to is the Committee of that Association.

The jute, when delivered under the contracts, proved not to be of the specified quality, and a considerable part of it was "invoiced back" to the Appellants and resold by them at lower prices, with the result that the Appellants claimed to have suffered damages to the amount of Rs. 83,623, and demanded payment of this amount from the Respondents. The demand having been refused, the Appellants, in July 1915, appointed Mr. G. C. Allan to act as their arbitrator in the matter in accordance with the contracts, and the Respondents after some delay, viz., in September 1915, appointed Babu Sarat Chander Gossain to act as arbitrator on their behalf. Mr. Allan endeavoured to arrange a meeting with Babu Gossain with a view to entering on the reference, but without success, and ultimately, on the 7th March 1916, Mr. Allan retired from the reference. Thereupon, the Appellants appointed Mr. S. H. Singleton to be an arbitrator in his place, but Mr. Singleton was equally unsuccessful in his efforts to get Babu Gossain to meet him; and after many excuses, the latter, on the 30th June 1916, withdrew from the

matter. On the 27th July 1916, the Appellants wrote to the Respondents a letter referring to the retirement of Babu Sarat Chander Gossain and adding—

"We, therefore, call upon you to appoint an arbitrator to act on your behalf, in the place of Babu Gossain, within 48 hours, failing which we shall apply to the Baled Jute Association to make an appointment in your behalf in accordance with Bye law 15 of the Association."

To this letter, the Respondents replied on the 31st July, as follows—

"Yours of the 27th July, 1916

"The time limit under the Indian Arbitration Act is over, and we regret that we cannot agree to further extension of time. Regarding your suggestion that you will ask the Chairman of the Association to appoint an arbitrator, we beg to point out that the Chairman has no authority to override the provision of the Indian Arbitration Act. Further, we hold that the dispute to settle which this arbitration was agreed upon, does not come under the terms of the Calcutta Baled Jute Association Contract, so the Chairman cannot exercise his rights under the contract."

In answer to this letter, the Appellants wrote to the Respondents as follows.—

"With reference to your letter of the 31st ultimo, we are advised that, neither of our arbitrators, Mr. Allan or Mr. Singleton, nor your arbitrator, Babu S. C. Gossain, having entered upon the reference, the question of the period of making their awards having expired does not arise. We, therefore, call upon you to appoint an arbitrator to act on your behalf in the disputes arising out of our claims under each of the above contracts as set out above, within seven clear days from this date, in default of which we shall appoint our arbitrator, Mr. S. H. Singleton, to act as sole arbitrator in the reference, in accordance with the provisions of the Indian Arbitration Act Section 9 (b).

The Respondents having made no further appointment, the Appellants, on the 4th September, purported to appoint Mr. Singleton to act as sole arbitrator in the

E. D. SASOON & Co v. RAMDUTT RAMKISSEN DAS.

reference in pursuance of the Indian Arbitration Act, sec. 9 (b), and so informed the Respondents. The Respondents declined to recognise this appointment, but Mr Singleton, after giving due notice to the Respondents, proceeded with the reference *ex parte* and ultimately made eleven awards (one under each contract), by which he awarded to the Appellants sums to be paid by the Respondents amounting in all to Rs 68,574. The awards were filed under sec. 11 of the Act, and in pursuance of sec. 15 a warrant was issued directing the Sheriff to levy the amounts awarded by seizure of the Respondents' goods; and this was done.

On the 8th January 1917, the Respondents commenced against the Appellants the present suit, in which they alleged (among other things) that the appointment of Mr Singleton to act as sole arbitrator was illegal and that the awards were void and inoperative, and claimed a declaration to that effect, an injunction restraining the Appellants from withdrawing the sum in the Sheriff's hands and a declaration that the Respondents were entitled to a refund of that sum. There was also a claim for damages which has not been proceeded with. Under a consent order made in the suit on the 12th January 1917, the amount in the Sheriff's hands (Rs. 66,477) was paid to the Defendants, but it was agreed that for the purpose of the suit, the money should be deemed to be still in the Sheriff's hands.

On the hearing of the suit before Mr Justice Ghose on the 7th April 1920, the Defendants contended, first, that having regard to the provisions of secs. 42 and 56 of the Specific Relief Act, and to the fact that the Plaintiffs did not claim to set aside the awards, and the execution proceedings, the suit was not maintainable,

and, secondly, that the awards were not made out of time. The learned Judge overruled the first but he upheld the second contention, and held the awards to be valid, and accordingly dismissed the suit with costs.

On appeal to the High Court at Fort William, the Plaintiffs, while still maintaining that the time for making the awards had expired, relied mainly upon a point which, although open to them upon their pleadings, had not been argued in the Court of first instance. They now contended that the appointment of Mr Singleton as sole arbitrator was illegal on the ground that the scheme of arbitration contained in cl. 15 of the contract, and in the Rules and Bye-Laws annexed, was inconsistent with sec. 9 (b) of the Arbitration Act under which that appointment was made and accordingly that, a "different intention" having been expressed in the contract, sec. 9 (b) did not apply. The learned Judges who heard the appeal (Sir L. Sanderson, C. J., and Richardson, J.) acceded to this contention and held that the appointment of Mr Singleton as sole arbitrator was ineffective, and that the awards were void on that ground. Upon the question whether the awards were out of time, the learned Judges were disposed to take different views, but upon this point they gave no definite decision, as their conclusion upon the other point was sufficient to dispose of the suit. The Court accordingly allowed the appeal and declared the awards void, and with the consent of the parties, ordered the Defendants to repay the above sum of Rs. 68,574 to the Plaintiffs upon an undertaking by the latter to return the amount if the awards should be found valid by this Board. In view of the fact that the point on which the Plaintiffs had succeeded had not been

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taken in the Court below, the parties were ordered to bear their own costs of the original trial. Against this decision the Defendants now appeal to the Board.

On the argument before their Lordships, it was argued, as a preliminary point, that the suit would not lie, as the only remedy open to the Plaintiffs was to move to set aside the awards under sec. 14 of the Arbitration Act, and this could not be done after the awards had been enforced by execution. In their Lordships' opinion, there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award—but where (as here) it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. Nor is the fact that the award has been enforced by execution under sec. 15 a bar to a suit to have it declared void and for consequential relief. Sec. 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree.

A suggestion was also made that the suit was open to objection under secs. 42 and 56 of the Specific Relief Act, on the ground that no relief was asked other than a declaration, but in their Lordships' opinion this is not the case. The plaintiff asked not only for a declaration, but also for an injunction, repayment of the amount levied, and other relief. Further, it is difficult to see how any technical objection to the jurisdiction can now be maintained, having regard to the fact that the order appealed from was to some extent a consent order, and contemplated that the question of the validity of the

awards should be finally determined by this Board.

Turning now to the substance of the case, the main question is whether the submission to arbitration contained an expression of a "different intention" which had the effect of excluding the operation of sec. 9 (b) of the Arbitration Act. In their Lordships' opinion, this question must be answered in the affirmative. Each of the contracts provides that any dispute shall be referred to arbitration

in accordance with the Rules and Bye-Laws endorsed on this contract," and that such Rules and Bye-Laws shall form part of the contract, and Bye-Law 15 is to the effect that, where one of the parties to a dispute fails to appoint an arbitrator within the time limited, "the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator." The contract further provides that both arbitrators and umpire must be persons engaged in the Baled Jute Trade, and that their award shall be final, subject only to a right of appeal to the Committee of the Association. The effect of these provisions is that on a failure by either party to appoint an arbitrator—which includes (in their Lordships' opinion) a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed—the appointment is to be made by the Chairman on behalf of the defaulting party, so that in every such case there are to be two arbitrators, one appointed by one of the parties, and the other by the Chairman on behalf of the other party. Both are to be men engaged in the trade, and the decision of these skilled men or their umpire is subject to an appeal to the Committee of the Association. It is to

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such a domestic tribunal, so constituted, that the parties have agreed to submit their differences; and this agreement appears to their Lordships to be quite inconsistent with sec 9 (b) of the Act, under which, if it comes into operation, the decision will be made by a single arbitrator chosen by one party only. Further it appears to be at least doubtful whether, if the scheme of the Bye-Laws were departed from by the application of sec. 9 (b), the right of appeal to the Committee would continue to be effective. Upon the whole, therefore, their Lordships agree on this point with the judgment of the Appellate Court.

It was contended on behalf of the Appellants that the Respondents' letter of the 31st July 1916, above quoted, had the effect of excluding an appointment by the Chairman and evidencing a new agreement to which the Arbitration Act, including sec. 9 (b), would apply, but in their Lordships' opinion, that letter cannot have this effect. By the letter, the Respondents contended that the time for making the award had expired, and that the Chairman had no authority to override the provisions of the Arbitration Act in that respect; and also that the dispute did not come under the terms of the contract at all. They may have been mistaken in both these contentions; but there was clearly no intention on their part to set up any new form of arbitration different from that to which they had agreed. The Appellants, erroneously as it now appears, accepted the Respondents' view that the Chairman had no authority to appoint, and had resort to sec. 9 (b) of the Act. In this, unfortunately, they were wrong; and they must now accept the consequences of their action.

As the above considerations dispose of

the appeal, it is unnecessary to consider the question raised as to the awards being out of time. Their Lordships will accordingly humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Solicitors Messrs Orr Dugan & Co
for the Appellants

Solicitors Messrs H. W. Bor & Co
for the Respondents

G. D. M.

(ORDINARY ORIGINAL CIVIL JURISDICTION.)

GREAVES, J.	}	GLADSTONE WYLLIE &
1923,		Co.
18, April.		v.
		JOOSUB PEER MAHOMED
		& Co.

Assignee of an award filed in Court, of an award made under Civil Procedure Code (Act V of 1908), Or. 21, r. 16—Indian Arbitration Act (IX of 1899) s. 17

A, having obtained an award against B, and filed it in Court, assigned the same to C. C applied for execution of the award against B.

Held—That C, the assignee, was entitled to execute it against B under Or. 21, r. 16 of the Civil Procedure Code, 1908.

Held also—That when under the provisions of the Indian Arbitration Act, sec 15, the legislature provided that an award on being filed was enforceable as if it were a decree of the Court, it intended that all the provisions of the Code of Civil Procedure applicable to the execution of decrees should apply to an award so filed.

LOUIS DREYFUS & Co v PURUSOTTOM DAS NARAIN DAS (1) referred to

TRIBHJ WANDAS KALIANDAS GAJAR v JIBANCHAND (1), BALNATH v AHMED

(1) I. L. R. 35 Bom. 196 at p. 198 (1910).

(4) I. L. R. 47 Cal. 29 at p. 38 (1919).

GLADSTONE WYLLIE & Co. r JOOSUB PEER MAHOMED & Co.

MUSSAH (2) and E. D. SASSOON r. RAMDUTT RAMKISSENDAS (3) considered.

The facts of the case will appear from the judgment.

Mr. J. K. Roy for Messrs. Joosub Peer Mahomed & Co.—The award cannot be executed under the provisions of Civil Procedure Code by the assignee. He must bring a separate suit. Or. 21, r. 16 does not apply. The award when filed though enforceable as if it were a decree is not a decree.

Relies on *Tribhuwandas Kaliandas Gajar v. Jibanchand* (1), *Bapnath v. Ahmed Mussap* (2) and *E. D. Sassoon v. Ramdutt Ramkissendas* (3).

Mr. J. N. Chaudhuri for the assignee (applicant) refers to *Louis Dreyfus & Co. v. Purusottom Das Nayandass* (4).

THE JUDGMENT OF THE COURT was as follows:—

GRIEVES, J.—This is an application by the assignees of an award for the execution of the award. The award was made in favour of Messrs. Gladstone Wyllie & Co. It was duly filed and was therefore capable of execution as a decree under the provision of sec. 15 of the Indian Arbitration Act. In execution thereof Messrs. Gladstone Wyllie & Co. attached certain properties of Messrs. Joosub Peer Mahomed & Co.

The attachment was ultimately withdrawn upon certain terms which are set out in the copy of a letter addressed by Messrs. Gladstone Wyllie & Co. to Messrs. Joosub Peer Mahomed. By these terms the amount of the award was payable in certain sums therein men-

tioned and, in default of any instalment not being paid, Messrs. Gladstone Wyllie & Co. reserved to themselves the right to proceed with the execution proceedings for the balance of the full amount due under the award. Certain payments were made in pursuance of this arrangement and ultimately, I think sometime in January or February of this year, the award was assigned by Messrs. Gladstone Wyllie & Co. to the present applicants who now seek to enforce it for the balance of the whole amount of the award.

Three points are raised on behalf of Messrs. Joosub Peer Mahomed & Co. First, it is said that the assignment is not proved. Secondly, it is said that the arrangement is not correctly set forth, and thirdly, certain points arising on the Civil Procedure Code are relied on as reasons why the order sought should not be made.

So far as the first point is concerned it seems to me that upon the evidence before me the assignment is amply proved and, so far as the second point is concerned, I am satisfied that the arrangement put forward by the present applicants is in fact the arrangement that was arrived at between Messrs. Gladstone Wyllie & Co. and Messrs. Joosub Peer Mahomed as terms upon which the attachment should be withdrawn. The third point remains. What is said is this—that the provisions of Or. 21, r. 16, are not applicable in a matter of this nature inasmuch as this is not the Court which can be said to have passed the decree, and reliance is placed upon the case of *Tribhuwandas Kaliandas Gajar v. Jibanchand* (1), where the learned Chief Justice of Bombay refused to grant a stay under Or. 21, r. 29, in respect of the execution of an award filed in Court, on the ground that the appli-

(1) I. L. R., 55 Bom. 116 at p. 198 (1910).

(1) I. L. R. 35 Bom. 196 at p. 198 (1910).

(2) I. L. R. 40 Cal. 219 at p. 230 s. c. 17 C. W. N. 395 (1912).

(3) I. L. R. 50 Cal. 1 at p. 9 s. c. 27 C. W. N. 660 (P. C.) (1922).

(4) I. L. R. 47 Cal. 29 at p. 33 (1919).

GLADSTONE WGLLIE & Co. v JOOSUB PEER MAHOMED & Co.

cant was not the holder of a decree of Court and was therefore not entitled to a stay under the provision of order 21, r. 29. Reliance was further placed on a passage in *Baynath v Ahmed Mussaji* (2), where Sir Lawrence Jenkins states that when an award is filed the result is not that there is a suit in which a decree has been passed but that there is an award which shall be enforceable as though it were a decree. And lastly, reliance was placed on the case of *E. D. Sassoon v. Ramdutt Ramkissendas* (3), where the present Lord Chancellor, in delivering the opinion of the Judicial Committee, stated that section 15 of the Arbitration Act does not enact that the award when filed is to be deemed to be a decree of the Court but only that it is to be enforceable as if it were a decree.

As against this, I was referred to the provisions of Or. 21, r. 50, sub-sec. 2 of the Civil Procedure Code and to a decision in *Louis Dreyfus & Co v Painsottom Datt Naraindas* (4), where the learned Judge refused to accede to the argument that he could not go into the matters to which Or. 21, r. 50, sub-cl. 2 relates on the ground that the award when filed was not a decree for the purpose of that sub-section, and I was further referred to a decision in Chambers by myself in which I apparently arrived at the same conclusion.

On behalf of Messrs Joosub Peer Mahomed & Co, it is said that although the decision under Or. 21, r. 50, sub-cl. 2, may be correct, it does not cover a case arising under Or. 21, r. 16, which does not relate to actual proceedings for

enforcement of a decree as do the provisions of Or. 21, r. 50, sub-cl. 2. I am afraid I cannot assent to this argument. I think that when under the provisions of the Indian Arbitration Act (sec. 15) the legislature provided that an award on being filed was enforceable as if it were a decree of the Court, it intended that all the provisions of the Code of Civil Procedure applicable to the execution of decrees should apply to an award so filed, and if it is necessary to say which is the Court which passed the decree within the meaning of Or. 21, r. 16, I think that for purposes of execution after the award is filed and is capable of execution as a decree this Court must be deemed to be the Court which passed the decree for the purposes of these sections in the Civil Procedure Code.

The result is that the objections raised on behalf of Joosub Peer Mahomed & Co, in my opinion fail and I must make the order that is sought. Let a warrant issue. The applicant is entitled to the costs of this application. I stay execution for a week. If Joosub Peer Mahomed & Co pay in the amount of the award by then, there will be liberty to the applicants to withdraw same on giving security.

Messrs A. C. Mitter and Basu, Solicitors for the Applicant J. Gridharilal.

Messrs. N. C. Baral and Pyne, Solicitors for Messrs Joosub Peer Mahomed & Co.

P. K. C.

(2) I. L. R. 40 Cal. 219 at p. 280 : s. c. 17 C. W. N. 295 (1912).

(3) I. L. R. 50 Cal. 1 at p. 9 : s. c. 27 C. W. N. 660 (P. C.) (1922).

(4) I. L. R. 47 Cal. 29 at p. 32 (1919).

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM APPELLATE DECREE**

No. 689 OF 1921.

C. C. GHOSE, J.

PANTON, J.

1923,

Heard,

29, January.

Judgment,

20, March.

SANTALA BEWA and

ors., Defendants,

Appellants,

v.

BADASWARI DAS,

Plaintiff, Respondent.

Rajbansis, if governed by ordinary Hindu law—Hindu Widows Re-marriage Act (XV of 1856), sec. 2—Re-marriage of Rajbansi widow, if entails forfeiture of her late husband's estate.

Held—That the parties to this case, who were Rajbansis, were governed by the ordinary Hindu law, and one of them, a widow, who re-married, forfeited her former husband's estate, even though there was a custom of re-marriage in her caste.

The second section of Act XI of 1856 (Hindu Widows Re-Marriage Act) applies not only to widows who could not re-marry before the passing of the Act, but also to those who were not so precluded from re-marrying either by law or custom.

NITYA MADHAB v. SRINATH (7),
RASHUL JEHAN BEGUM v. RAM SARAN
SINGH (8), MURUGAYI v. VEERAMAKALI (3)
and several other cases referred to and re-
lied on.

This was an appeal preferred on the 14th of March 1921, against the decree of S. W. Goode, Esq., Deputy Commissioner of Zillah Darjeeling, dated the 5th of December 1920, reversing the decree of B. A. Hollow, Esq., Munsif of Siliguri, dated the 4th of August 1920.

The facts of the case are briefly as follows.—One Lalua, a Rajbansi, who held a six pies share in a certain *jote*, died leaving a daughter and a widow. On

Lalua's death his widow inherited the share of Lalua in the said *jote*. Thereafter the widow married again, according to the custom of the Rajbansis, and subsequently sold off the said six pies share in the *jote*. The daughter thereafter brought the present suit for recovery of possession of the said six pies share on the ground that the widow by her re-marriage had forfeited her right to the said share and the vendees by their purchase had acquired no right and title to the same. The Munsif held that the Rajbansis were not Hindus and that amongst Rajbansis re-marriage of a widow did not entail forfeiture of her former husband's property. He accordingly dismissed the suit. On appeal the Deputy Commissioner of Darjeeling held that the widow had forfeited the estate inherited from her first husband by her re-marriage and decreed the suit. The Defendants thereupon preferred the present second appeal to the High Court.

Babu Tanakeswar Pal Chowdhury for the Appellants.

Babu Mritunjoy Chattopadhyaya for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Defendants are the Appellants before us and the facts of the suit, out of which this appeal has arisen are, shortly stated, as follows.—

The Plaintiff is the daughter of one Lalua Singh, who held a six pies share in a certain *jote*. The Defendant No. 1, Santala Bewa, is Lalua's second wife. On Lalua's death she inherited the share of Lalua in the said *jote*. Thereafter the Defendant No. 1 married again, according to the custom of the Rajbansis and subsequently she sold the said six pies share in the *jote* to Defendant No. 2, who again sold the same to Defendant No. 3.

(3) I. L. R. 1 Mad. 226 (1877).

(7) S. C. L. J. 542 (1907).

(8) I. L. R. 22 Cal 589 (1895).

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The Plaintiff has brought the present suit for recovery of possession of the said six pies share on the ground that the Defendant No. 1 by her re-marriage had forfeited her right to the said share and that the Defendants Nos. 2 and 3 by their purchase had acquired no right and title to the same. The Defendant No. 1 in her defence stated that there was a special custom among the Rajbansis that a widow did not forfeit her right to her husband's property by her re-marriage.

The Munsif held that the Rajbansis were not Hindus and that the parties were governed not by Hindu law but by custom, and that among the Rajbansis a widow could keep a Dangua, and by keeping one she was not divested of her former husband's property. He accordingly held that the Defendant No. 1 did not forfeit her right to her first husband's property by her re-marriage and accordingly dismissed the suit.

The Plaintiff appealed to the Deputy Commissioner of Darjeeling and the latter held that the special custom referred to by the Munsif had not been satisfactorily established. It was also held by the learned Deputy Commissioner that the Rajbansis were governed by the ordinary Hindu law and that, therefore, the Defendant No. 1 forfeited the estate inherited from her first husband by her re-marriage and consequently the Defendants Nos. 2 and 3 acquired no title to the property in suit by purchase from the Defendant No. 1.

On behalf of the Appellants it has been contended before us that the Lower Appellate Court was wrong in holding that the Rajbansis were governed by the ordinary Hindu law, and, in the second place, that there was a difference between a widow among the Rajbansis re-marrying and keeping a Dangua according to the

custom which prevails among the Rajbansis, and that the fact of the Defendant No. 1, having kept a Dangua did not entail any forfeiture of the interest taken by her in her first husband's estate.

As regards the first contention that the Rajbansis are not governed by the ordinary Hindu law, reliance has been placed upon the decision of the Privy Council in the case of *Phanindra Deb Raikat v. Rajeshwar Das* (1). The question of acknowledgment and recognition of Non-Hindus as Hindus arose in the following manner in that case. The dispute related to the succession of a zaminderi called the Baikantpur Raj and the question their Lordships had to determine was as to the validity of the adoption of the Defendant in that case as a son to the deceased zaminder. It was found that the family of Cooch-Behar, to which the parties belonged, originally belonged to the Cooch-Behar aboriginal tribe, which had abandoned their old customs, called themselves Rajbansi Kshatriyas, adopted Hinduism as their religion and claimed a divine ancestry for their chief, who traced his pedigree to the god Shiva. Upon this, the High Court presumed that the parties were Hindus and cast upon the Plaintiff, who was a rival claimant, the burden of proving the invalidity of the Defendant's adoption.

On a review of their family history, their Lordships held that it showed "that although they affected to be Hindus, they had retained and were governed by family customs, which as regards some matters, were at variance with the Hindu law." They therefore held that the family was subject only to customary law and that as no custom in favour of adoption had been proved, the Defendant lost

(1) L. R. 12 I. A. 72; s. c. I, L. R. 11 Cal. 443 (1885).

SANTALA BEWA v. BADASWARI DAS.

his estate, though he held a deed of adoption from the deceased zeminder, such deed according to the opinion of their Lordships failing to convey the property to a *persona designata*. In that case, the ratio of the decision was that the process of conversion into Hinduism was incomplete when the case arose. In the case of *Ramdas v Chandra Dass* (2) where the parties were Rajbansis, the Court held that the process of conversion into Hinduism was complete and that the ordinary Hindu law applied to the parties.

The distinction between the two cases referred to above was this, that while in the one case the origin and history of the family was known, in the other case it was not, and there being nothing to show that the conversion into Hinduism in the latter case was incomplete, the Court assumed the ostensible state to be the real state and held the parties to be Hindus bound by the *lex loci*, adding "it must be taken that they have adopted in its entirety one form or other of Hindu law, and it being uncertain which form they adopted, it is not unreasonable to infer that they adopted the form which prevailed in the locality."

In his *Tribes and Castes of Bengal*, Vol. I, at p. 491, Sir Herbert Risley observed as follows:—"The transformation of the Kochh into the Rajbansi, the name by which they are now known in Rangpur, Jalpaiguri and Kuch or Koch Behar, is a singular illustration of the influence exercised by fiction in the making of caste. As described by Buchanan at the beginning of the century and by Hudson some fifty years ago, the Koch tribe was unquestionably Non-Aryan and Non-Hindu. Now the great majority of the Koch inhabitants of Northern Bengal invariably describe themselves as Rajbansis or

Bhanga-Kshatriyas—a designation which enables them to pose as an outlying branch of the Kshatriyas who fled to these remote districts in order to escape from the wrath of Parsu-Ram. They claim descent from Raja Dasarath, father of Rama; they keep Brahmans, imitate the Brahminical ritual in their marriage ceremony and have begun to adopt the Brahminical system of *gotras*. In respect of this last point they are now in a curious state of transition, as they have all hit upon the same *gotra* (Kasyapa), and thus habitually transgress the primary rule of the Brahminical system which absolutely prohibits marriage within the *gotra*. But for this defect in their connubial arrangements—a defect which will probably be corrected in a generation or two as they and their *purohits* rise in intelligence—there would be nothing in their customs to distinguish them from the Aryan Hindus although there has been no mixture of blood and they remain thoroughly Koch under the name of Rajbansis. Although there is no historical foundation for the claim of the Rajbansis to be a provincial variety of Kshatriyas, it is a singular fact that the title Rajbansi serves much the same purpose for the lower strata of the Hindu population of Northern Bengal as the title Rajput does for the land-holding classes of dubious origin all over India. The one term like the other, serves as the sonorous designation of a large and heterogeneous group bound together by the common desire of social distinction."

There are three kinds of marriage prevalent amongst the Rajbansis, *viz.*, (1) Gandharva, (2) Brahma and (3) widow marriage. Widow marriage amongst Rajbansis takes place without any ceremonies whatever. The peculiar circumstances under which widows are received

(2) I. L. R. 20 Cal. 409 (1892).

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by men as wives, amongst Rajbansis, have given rise to different names by which such women are known, such as, Dangua wife, Dhoka wife, Pashua wife. Dang means a stick or a blow dealt with a stick, when a widow lives by herself and a man goes to the house with a dang or stick in his hand and strikes a blow with it on the roof of the house, and so enters in and takes possession of the woman such woman is called a Dangua wife (See Hunter's Statistical Account of Bengal, Vol. X, p 377).

In this case the lower Appellate Court has observed that it is a matter of common knowledge that the Rajbansis have assumed the sacred thread and have termed themselves Chetries and that in these circumstances it is not understood why it should be held that they are not governed by the ordinary Hindu law, although there may be a custom prevailing amongst them which renders re-marriage of widow permissible.

In our opinion the parties to this particular case are governed by the ordinary Hindu law and in that view of the matter the question arises whether having regard to the provisions of Act XV of 1856, a Rajbansi widow after re-marriage forfeits her former husband's estate, even though there is a custom of re-marriage in her caste. Now, the second section of Act XV of 1856 contemplates the case of any widow, which may include even a widow of a class or caste in which such marriages are allowed or permitted by caste custom, and the scope of this section has been the subject of controversy in many cases. [See *Murugayi v. Pccramakali* (3), *Vithu v. Govinda* (4), *Pan-*

chappa v. Sangunbasawa (5) and *Matungini v. Ram Ruttun* (6)]

The consensus of opinion, so far as this Court and the Madras and Bombay High Courts are concerned, is that the second section of Act XV of 1856 applies not only to widows who could not re-marry before the passing of the Act, but also to those who were not so precluded from re-marrying, either by law or custom. [See *Nitya Madhar v. S. Srinath* (7)]. In the case of *Rashul Jehan Begum v. Ram Saran Singh* (8), it was held that a Hindu widow on re-marriage forfeits the estate inherited from her former husband, although according to the custom prevailing in her caste re-marriage is permissible. Much support is lent to this view by the fact that in almost all castes in which a re-marriage is allowed by custom, such marriages are followed by forfeiture of the first husband's estate. In the case of *Gouri Charan Patni v. Sita Patni* (9), it was held that a Hindu widow after re-marriage forfeits her deceased husband's estate even though there is a custom of re-marriage in her caste. We are not unmindful of the fact that a different view has been taken by the Allahabad High Court [See *Khuddo v. Durga Pershad* (10) and *Mula v. Partab* (11)]. But we think we are bound by the decisions of this Court to which reference has already been made.

The result, therefore, is that this appeal fails and must be dismissed with costs.

J N R *Appeal dismissed with costs.*

(5) I. L. R. 24 Bom. 89 (1899).

(6) I. L. R. 19 Cal. 289 (1891).

(7) 8 C. L. J. 542 (1907).

(8) I. L. R. 22 Cal. 589 (1895).

(9) 14 C. W. N. 346 (1909).

(10) I. L. R. 29 All. 122 (1906).

(11) I. L. R. 32 All. 489 (1910).

(3) I. L. R. 1 Mad. 226 (1877).

(4) I. L. R. 23 Bom. 321 (F. B.) (1896).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1378 of 1920.

KULADAPRASAD CHAT-

TERJEE and ors.,

Defendants, Appellants,

v.

KHUDIRAM MISRA and

anr., Plaintiffs,

Respondents.

MOOKERJEE, J.

CHOTZNER, J.

1922,

13, June.

Civil Procedure Code (Act V of 1908), Or. II, r. 2—Possession, decree for—Symbolical possession, delivery of, though judgment-debtor in actual possession—Suit for recovery of mesne profits up to delivery of symbolical possession—Omission to claim mesne profits accrued before suit, but after delivery of possession, if bars fresh suit for same—Test—Identity of cause of action

Plaintiffs in execution of a decree obtained symbolical possession through Court and instituted a suit for recovery of mesne profits from the date of the institution of the suit to the date of delivery of possession. After this suit was decreed, Plaintiffs instituted another suit for recovery of mesne profits for the period subsequent to the date of delivery of symbolical possession.

Held—That the claim for mesne profits for the period subsequent to the delivery of symbolical possession up to the institution of the previous suit was not barred by Or. 2, r. 2, of the Civil Procedure Code. The test to be applied was whether the claim in the subsequent suit was based on the cause of action which was the foundation of the claim in the previous suit. The claims for mesne profits prior and subsequent to the delivery of possession could not be deemed to be based on an identical cause of action, because the delivery of symbolical possession was the line of demarcation between possession antecedent and possession subsequent, whereby the adverse possession of the judgment-debtor was interrupted, this being the case, even where the decree-holder was entitled to actual possession.

THAKUR SRI SRI RADHAKRISHNA CHANDERJI v. RAM BAHADUR (1), JUGGOBANDHU MUKERJEE v. RAM CHANDRA BYSACK (2) and other cases referred to

MAHAMMAD HAFIZ v. MAHAMMAD ZAKARIA (7) distinguished

This was an appeal preferred on the 28th of May 1920, against the decree of Babu Aswini Kumar Das Gupta, Subordinate Judge of Asansole in Zilla Burdwan, dated the 28th of February 1920, modifying the decree of Babu Nalini Kanta Bose, Munsif Asansole, dated the 19th of March 1919.

The material facts will appear from the judgment.

Babus Sarat Chandra Roy Choudhuri and Gopendranath Das for the Appellants.

Babu Pyari Mohon Chatterjee (for Babu Bankim Chandra Mukerjee) for the Respondents.

The JUDGMENT OF THE COURT was as follows —

This is an appeal by the Defendants in a suit for recovery of mesne profits. The only question in controversy is whether the suit is barred under the provisions of Or. 2, r. 2 of the Civil Procedure Code of 1908. The facts material for the determination of this question may be briefly recited. The Plaintiffs instituted a suit in 1913 against the Defendants for recovery of possession of the disputed land with mesne profits upon establishment of title. That suit was decreed on the 22nd May 1914. The Plaintiffs became entitled to recover possession of the land and also to realize the mesne profits which had accrued due antecedent to the suit. In July 1914 the Plaintiffs executed the decree and obtained symbolical possession through Court. On the 12th February

(1) 22 O. W. N. 330 (1917).

(2) 1. L. R. 5 Cal. 584 (F. B.) (1880).

(7) L. R. 49 I. A. 9, s. c. 26 O. W. N. 297 (1921).

KULADAPRASAD CHATTERJEE *v.* KHUDIRAM MISRA.

1917, the Plaintiffs instituted a suit against the Defendants for recovery of mesne profits subsequent to the institution of the suit and up to the date of delivery of possession. This suit was decreed. On the 20th April 1918 the Plaintiffs commenced this litigation against the Defendants for recovery of mesne profits from the date of delivery of symbolical possession up to the 13th April, 1918. In these circumstances the question arises whether the provisions of Or. 2, r. 2 operate as a bar in respect of that portion of the claim for mesne profits which had accrued due subsequent to the delivery of symbolical possession and before the institution of the first suit for mesne profits. The Courts below have answered the question in favour of the Plaintiffs. On behalf of the Defendants it has been maintained in this Court that the mesne profits claimed in this suit for the period subsequent to the delivery of symbolical possession and prior to the date of the institution of this first suit for mesne profits could and should have been claimed in that suit. To test the validity of this contention we have to determine whether this portion of the claim is based on the cause of action which was the foundation of the claim for mesne profits for the period antecedent to the delivery of symbolical possession. On behalf of the Plaintiffs-Respondents it has been maintained that delivery of possession operated to interrupt the prior adverse possession and that "the continuance in occupation by the Defendants gave rise to a new cause of action; in other words, that the delivery of symbolical possession is the line of demarcation between possession antecedent and possession subsequent. This contention is supported by the decision of the Judicial Committee in the case of *Thakur Sri Sri*

Radhakrishna Chanderji v. Ram Bahadur (1). In that case, Lord Sumner pointed out that when a decree-holder has received formal possession as usual after due proclamation by beat of drum, adverse possession of the judgment-debtor is interrupted. In support of this view reference was made to the decision of a Full Bench of this Court in the case of *Juggobandhu Mukerjee v. Ram Chandra Bysack* (2) which was treated as an authority for the proposition that symbolical possession "availed to dispossess the judgment-debtor sufficiently because they were parties to the proceeding in which delivery was ordered and given. Lord Sumner added that this decision was one of long standing and had been followed for many years and he saw no reason to question or to hold that this rule of procedure should now be altered. In the case before us, no doubt, the decree-holders were entitled to actual possession. But this circumstance does not make any difference in the position of the parties as is clear from the decision in *Hari Mohan Saha v. Babur Ali* (3), where it was pointed out, on the authority of the earlier decisions in *Lohessur Koer v. Puri-gun Roy* (4) and *Shama Charan v. Madhub Chandra* (5), that though the judgment-debtor was actually in possession and the decree-holder was consequently entitled to take not merely formal possession but actual possession, yet the formal possession given to the decree-holders was in the eye of law sufficient possession as against the judgment-debtor. This view was also adopted in the case of *Mir Wazir-uddin v. Deoki Nandan* (6). We must

(1) 22 C. W. N. 880 (1917).

(2) I. L. R. 5 Cal. 584 (F. B.) (1880).

(3) I. L. R. 24 Cal. 715 (1897).

(4) I. L. R. 7 Cal. 418 (1881).

(5) I. L. R. 11 Cal. 98 (1884).

(6) 6 C. L. J. 472 (1907).

KULADAPRASAD CHATTERJEE v KHUDIRAM MISRA.

consequently hold that the claim for mesne profits subsequent to the delivery of possession cannot be deemed to be based on an identical cause of action. This serves to distinguish the decision of the Judicial Committee in the case of *Mahammad Hafiz v Mahammad Zakaria* (7). In that case, a suit was instituted for recovery of interest due on a mortgage. A subsequent suit was instituted for recovery of the principal and interest. It was ruled that the claim for principal was barred under Or. 2, r. 2 as the claim had accrued due before the institution of the prior suit and as the claim for principal and interest arose out of the same cause of action they should have been united in the previous suit. We may point out that the rule is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the Plaintiff may have against the Defendant. This is supported by the decisions of the Judicial Committee in *Raja of Pithapur v Venkata Mahipalisurja* (8) and *Chand Koer v Partab Singh* (9). The test is whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit. If the answer be in the affirmative the subsequent suit is not barred, even though it might have been open to the Plaintiff to unite the cause of action with the cause of action in the prior suit, *Mullik v Sheoprasad* (10). We hold accordingly that the Courts below have correctly adopted the view that this suit is not barred under

Or. 2, r. 2, C P C. It has not been argued before us that the proper remedy of the Plaintiffs is not by a suit for mesne profits but by a suit for recovery of possession. We need not consequently express an opinion upon that question.

The result is that this appeal is dismissed with costs.

J N R

Appeal dismissed

(CRIMINAL REVISIONAL JURISDICTION.)

REV. No. 908 OF 1922.

C. C. GHOSE, J.	NATABAR GHOSE,
CHOTZNER, J.	Accused, Petitioner,
1922,	v.
21, December.	ADYANATH BISWAS,
	Complainant,
	Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 540, examination of witnesses after arguments of both sides heard, propriety of.

In a certain case, after both sides had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judgment, two witnesses who were named by the prosecution were examined before the Magistrate, the Magistrate having exercised his powers under sec. 540, Cr P. C. :

Held—That the accused can rightly complain that the procedure adopted was unjustifiable. The action of the Magistrate in summoning the two witnesses cannot be justified although the terms of sec. 540, Cr P. C. are very wide.

This was a Rule praying that the order of the Sub-Deputy Magistrate of Kushtia (Mr. A Sen), dated the 8th day of August 1922, convicting the Petitioner under sec. 408, I. P. C. and sentencing him to undergo rigorous imprisonment for six weeks and also to pay a fine of Rs. 50, in default to suffer further rigorous imprisonment for four weeks, an appeal from which

(7) L. R. 49 I. A. 9: s. c. 26 C. W. N. 297 (1921).

(8) L. R. 12 I. A. 116: s. c. I. L. R. 8 Mad. 520 (1885).

(9) L. R. 15 I. A. 156: s. c. I. L. R. 16 Cal. 98 (1888).

(10) I. L. R. 23 Cal. 331.

NATABAR GHOSE & ADYANATH BISWAS.

order was dismissed by the Deputy Magistrate of Krishnagar (Babu Jotindra Mohan Guha), on the 28th August 1922, may be set aside.

The facts of the case are briefly as follows :—The accused was tried under sec. 408, I. P. C., and after a protracted trial the prosecution closed its case on the 9th June 1922, and the defence on the 14th July 1922. Arguments on behalf of the prosecution were heard on the 18th July and the 25th July was fixed for delivery of judgment. On the 28th July 1922 after both sides had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judgment, two witnesses who were named by the prosecution were examined before the Magistrate and the Petitioner was eventually convicted. The accused Petitioner thereupon obtained the present Rule.

Babus Dasarathi Sanyal and Diwyendia Krishna Dutta for the Petitioner.

Babus Monmatha Nath Mukherjee and Pannalal Chatterjee for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

In this case a complaint was lodged against the accused Natabar Ghose on the 27th October 1921 under sec. 408, I. P. C. From the order-sheet which has been placed before us by Mr Sanyal who appeared on behalf of the accused, it is clear that there was a protracted hearing of the case before the Sub-Deputy Magistrate of Kushtia. The case for the prosecution was not closed till the 9th June 1922 and the case for the defence was not closed till the 14th July 1922. Arguments on behalf of the prosecution were heard on the 18th July and the 25th July 1922 was fixed as the date for delivery of

judgment. It appears that on the 28th July 1922 after both sides had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judgment, two witnesses who were named by the prosecution were examined before the Magistrate—the Magistrate having exercised his powers under sec. 540, Cr. P. C. The accused rightly complains before us that the procedure which was adopted by the Magistrate was one which was entirely unjustifiable. It is pointed out on behalf of the accused that although the terms of sec. 540 are very wide, the wider the power the more cautious should be the exercise of discretion on the part of the Magistrate. There is a great deal of force in this argument and we think that the action of the Magistrate in summoning the two witnesses on the 28th July 1922 cannot be justified on any view of the matter.

The conviction of the Petitioner under sec. 408 and the sentence imposed on him must, therefore, be set aside and the case against the accused must be retried. Such retrial is to be held before a Magistrate other than the Sub-Deputy Magistrate who originally tried this case or by such Magistrate as may be nominated by the District Magistrate.

The accused will remain on the same bail till the disposal of the case by the new Magistrate.

J. N. R. *Rule made absolute*

PRIVY COUNCIL.

[APPEAL FROM MADRAS]

LORD BUCKMASTER.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS

LORD SALVESSEN.

1922,

Heard, 27 and

30, October.

Judgment,

24, November. J

P. M. SADASIVA

MUDALIAR and

ors, Appellants,

v.

A. R. HAJEE

FAKEER MAHO-

MED SAIT & SONS,

Respondents

Hindu law—Mitakshara—Madras Province—Adult members of joint family incurring liability in connection with business not joint family business—Joint family property belonging to them, if bound—Minor member's liability

In the Madras Presidency, members of a joint Hindu family cannot escape from liability to perform contracts entered into by them on the ground that their contracts were not such as would bind the joint family and that they had no property other than that which was the property of the joint family. Decrees made against such members upon such contracts can be executed against their interests in the joint family property.

A contract purporting to have been executed by an adult member of a joint Hindu family as the guardian of a minor member does not bind the minor or his interest in the joint family property, when the business for the purpose of which the contract was entered into was not a business of the joint family.

This was an appeal from a decree of the High Court, Madras, dated the 25th March 1919, varying a decree of the Subordinate Judge of the Nilgiris, dated 11th August 1917.

The suit out of which the appeal arose was instituted by the Plaintiffs (Respondents) to recover from the Defendants (Appellants) a sum of Rs. 77,303 on the

basis of an agreement between the parties and a promissory note.

The Subordinate Judge passed a decree in favour of the Plaintiffs for Rs. 20,000 and interest and on appeal to the High Court that decree was varied and a further sum of Rs. 30,000 and interest was awarded to the Plaintiffs.

The facts of the case are fully set out in the judgment of the Judicial Committee.

Messrs. Clauson, K. C. and Dubé for the Appellants.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Respondents.

Then LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE—This is an appeal from a decree, dated the 25th March 1919, of the High Court at Madras, which varied in the Plaintiffs' favour a decree, dated the 11th August 1917, of the Subordinate Judge of the Nilgiris in Civil Suit No. 67 of 1916. The suit relates to a contract which was made and to be performed in the Presidency of Madras.

The Defendants, who are the Appellants here, are P. M. Sadasiva Mudaliar, Defendant No. 1, P. M. Gurusamy Mudaliar, Defendant No. 2, and P. M. Pasupathy Mudaliar, Defendant No. 3. They and their youngest brother, who is a minor and is not a party to this suit, constitute a joint Hindu family. When this suit was instituted on the 4th October 1916, Defendant No. 1 was 40 years of age, Defendant No. 2 was 35 years of age, and Defendant No. 3 was 22 years old. They were sons of P. Marudachala Mudaliar, who died in 1906. This joint family carried on business as owners of lands and house property in the Nilgiri District, and in the purchase and sale of hides, and as commission agents for the sale of beer brewed at the Rose and Crown Brewery,

P. M. SADASIVA MUDALIAR v. A. R. HAJEE FAKKEER MAHOMED SAIT & SONS.

of which brewery the father had been a director. In the office of director of that brewery the father was on his death succeeded by his son the Defendant No 1. The joint family business was carried on under the names of P M Marudachala Mudaliar and Sons and P M Sadasiva Mudaliar and Brothers. In the father's life-time he had acted as the manager for the joint family with the assistance of his eldest son, and since the father's death the Defendant No 1, with the assistance of the Defendant No 2, managed the family business.

On the 8th April 1915, the Plaintiff firm obtained against persons who constituted the firm of Rangayya Goundan and Company a decree for sale of two breweries, known as the Nilgiri Brewery of Ootacamund, and the Castle Brewery of Aruvanghat, in default of payment of Rs 1,81,429 odd, interest thereon and costs. The Plaintiff firm, claiming that more was due to them in that suit appealed to the High Court. While that appeal was pending, these Defendants Nos 1 and 2, on the 6th December 1915, agreed (Ex. H) with Rangayya Goundan, one of the judgment-debtors of the 8th April 1915, to purchase the two breweries, free from all encumbrances, for a sum of Rs 3,70,000, of which Rs 1,83,000 were to be paid into Court on or before the 3rd January 1916, in satisfaction of the decree of the 8th April 1915. These Defendants Nos 1 and 2, not having the money with which to pay the Rs. 3 70,000, applied to the Plaintiffs' firm for financial assistance, and on the 31st December 1915, an agreement (Ex. AA) was drawn up as between these three Defendants and their minor brother through his guardian, who were described as the mortgagors (that term to include them and each of their heirs) of the one part and the

Plaintiff firm of the other part, whereby the Plaintiff firm agreed to advance to the mortgagors four lakhs of rupees at 12 per cent per annum interest on the security of the two breweries, and of other property which was property of the joint family. The four lakhs of rupees were to include a bonus of Rs 30,000 to the Plaintiff firm for their assistance. The four lakhs of rupees were to be paid as follows — To the mortgagees, the Plaintiff firm, Rs 1,83,000 or thereabouts, in satisfaction of their decree of the 8th April 1915; to the mortgagors, Rs 51,000 or thereabouts, to Mr Branson in satisfaction of a decree obtained by him against Rangayya Goundan and Company, Rs 86,000 or thereabouts; an undefined amount to be kept in reserve pending the decision by the High Court of the appeal by the Plaintiff firm in the suit against Rangayya Goundan and Company, and Rs 30,000 the bonus. The agreement was signed by the Defendants Nos 1 and 2, and by the Defendant No 1 as the guardian of their minor brother. The Defendant No 3 was at the time absent from his home at Ootacamund, he was in some country District, and did not sign the agreement, nor was he consulted about it.

It was found that the Defendants Nos 1 and 2 were not in a position to grant a mortgage of the two breweries, owing to the illness of Rangayya Goundan and to the widow and son of Nanjayya Goundan refusing to join in a conveyance of the breweries until certain claims which they made had been satisfied, and on the 5th January 1916, the Defendants Nos 1 and 2 gave to the Plaintiff firm the following letter —

(Exhibit BB)

“ To Messrs A R Hajee Fakeer Mahomed Sait and Sons,

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"Ootacamund.

"We beg to inform you that we are unable to carry out at once as agreed upon the terms of our finance agreement of the 31st December, 1915 (hereinafter referred to as the agreement), on account of the delay in obtaining a proper conveyance of the Brewery properties from the vendor and all necessary parties

"In the event of our not being in a position to execute the mortgage for Rs 4,00,000 referred to in the agreement within two months from this date, we agree to take a transfer of the decree obtained by you against Rangayya Goundan and others on the 8th day of April 1915, in O. S. No 28 of 1910 on the file of the Sub Court upon which the sum of Rs 1,82,145-14-2 is now due and also any further decree that may be passed in your favour by the High Court on an appeal now pending from the said decree

"In consideration of your making us an advance of Rs 50,000 on our promissory note on this date (Rs 20,000 having been paid in cash and Rs 30,000 being the bonus already paid by us to Mahomed Hashim Sait for his services for arranging the loan of Rs 4,00,000 referred to in the agreement), we hereby agree to execute in your favour a legal mortgage of our properties set out in the agreement to secure the said sum of Rs 50,000 and interest thereon as provided for in the agreement as and from the 5th day of January 1916

"As to the transfer of the said decree amounting to Rs 1,82,145-14-2 as aforesaid, we agree to execute a legal mortgage in your favour of our properties set out in the agreement as well as the said decree to be so transferred to secure the said sum of Rs 1,82,145-14-2 with interest as provided for in the agreement as and from the 3rd day of January, 1916

"As to any further amount that may be decreed on appeal by the High Court, we will execute a legal mortgage in your favour of our properties set out in the agreement and any excess amount so decreed and to be transferred as aforesaid to secure the excess amount decreed on appeal with interest as

provided for in the agreement as and from the date of appellate decree

"Should the agreement to purchase the Breweries fall through, the agreement shall be restricted to the present advance of Rs 50,000 and the amounts of the decree of the Sub-Court of the Nilgiris and of any further decree to be passed on appeal by the High Court

"Dated this 5th day of January, 1916

"(Signed) P M Marudachala Mudaliar and Sons

"(") P M Sadasiva Mudaliar

"(") P M Gurusamy Mudaliar

"(") P M Sadasiva Mudaliar, guardian for Rajababadur Mudaliar "

It will be observed that one of the signatures to the letter is in one of the business names of the joint family. The solicitor who acted for the Plaintiff firm probably thought that by way of precaution the letter had better be also signed by the members of the family. The Defendant No 3 did not sign that letter of the 5th January 1916, nor was he consulted about it. He was at that time still absent from home. The Plaintiff firm agreed to the terms of that letter, and gave to the Defendants Nos 1 and 2 Rs 50,000 by cheque, which was duly paid, and received from them the following promissory note -

(Exhibit CC)

"OOTACAMUND,

5th January, 1916

"On demand we, P M Sadasiva Mudaliar and P M Gurusamy Mudaliar, jointly and severally promise to pay Messrs A R Hajee Fakker Mahomed Sait and Sons or order the sum of Rs 50,000 with interest at 12 per cent per annum for value received this day in cash

"Fifty thousand only

Signed on
one anna
stamp.

"P M Sadasiva
Mudaliar

"P M Gurusamy
Mudaliar "

The Defendants Nos. 1 and 2 were un-

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able to come to an arrangement with the widow and son of Nanjayya Goundan, and consequently could not grant the mortgage of the two breweries. The two breweries were finally sold to the United Breweries Company. That Company, by payment of the amount due under the decree of the 8th April 1915, discharged that decree.

The Defendants Nos. 1 and 2 in December 1917, entered into possession of the two breweries under their agreement with Rangayya Goundan, of the 6th December 1915, and carried on the business of brewing at the breweries. They obtained in the name of P. M. Sadasiva Mudaliar and Brothers the necessary Government Abkari licence for the official year 1915-16. That licence was hung up in a prominent place in the brewery office. The business of brewing was carried on until the breweries were sold to the United Breweries Company.

According to the evidence of Defendant No. 3, he first became aware, in February 1916, that the two breweries were being carried on by the Defendants Nos. 1 and 2 and of the terms on which they had acquired an interest in the breweries. That may, in their Lordships' opinion, be accepted as a fact. It appears that he had been advised by an uncle of his that the two breweries should not be treated as business of the joint family and that on his return to Ootacamund in March 1916, he informed his brothers, the Defendants Nos. 1 and 2, that he objected to the breweries being joint family businesses. As a matter of fact, the owning and carrying on of breweries was not business which had been carried on by the joint family, and was outside the scope of the business of the joint family. If that was his opinion, as it may be assumed it was at that time,

he should have avoided taking any part in the management of the breweries, and in the sale of the beer brewed there. Probably he came to the conclusion that the breweries were or would be a profitable concern for him to have an interest in as a proprietor. Whatever his motive may have been, he acted at Ootacamund in the management of the two breweries from June until October 1916. In October 1916, a depot for the sale of the beer brewed at these breweries was started at Madras and the Defendant No. 3 took charge of that depot, which was carried on in one of the trading names of the joint family. Some of the cheques which were received at the depot in Madras in payment of money due for beer were endorsed by him in the name of P. M. Sadasiva Mudaliar and Brothers, and were paid by him into the account of the joint family with their bankers. Their Lordships will later express their opinion as to what are the inferences to be drawn from the acts of the Defendant No. 2 in and after June 1916, at Ootacamund and in Madras. It has not been suggested that he acted in the position of a paid manager or paid clerk.

This suit was brought on the 4th October 1916, on the basis of the letter of the 5th January 1916, the offer contained in it having been accepted by the Plaintiff firm. The Plaintiff firm claimed in their plaint Rs. 77,303-13-7, which represented the Rs. 50,000 which were advanced on the 5th January 1916, and interest on that sum, interest on the sum of Rs. 1,82,145-14-2, the amount of the decree for sale of the 8th April 1915, interest on Rs. 37,336-7-5, the additional amount which was allowed to them by the Appellate Court in the appeal from the decree for sale, and interest on the total amount of that Appellate Court decree by

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way of prospective damages, and the Plaintiff firm prayed for a decree against the Defendants Nos. 1, 2 and 3 personally and against their family property in the hands of the Defendants excepting the share in it of their minor brother. The Defendants severed in the defences, the Defendants Nos. 1 and 2 filed one written statement, and the Defendant No. 3 filed two written statements. The defences pleaded, so far as they are now material, were briefly that the agreements of the 31st December 1915, and of the 5th January 1916, were not completed contracts, as they were not executed by all the parties intended to be jointly bound by them and could not be enforced against any of the Defendants. That in view of the facts, as will later appear, was an untenable defence. It was further pleaded by the Defendant No. 3 that the agreements were not for the benefit of the joint family, and were not within the powers of the manager of a joint family to make. The Defendant No. 3 also specially pleaded that he was not consulted about the agreements, and was not bound by them. The Defendants Nos. 1 and 2 in their written statement, admitted their liability to pay Rs. 20,000 of the Rs. 50,000.

The learned Subordinate Judge who tried the suit and heard the witnesses giving their evidence, observed in his judgment —

“The facts of the case not being complicated, and covering as they do a comparatively short period, the oral evidence in the case is, on the whole, short. The questions in issue are in the main questions of construction and questions of law. Despite, however, the essential simplicity of the facts, there has been in the case an unusual amount of hard swearing on the part of the four parties to the suit that have been examined, a most regrettable feature of the case, having regard to the fact that the

Plaintiffs and the Defendants occupy a very leading position in their respective communities.”

The four parties to the suit who gave evidence were the Defendants Nos. 1, 2 and 3, and the managing member of the Plaintiff firm. As regards the Defendant No. 3, the Subordinate Judge also said in his judgment

“As regards Pasupathy Mudaliar, I do not think he is speaking the truth when he tries to dissociate himself as much as possible from the brewery business which was actually being carried on in the name of the family firm and in which he actually took part between June 1916, and January 1917, in Ootacamund and in Madras. He has tried hard to fight shy of even an ocular acquaintance with the contents of the licence in the name of the firm that was hung up in the brewery. I cannot agree with him when he pretends that he was an independent member of his joint family on the same footing as his senior brothers. I do not believe him when he says that he told his elder brother in September 1915, that he would not be bound by them forming a syndicate to buy the breweries.

And

As already indicated in the summary of facts, the 3rd Defendant after July 1915, took an active, though subordinate, part in the brewery business which Defendants Nos. 1 and 2 wanted to acquire for the family. The reasonable inference to be drawn is that he ratified those acts of the Defendants Nos. 1 and 2 under which they bound themselves to acquire the breweries, *et c.*, the agreements H and J and those acts under which Defendants Nos. 1 and 2 obtained authority from the Board of Revenue to carry on the brewing business and to open a depot in Madras. But this does not indicate that he ratified those acts of Defendants Nos. 1 and 2 which are referable to the particular method of acquisition which the Defendants Nos. 1 and 2 wished to adopt, and I may say that there is absolutely no evidence whatsoever which shows that the 3rd Defendant ratified Exbts. AA, BB or CC except to the extent of the sum

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of Rs 20,000-0-0 which forms a portion of the consideration of the Exbt CC promissory note. I make this exception, as in the absence of the account books of the family, I must presume that this sum of Rs 20,000-0-0 actually received by Defendants Nos 1 and 2 has passed into the family accounts, and on the ground that the implied authority given by the 3rd Defendant to Defendants Nos 1 and 2 by way of ratification to acquire the breweries necessarily implies an authority to borrow the required money under ordinary conditions, and the borrowing of Rs 20,000-0-0 only at 24 per cent for the purpose of making up Rs 3,70,000-0-0, the sale price of the breweries *prima facie* amounts to borrowing under ordinary conditions."

In conclusion the Subordinate Judge, disallowing all Plaintiff Company's claims except as to Rs 20,000, made the following decree:—

"It is ordered and decreed that the Defendants Nos 1 to 3 do pay to the Plaintiffs the sum of Rs 21,800-0-0 (being principal—Rs 20,000-0-0 and interest thereon at the rate of 12 per cent per annum from 5th January, 1916, to date of suit, 4th October, 1916,—Rs 1,800-0-0) out of the amount sued for, with interest on Rs 20,000-0-0 at the rate of 12 per cent per annum from 5th October 1916, to this date, *viz.*, Rs 2,040-0-0 and with further interest on the aggregate amount of Rs 23,840-0-0 at the rate of 6 per cent per annum from this date to the date of realization, and that the Defendants Nos 1 to 3 do also pay to the Plaintiffs the sum of Rs 682-2-0 on account of the proportionate costs of the suit, with interest thereon at the rate of 6 per cent per annum from this date to the date of realization, subject, however, to the reservation that the 3rd Defendant's liability is restricted to his share in the family property only.

"It is further ordered that the Defendants 1 to 3 will not get their proportionate costs on the amount disallowed to the Plaintiffs and do bear their own costs."

It is not clear why the Subordinate Judge did not decree payment of the

Rs 50,000, instead of Rs 20,000 only. If he had been consistent, he would have decreed payment of the larger amount.

From the decree of the Subordinate Judge the Plaintiff Company appealed to the High Court. The leading judgment in the High Court was delivered by Abdul Rahim, J. In his judgment, he said:—

"The main question argued both in the Lower Court as well as before us is whether the agreement, Exhibit BB, was a contract at all, that is to say, whether the agreement was to be regarded as complete and binding since the 3rd Defendant in the suit, Pasupathy Mudaliar, did not sign it. It is signed by 'P. M. Marudachala Mudaliar and Sons'—that is the name of the family firm of the Mudaliars—and also by the 1st Defendant, Sadasiva Mudaliar, the 2nd Defendant, Gurusamy Mudaliar, and by Sadasiva Mudaliar as guardian for Rajabahadur Mudaliar, minor brother of the Defendants. I have no hesitation whatever in accepting the evidence of Mr. Walker that the parties expected that the third brother, Pasupathy Mudaliar, also would execute the agreement. The promissory note, Exhibit CC, is signed only by Sadasiva Mudaliar, and Gurusamy Mudaliar, 1st and 2nd Defendants. The question with respect to both the documents is whether they are to be regarded as completed transactions or whether it was the intention of the parties that there was to be no binding contract until the 3rd Defendant, Pasupathy Mudaliar, joined in executing Exhibit BB. The learned Subordinate Judge has held that the agreement was conditional, that is, it was not to take effect until it was executed by Pasupathy Mudaliar. It seems to me, however, that the admitted and clearly established facts of the case point to an opposite conclusion. There can be no doubt whatever, as already stated, that both the parties intended that Exhibit BB should be binding on the entire family. At the same time, it is equally clear to me that the parties intended that, if all could not be bound, at least those who signed in their

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individual capacity, would be bound. The Saita had left the matter in the hands of their legal adviser, Mr Walker, and the evidence also shows that the Mudaliars were represented by a Pleader, Mr Rama Row, who, however, has not been examined in the case. There was considerable discussion between different parties and their lawyers as to what should be the exact nature of the arrangements. The result of the evidence amounts to this—that since there was difficulty as mentioned in Exhibit BB itself as to getting the necessary parties to join in the conveyance of the breweries to the Mudaliars, the expedient that they hit upon was that the Mudaliars should take a transfer of the decree of the Saita. With that decree in their hands they expected that there would be no great difficulty in securing the breweries. The Mudaliars wanted the breweries for the benefit of the entire family, which consisted of three adults and one minor brother, but the lawyers of the parties thought that difficulty might arise in binding the entire family, as questions might be raised as to whether the transaction was a proper one for the benefit of the family. Mr Walker's evidence makes it clear that under the circumstances, he thought it expedient and advisable that the agreement should be signed not only by the firm or in the firm's name, but by the Mudaliars individually. The Plaintiffs' object in that was that if it so happened that the transaction did not come within the scope of the family business which consisted mainly in plantations the members of the family who signed the agreement would be bound by them. The 3rd Defendant was at the time not in Ootacamund, and that was the reason why he did not actually sign Exhibit BB, but he was expected to sign it, and the evidence is that the 1st Defendant, who is the head of the family, being the elder brother, undertook to obtain the signature of Pasupathy Mudaliar. Mr Walker positively swears that it was never suggested or understood that Exbt. BB would not come into operation unless or until Pasupathy signed it. There is not the slightest reason to doubt the *bona fides* or accuracy of his statement. And it

clearly could not have been the intention of the parties that Exbt. BB was to have no effect whatever until the third brother signed it

Their Lordships agree with all that the learned Judge said on that subject. As to the liability of Defendant No. 3, he said that—

“It cannot be disputed that at least from June 1916, he took a very active part in the business of the breweries. He was in charge of the depot in Madras for some time according to the arrangement with the Excise authorities (their licence), he received monies from the family to funds (with which to carry on the business), and paid the profits of the business into the family account with the bank. He also signed cheques in the name of the family firm of Marudachala Mudaliar and Sons and Sadasiva Mudaliar and Brothers, and there cannot be the least doubt that he regarded the business as much his own as that of the 1st and 2nd Defendants.”

Their Lordships are not aware that the Defendant No. 3 ever signed any cheque in the name of either of the joint family firms, it is that is what the learned Judge meant in the passage quoted, but he probably meant that the Defendant No. 3 had endorsed some cheques in the name of the firm, and with that explanation their Lordships agree with the finding quoted. Further on the learned Judge found “the evidence clearly shows that he (the Defendant No. 3) treated and adopted the whole transaction as one in which he was interested as much as the 1st and 2nd Defendants,” and he also found that the Defendant No. 3 ratified and adopted the transaction of the 5th January 1916, by his subsequent conduct, and made himself liable by adopting that contract. Spencer, J., in a short judgment, agreed with Abdur Rahim, J., and said, “I also agree in thinking that the 3rd Defendant, by his subsequent conduct, ratified and ac-

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quiesced in the agreement when he joined with his brothers in managing the brewery business in 1916." The result was the High Court gave the Plaintiff firm a decree for Rs. 76,159-5-7, which included the Rs. 51,359-5-7, which had been decreed by the Subordinate Judge, and with some future interest at 6 per cent.

From that decree of the High Court this appeal has been brought. Their Lordships agree with the findings of the High Court, which they have quoted from the judgments delivered in that Court. There can be no doubt the business of owning and carrying on breweries was not a business of the joint family, and that the minor brother, when he comes of age, can repudiate the contract of the 5th January 1916, so far as he and his interest in the joint family property are concerned, and that his interests in the joint family property cannot be affected by this suit. The contract of the 5th January 1916 cannot be regarded as a contract of the joint family of which the minor brother is a member, but Defendant No. 3 accepted that contract as binding on him, and derived benefits under it and consequently accepted it, with liability to perform it. The money which was advanced under it by the Plaintiff firm was money which was required for the starting and carrying on of the brewing business. It appears to their Lordships that it is a contract which is binding on those members of the joint family, the Defendants Nos. 1, 2 and 3, who were parties to it or accepted it as a contract, and that they cannot escape their liability to perform it or to pay damages for the non-performance of it by showing that they have no property except that which is property of the joint family in which their minor brother is equally interested with them. If it were the law that some

members of a joint family could escape from liability to perform contracts entered into by them on the grounds that their contracts were not such as would bind the joint family, and that they had no property other than that which was the property of the joint family, it would be necessary for every person with whom they sought to make a contract to assure himself that the business to which the proposed contract would relate was business of the joint family, and that no member of the joint family was a minor. Under such circumstances, it would be difficult to carry on business with persons who happened to be members of a joint family of the Province of Madras. What might be the position in other Provinces it is unnecessary to consider. The decree in this suit cannot be executed against the minor's interest in the joint property of the family.

Then Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor Mr Henry S. L. Polak for the Appellants.

Solicitor Mr Douglas Grant for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 92 OF 1922.

SANDERSON, C. J.
RICHARDSON, J.
1923,
10, April.

PRADYUMNA KUMAR
MULLIK, Defendant,
Appellant,
v.
PRAMATHA NATH
MULLIK, Plaintiff,
Respondent.

Rights of a shebait of an idol, not being the founder, to impose restrictions on the powers of subsequent shebait—Acceptance of benefits conferred by

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such shebait—Effect thereof—Whether an idol may be a subject of gift or devise.

A Hindu governed by the Dayabhaga School established certain family deities, but imposed no condition as to their location. His son acquired a piece of land and created thereon a thakurbari for one of the deities. By a declaration of trust he declared that he, his heirs, executors, representatives and administrators should for ever hold the land to and for the use of the deity, that the Thakur should be located and worshipped in the premises and that the Thakur should not on any account be removed therefrom unless and until a similar or better thakurbari was built. The grandsons of the founder separated and the palas of worship were divided. One of the grandsons, not having got any grant of the family house, removed elsewhere and built himself a separate residence where he wanted to remove and worship the Thakur during his turn of worship.

Held per CURIAM—That the condition, viz., that the Thakur should not on any account be removed from the thakurbari unless and until a similar or better thakurbari was built, being for the benefit of the Thakur, was valid in law and should be observed by future shebaites.

Held per RICHARDSON, J.—That the condition did not make a change in the character of the worship.

JUGGUT MOHINI DASSEE v. MUSSAMUT SOKHEEMONEY DASSEE (7) referred to.

That if a situation should arise in which it would be desirable in the interests of the Thakur that other arrangements should be made, an application could be made to Court and a proper order obtained.

GIRIJANUND DATTA JHA v. SAILAJANAND DATTA JHA (6) referred to.

(6) I. L. R. 23 Cal. 645 at p. 662 (1896).

(7) 14 M. I. A. 289 at p. 302 (1871).

Quere:—Whether an idol considered as a legal or spiritual entity can be the subject of a gift or devise.

SUBBARAYA (GURUKAL v. MUDALI (2), KHETTER (1) HARI DAS BANDOPADHYA (3) CHATTERJI v. KEDAR NATH BANERJEE (4) and RAJESHWAR MULLIK v. GOPESWAR MULLIK (5) considered

This was an appeal against the judgment* of Mr. Justice Greaves, dated the 1st June 1922, passed in exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Messrs B. L. Mitter and S. C. Bose appeared for the Defendant-Appellant.

Messrs S. N. Bannerjee and S. K. Chakravarty appeared for the Plaintiff-Respondent.

Mr H. D. Bose appeared for the Defendant-Respondent.

The JUDGMENT OF THE COURT was as follows —

RICHARDSON, J.—This is an appeal from the judgment of Greaves, J., dated 1st June 1922. The parties to the suit are the present representatives of a well-known family in Calcutta, the founder of which was Moti Lal Mullik. Moti Lal died in 1846 leaving a widow Rangomani Dasi and an adopted son Jadulal, then two years old. During his life-time he established and consecrated the three deities who are the subject of this litigation, Thakur Sree Sree Radhashamsur der Jee, Thakurani Sree Sree Radharane, and a Saligram-sila known as Sree Sree Raj Rajeswar. These deities were located in

(2) I. L. R. 4 Mad. 315 (1881).

(3) I. L. R. 17 Cal. 557 (1890).

(4) 36 C. L. J. 478 at p. 483 (1922).

(5) 12 C. W. N. 323 (1907).

* Reported 26 C. W. N. 909 (1922).

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his family dwelling house in Pathuria-ghata Street. A room was set aside for them as a private or retiring room and there was also a *thakurdalan* into which they were brought on ceremonial or festival occasions.

By his Will dated the 3rd September 1846, Moti Lal provided that until Jadulal should attain the age of 20 years, his widow should be the *malik* or proprietor and attorney for the care of the whole of his estate which was considerable. On Jadulal attaining the age mentioned, the whole estate was to be made over to him except the monies or Government securities which the testator bequeathed to his widow or others or had set apart for his own *shradh* and so forth.

As regards the deities, no direct gift was made in their favour, but the widow was authorised to spend Rs. 600 a month in defraying the expenses of their worship

in the same manner that I have paid and defrayed the same hitherto." On Jadulal taking over the estate, he was "in the like manner to protect the whole of the property and effectuate the *kram* *lornas* or religious acts and ceremonies and so forth." The whole estate, therefore, was given to Jadulal subject to a charge thereon for the maintenance of the worship both of the ancestral deities and of those established by the testator.

The two relevant portions of the Will run according to an old translation as follows :

"(1) As long as my adopted son Shriut Jadulal Mullik does not attain the age of 20 years (twenty) so long I do hereby appoint you the *malik* or proprietor and attorney for the protection and care of the whole of my estate. The whole of my property, fixed and moveable, i.e., my land homesteads and gardens and my *my dwelling homestead*, and my ready money

and my Company's papers and my pearls, diamonds, corals, etc., and my *purrow* gold and silver *olonkar* or personal ornaments, my plates and brass and *kansa* or bell-metal vessels and my dresses and apparels and my *shawls*, *doshallahs*, etc., and my *Sri Sri Issur Thakurs* and *Thakurams*, etc., established by me and ancestral, of the whole of my property agreeably to the list in my hand-writing under my signature, you remain the *malik* of protecting and taking care of whatever property and effects I leave behind. Upon my said *possioptthro* or adopted son attaining the age above mentioned you will make over the whole of the said property to him in full and the said *possioptthro* or adopted son is become our, i.e., both your and mine, *uttaradheekary* or heir of the whole of the property, and will be me so."

"(2) The Company's papers belonging to my estate that shall stand in the Government Agency to the credit of the name of my *possioptthro* or adopted son Shriut Jadulal Mullik, you will draw Company's Rs. 600 monthly from the interest thereof or having sent for and obtained Company's Rs. 36,000 (thirty six thousand rupees) at the interval for every six months, you will defray the expenses of the daily *sheba* or service and the *porbas* or festivals and the *teher* or ceremonies of the *Sri Sri Issur Thakours*, *Thakoorams* etc., established by me and ancestral according to my *pala* or turn, as also the *uttoo* or daily and the *nomuttoo* or periodical expenses and so forth, in the manner that I have paid and defrayed the same hitherto, as long as my said *possioptthro* or adopted son does not attain his age above-mentioned. Upon the said *possioptthro* or adopted son's having attained his majority you will, without *ozur* or objections make over the whole of the property to him fully and he will in the like man-

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ner protect the whole of the property and effectuate the *kreach karmas* or religious acts and ceremonies and so forth where with you have no concern, and the above-mentioned Company's paper of one lac of rupees that I have given to you and Company's 25 thousand rupees that I have set apart for my *shrauddho* and *sopindekhoron* or offering of the funeral cake exclusive of that, Company's papers to whatever amount shall remain, agreeably to the afore-mentioned list under my signature, all those Company's papers you will place to credit in the name of Sripot Jadulal Mullik in the Government Agency, when I am no more, and they shall so remain. He will, upon his attaining the age above-mentioned, receive fully all the said Company's papers, together with interest agreeably to account and be entitled to the same."

Jadulal, after succeeding to the estate pulled down the old family dwelling house and built a new house partly on the site of the old house (No. 67, Pathumaghata Street) and partly on a new site (No. 7, Prasanna Kumar Tagore Street). On another site acquired for the purpose (No. 1, Prasanna Kumar Tagore Street) he built a *thakurbari*. There is no evidence that any special ceremony was performed but there he installed the three deities and there he worshipped them. The building is between No. 67 and No. 7, but is separate from them and has a separate entrance from the street. It is two-storied, and as in the old family house, the retiring room or sleeping apartment of the deities is on the first floor and the *thakurdalan* on the ground floor.

On the 26th April 1888, Jadulal executed a deed or declaration of trust which refers by name only to the Thakur Radha Sham Sunderjee. The erection of the *thakurbari* by Jadulal is recited and also

the fact that, with the land on which it stood, it was of the value of Rs. 10,000. Then comes a dedication of the premises in the form of a conveyance in trust to Jadulal, his heirs and representatives to the use of the Thakur for the purposes of his location and worship. The proviso is added that if at any time it should appear expedient to Jadulal or his representatives so to do, "it shall be lawful for him or them upon his or their providing and dedicating for the location and worship of the said Thakur another suitable *thakurbari* of the same or greater value than the premises hereby dedicated to revoke the trusts heretofore contained." Finally, there is a declaration in the following terms —

It is hereby declared that unless and until another *thakurbari* is provided and dedicated as aforesaid the said Thakur shall not on any account be removed from the said premises and in the event of another *thakurbari* being provided and dedicated as aforesaid the said Thakur shall be located therein but shall not similarly be removed therefrom on any account whatsoever and further that during the life-time of the said Jadulal Mullik he shall be the sole *shebait* of the said Thakur and after his death and subject to any provision in that behalf to be hereafter made by the said Jadulal Mullik, his heirs in the male line shall be such *shebaits*, no female heir or widow of any male heir being entitled to the *shebaitship* although she shall have full liberty to worship the said Thakur and also that in case of any disagreement between any future *shebaits* of the said Thakur the worship thereof shall be conducted by yearly *palas* or turns."

The subsequent history may be briefly narrated. Jadulal died on the 5th February 1894, leaving three sons, Anath, Pra-

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matha and Manmatha who separated. The partition of the family property was referred to the late Mr. W.C. Bonnerjee as arbitrator. Under his award published in 1899 and made a rule of Court in Suit No. 913 of that year, No. 7, Prasanna Kumar Tagore Street was allotted to Anath and No. 67, Pathuriaghata Street to Manmatha; Pramatha, the second son, obtained his share otherwise and has since built himself a residence at No. 129, Cornwallis Street. The penultimate paragraph of the award decides that the entrance or passage to the *thakurbari* from the street "shall remain as the common passage to the said *thakurbari* and shall continue to be the joint property of the three brothers, their heirs and assigns for ever and that none shall be entitled to raise any structure or any building of any kind or in any way to obstruct the said common passage and that it shall always remain perfectly open to the sky throughout."

Anath died in June 1900 and was succeeded by his infant son, Pradyumna.

The partition of 1899 was not exhaustive and in a suit of 1900 (No. 890) to which Pradyumna was a party other assets were partitioned by Babu Bhupendra Nath Bose as Commissioner appointed by the Court for the purpose.

Then, it is stated, controversy arose as to the Will of Moti Lal's widow, Rangomani, who had died in 1891 and had devised certain property for the worship of the Thakur Radha Sham Sunderjee. In a suit of 1904 (No. 799) Mr. Bose was appointed to frame a scheme for the worship of the deity and to partition the residue of the Rangomani's estate. Neither Rangomani's Will nor Mr. Bose's scheme has been placed before us, but it is common ground that as the result the right to manage the worship has since

been exercised by each of the three branches of the family by *palas* or turns of one year each. I gather also from para 31 of the plaint that the charge on Moti Lal's estate for the worship of the Thakur was then crystallized, and that a sum of Rs 1,00,000 was then by agreement set apart in trust, the income of which was to be devoted to the maintenance of that worship.

The first turn of worship for the Bengali year 1317 (commencing in April 1910) fell to Pradyumna. During Pramatha's turns of 1911-12 and 1914-15, he removed the deities to the *pujadalan* in his own house, returning them to the *thakurbari* at the end of each period. When his turn came round again in April 1917, and he again desired to remove the deities to his house, Pradyumna, who had then come of age, and Manmatha joined in refusing to allow him to do so. He then brought this suit against them asking for a declaration of his right to take the course which he had taken in his previous turns and for other reliefs.

As in the case of *Ram Soonder Thakoor v. Taruck Chunder Turkoruttuna* (1), it is not contended that there is anything in the Hindu canon which forbids the manager of a Hindu deity from taking the deity to his own house during his turn of worship. The dispute owes its origin to the prohibition against the Thakur's removal from the *thakurbari* in Jadulal's deed of 1888, on which the Defendants rest their case. As the other two deities are not specifically mentioned in the deed, there is a subsidiary question whether the prohibition applies to them.

A number of issues were framed for the trial but the only two of any present importance are the ninth, "Is the Plaintiff entitled to remove the Thakurs to his

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residence, 129, Cornwallis Street during his turn of worship?" and the seventh, "Could the Thakur Radha Sham Sunderjee be severed from his consort, the Thakurani, and from the other ancillary deities?"

The learned Judge answered the ninth issue in the Plaintiff's favour and it was accordingly unnecessary for him to decide the seventh issue.

The appeal is preferred by Pradyumna; Pramatha, however, though he appears as a Respondent, is ranged on the same side against Pramatha.

The main ground of the learned Judge's decision is shortly and clearly expressed as follows:—

"There is no dispute that the Thakurs were established by Moti Lal and he imposed no condition as to their location, and consequently I do not think that it was open to any subsequent *shebait* to impose restrictions which would fetter those who subsequently as heirs of the founder became *shebait*s."

This reasoning, which the first Respondent of course endorsed, if I may say so, deserves consideration and I am not prepared to follow the argument for the Appellant to the full length to which it was taken.

The learned Standing Counsel, Mr B. L. Mitter, founding on Moti Lal's Will, argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to Jadulal. When pushed Mr Mitter said, that Jadulal might, if he had so pleased, have thrown them into the river. The inclusion of the idols, however, among items of property, moveable and immoveable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property. The careful directions given later

in the Will show that the testator intended the worship of the ancestral deities and the deities he had established to be a charge upon his estate.

Reference, again, was made to the broad statement in *Subbaraya Gurukul v. Chellappa Mudali* (2), that "in the eye of the law idols are property," and to the observation of Banerjee, J., in *Khetter Chunder Ghose v. Hari Das Bando-padhya* (3), to the effect that an idol may be the subject of gift. In legal conception, however, an image which represents a deity, or in which the deity resides or inheres, is a juristic or juridical entity capable of receiving gifts and holding property. Hindu religious conception carries the matter even further, as the following passage from a recent judgment of Meekerjee, J. [*Rambrahma Chatterji v. Kedar Nath Banerjee* (4)], will show:—

"We need not describe here in detail the normal type of continued worship of a consecrated image, the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servants. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of cloths, the offering of cooked and uncooked food, and the retirement to rest."

Now, the subject is abstruse and in its

(2) 1. L. R. 4 Mad 315 (1881).

(3) 1. L. R. 17 Cal 557 (1890).

(4) 36 C. L. J. 468 at p 468 (1922).

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nature metaphysical. I have certainly no desire to be dogmatic or to find fault with the language of so great an exponent of Hindu law as Sir Guru Das Banerjee. There may be purposes for which an idol considered with reference to the material substance of which it is composed, may be regarded as moveable property. In this way it may be the subject of theft. But I find some difficulty in understanding how an image considered as a legal or spiritual entity can properly be said to be the subject of gift. What is probably true is that for certain purposes at any rate the office of manager or *shebait* of a deity may be regarded as property and the office will carry with it all such rights as properly pertain thereto, including the right to the custody of the image. In a loose way, therefore, the gift or transfer of the office may perhaps be spoken of as a gift or transfer of the image or the deity.

Assuming that the law will recognize such a gift or transfer *inter vivos*, there is a further difficulty when a devise is suggested. Moti Lal himself, having established these deities, was only their manager during his life-time. In *Rajeshwar Mullik v. Gopeswar Mullik* (5), Sir Francis Maclean, C. J., said: "A *shebait* is a manager or *quasi-trustee* for the benefit of the idol. His office only endures for his life, his Will only comes into operation on his death. What is then there for him to alienate by his Will? Nothing."

I cannot therefore accede to the contention that the terms of Moti Lal's Will conferred on Jadulal an unlimited discretion to deal with the deities according to his own pleasure. I will assume on the principle stated by Banerjee, J., in *Giripat*

nund Datta Jha v. Sailajanand Datta Jha (6), that Jadulal could not bind his successors by any act which was not for the benefit of the deities. Nevertheless, he had rightfully succeeded his father as sole manager, and within the limits of his duty he had full discretion to act as he might think best. No one suggests that the dedication of a *thakurbani* was not the act of a pious Hindu, anxious to do more than fulfil his obligations and to mark his tenure of the estate by a work of supererogation. In his secular capacity he had a perfect right to make the gift and to impose the conditions which he did impose. The only question of substance in the case is whether in his capacity as *shebait* he exceeded his authority in accepting the gift on the Thakur's behalf subject to the conditions. The test to be applied is whether the condition with which we are immediately concerned in the present case was or was not for the benefit of the Thakur. A house, suitable in every respect, built at considerable cost, close to his original home, was set apart for the Thakur's use. The condition is annexed that he should not be taken therefrom unless and until another house of equal or greater value is provided for his reception and entertainment. That ensures that he will always have a suitable abode, so long at any rate as funds are available to keep the present building in repair. It is not suggested that funds for that purpose are likely to fall short. If a situation should arise in which it would be desirable in the interests of the Thakur that other arrangements should be made, an application could doubtless be made to the Court and a proper order obtained. Meanwhile the three existing branches of the family may split up into numerous sub-branches, each with its own turn of

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worship, and the Thakur is at least secured from undignified journeys from one place to another.

As the worship of the deities was made by Moti Lal a charge on his estate, now converted into a trust fund, Jadulal has no right, I think, to the title of a founder of the endowment. His liberality, however, should dispose his successors and the Court to respect his wishes as far as possible. We have not been informed as to the extent of Rangonon's benefaction nor has the question been mooted whether she would have selected the Thakur as the object of her bounty if he had not been housed in the *thakurbari*. All we know is that at her death the Thakur was located there.

I do not regard the condition in question as making a change in the character of the worship, or, to use a phrase of their Lordships in *Tuqqut Mohini Dass v. Mussamat Sahibemoney Dass* (7), as "varying the use." The deities are worshipped in the *thakurbari* as they were previously worshipped in the family dwelling house. Till 1886 they had never been removed from that house and till 1911 they had not been removed from the *thakurbari*. In the different partitions, the latter was treated as the property of the deity and therefore impartible among the members of the family. Mr. Bonnerjee, moreover, as above stated, was careful to provide that the passage to the building from the street should remain joint property. Up to 1911 no question arose as to the validity of the condition.

The suggestion that the condition is repugnant to the nature of an absolute grant and therefore void on the principle of sec. 11 of the Transfer of Property Act, is far-fetched. It is inept to speak of deities, who presumably transcend the

limitations of time and space, as being "confined" or "imprisoned" in a habitation or temple erected in their honour, and such phrases have no application at all to their material images. Religious gifts are not in all respects on the same footing as secular gifts. They are exempt from the rule against perpetuities and in my opinion the condition cannot be said to be unreasonable.

It was suggested that the ladies of Pramatha's family would be inconvenienced in making their oblations if the deities were not removeable to his house during his turn of worship. I do not know whether the ladies of each branch only make oblations during the turn of worship of the head of the branch. The point is not specifically mentioned in the plaint though it is stated generally in para. 29 that the *thakurbari* "is so situate as to make it inconvenient to the Plaintiff who lives at a distance to carry on the worship." In these days of motor cars this complaint appears to me in any case to have little substance. The principal complaint, however, appears in para. 29 which runs:—

"The Plaintiff has suffered considerable damage and has further felt greatly humiliated and injured, and suffered pain of mind by reason of his having been prevented from exercising any of his said rights."

I need hardly say in regard generally to complaints of this kind that in deciding this we must have regard not to the personal prestige of any individual *shebait* or to his personal convenience or the convenience of the members of his family, but solely to the interests of the Thakur.

As to the case of *Gossamee Sree Gredharcejee v. Rumanlaljee Gossamee* (8),

(8) L. R. 16 I. A. 137 : s. c. I. L. R. 17 Cal. 3 (1889)

(7) 14 M. I. A. 269 at p. 302 (1871)

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in the view I take, it is unnecessary to rely on the principle which their Lordships there applied. Moreover, as Greaves, J., has pointed out, this is not a suit for the possession of the *thakurbari* and the Thakur is not put to any election between conflicting rights, or between remaining permanently in the *thakurbari* and being removed therefrom every third year. If he had to elect, which of the *shebais* is to speak for him? It was suggested for the Appellant, that the views of the majority should prevail. But, as I understand the matter, the system of rotation which has been introduced amounts to a partition of the office of *shebat* and I do not know whether Mr. Bose's scheme provides for meetings of the separate holders of the office for the purpose of discussing and deciding disputed or difficult questions of administration.

No doubt it would be *passim exemptum* that a deity should consent to be the recipient of a gift and should refuse to be bound by any valid condition annexed to it. But the whole question here is whether the condition is valid or not.

There remains the seventh issue, on which, as I have said, we have not the advantage of the learned Judge's decision. I gather that since their establishment, the three deities have been treated as companions. They have occupied the same apartments. They were installed together in the *thakurbari*, and in the issue itself as drawn, no doubt with the concurrence of the parties, the Thakurani is described as the consort of the Thakur. In the circumstances, I should be extremely loth to be party to any order which would admit of their being separated and occupying different abodes. In my opinion they should not in this respect be differentially treated. The location of the

Thakur in the *thakurbari* appears to involve the same location for the Thakurani and the Saligramasila. The considerations, therefore, which govern the Thakur are also applicable to his companions.

In the result, differing with great respect from the learned Judge, I come to the conclusion that the suit should be dismissed with costs in this Court and in the trial Court.

SANDERSON (C. J.)—I agree.

In my judgment the real question in this case is whether Jadulal, in his capacity of *shebat*, was empowered to accept on behalf of the Thakur the conditions which he, as donor of the property, attached to the gift in the deed of 26th April 1888.

I agree that the test is whether the conditions were for the benefit of the Thakur. In my judgment they were.

Some of the reasons therefor have been stated by my learned brother, and I need not repeat them. The main reasons, which influence my mind in this respect, are that the premises were undoubtedly, eminently suitable for the worship and location of the Thakur, and, it is to be noted that the deed did not absolutely prohibit the removal of the Thakur but provide for its removal in the event of the provision of another suitable *thakurbari* of a value, the same as or greater than, the value of the premises comprised in the deed.

I agree that the appeal should be allowed with costs and the suit dismissed with costs in the trial Court.

Messrs. H. N. Dutt & Co., Solicitors for the Appellant.

Messrs. P. L. Mullik and M. N. Sen, Solicitors for the Respondent.

P. K. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL DECREE

No 51 OF 1921.

C. C. GHOSE, J.

PANTON, J.

1923,

Heard, 30, January and 2, February.

Judgment,

20, March.

KRISHNA CHANDRA

DEY, Plaintiff,

Appellant,

v.

W. GRAHAM, Defendant,

Respondent.

Specific Relief Act (I of 1877), sec 16—Contract to sell two plots of land—One found to belong to vendor's wife—Vendee, if may enforce contract as to other plot at abated price—Contract, whether divisible or not—Time, if of the essence of the contract, where agreement was for "completion of sale within 14 days," but parties delayed completion of the preliminaries beyond specified time

By an agreement, dated 15th September, G agreed to sell to K two plots of land, viz, A and B, and to deliver to K's solicitor the title deeds within two days thereof, and K agreed to send in his requisitions within 5 days from the date of the delivery of title deeds. The requisitions were to be answered within 5 days thereafter, and K was to complete the purchase within 14 days from the date of the delivery of the title deeds. More than a fortnight was spent in the preliminaries, e.g., delivery of title deeds, answering requisitions, etc., for which G was primarily responsible. It was found that plot B belonged to G's wife. At the end of the fortnight G rescinded the contract, on the ground that K had failed to complete the purchase within the specified time:

Held—That time was not of the essence of the contract, and as the plots contracted to be sold were two distinct and independent lots, performance of the contract, so far as it related to plot A which belonged to G, was both practicable and proper, though performance of the contract, so far as it related to plot B which

belonged to G's wife who was not a party to the agreement, was both impracticable and improper. The present case came within the purview of sec. 16 of the Specific Relief Act, under which specific performance of so much of the contract as related to plot A should be enforced with an abatement in the price agreed upon.

RUTHERFORD v. ADAMS (1) and MORTLOCK v. BULLER (2) discussed and followed.

JONES v. EVANS (3), BARNES v. WOOD (4) and HOOPER v. SMART (5) referred to.

The question whether a contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract.

This was an appeal preferred on the 1st of March 1921 against the decree of Babu Kali Prasanna Sen, Subordinate Judge, 3rd Court of Zillah 24-Parganas, dated the 27th of November 1920.

The facts and arguments are fully set out in the judgment.

Dr. D. N. Mitter and Babus Satindra Nath Mukherjee and Asuranjan Chatterjee for the Appellant.

Mr. S. R. Das (Advocate-General) and Babus Charu Chander Biswas and Munindra Kumar Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff is the Appellant before us and the facts which have given rise to the suit, out of which this appeal has arisen, are, briefly stated, as follows:—By an agreement in writing made on the 15th day of September 1919, the Defendant agreed to sell and the Plaintiff agreed to purchase certain lands, measuring about

(1) [1915] A. C. 866.

(2) 10 Ves 315 (1804).

(3) 17 L. J. Ch. 469 (1848).

(4) L. R. 8 Eq. 424 (1869).

(5) L. R. 15 Eq. 683 (1874).

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21½ bighas, in Tollygunj in the suburbs of Calcutta, particularly described as plots A and B in the schedule annexed to the said agreement, free from encumbrances, for a sum of Rs 1,53,000. The vendor agreed to deliver to the purchaser's solicitor the title deeds relating to the said plots A and B within two days from the said date and the purchaser agreed to send in his requisitions in respect of the title within 5 days from the date of the delivery of the title deeds. The requisitions were to be answered within 5 days thereafter. The vendor agreed to make out a marketable title to the said properties, and, in case of failure, to refund to the purchaser the latter's deposit of Rs 501 without interest. It was also agreed, *inter alia*, that on the vendor making out a marketable title, he should execute a proper conveyance in favour of the purchaser, causing all necessary parties to join therein, and that in the event of the purchaser failing to complete the purchase within 14 days from the date of the delivery of the title deeds, the vendor should be entitled to cancel the said agreement and to forfeit the amount of the vendor's deposit. On the 16th September, the title deeds in respect of the properties were handed by Messrs. Leslie and Hinds, the vendor's solicitors, to the Plaintiff's solicitor, Mr. Rajendra Nath De. On the 19th September, the requisitions on title were sent to the vendor's solicitors. It was pointed out therein by the Plaintiff's solicitor that it appeared from a certain conveyance bearing date the 12th July 1904, that Mrs. Kate Graham, the wife of the vendor, was the owner of one of the properties comprised in the schedule to the said agreement and an enquiry was addressed as to how the vendor proposed to sell the said property. The answer to this requisition, which was

given on the 24th of September, was in these words, "Mrs Graham will concur in the same." Another requisition, being requisition No 16, was in these terms—"Is the vendor alone competent to convey an absolute title to the properties free from all encumbrances," and the answer was, "Yes, with the concurrence of Mrs Graham." The answers to the requisitions were not received by the Plaintiff's solicitor till the 25th September and on that date he asked that the title deeds might be returned to him to enable him to consider the sufficiency of the answers (see Ex 8). On the 27th September, the vendor's solicitors drew the attention of the Plaintiff's solicitor to the fact that the completion of the transaction under the agreement must take place on or before the 30th September and asked for the draft conveyance for the approval of the vendor. On the same day, the Plaintiff's solicitor again wrote to the vendor's solicitors asking for the title deeds, without which, it was pointed out, the sufficiency of the answers could not be considered. On the 29th September, the Plaintiff's solicitor wrote a further letter to the vendor's solicitors asking for the title deeds and protesting against the unreasonableness of the attitude taken up by the vendor's solicitors and he pointed out that some of the answers to the requisitions were unsatisfactory. However, on the 29th September, the vendor's solicitors wrote to the Plaintiff's solicitor purporting to return the title deeds to the Plaintiff's solicitor and on the 30th September they wrote the following letter to the Plaintiff's solicitor—"According to the terms of the agreement, the conveyance of the above premises should have been executed to-day. As your client failed to do this, we have been instructed by our client to

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give you notice that the agreement is cancelled and the deposit money forfeited to the vendor." It appears that on the 29th September, the Plaintiff's solicitor closed his office for the long vacation, without receiving the title deeds in question, and on the 30th September he left town. What happened subsequently was this—the title deeds in question were brought to the clerk of the Plaintiff's solicitor, after the latter had left town and he, the clerk, at first refused to receive the same, but on the vendor's solicitors' clerk refusing to take back the title deeds, the Plaintiff's solicitor's clerk kept the same with him, without the knowledge of the Plaintiff's solicitor. Meanwhile on the 6th and 17th October the vendor's solicitors kept on asking for the return of the title deeds. These letters, however, were returned by the Plaintiff's solicitor's durwan on the ground that the office was closed. On the 28th October the Plaintiff's solicitor, having returned to town, asked for the title deeds to enable him to deal with the sufficiency of the answers. Thereafter a controversy arose as to whether the title deeds had not been returned to the Plaintiff's solicitor and whether the contract had not already been cancelled. The question about the title deeds was not settled until the 1st November, when it was discovered that the title deeds had been left with the clerk of the Plaintiff's solicitor. On that date, further requisitions on title were sent by the Plaintiff's solicitor. On the 5th November, the vendor's solicitors returned these further requisitions and declined to answer them on the ground that the contract had already been cancelled by reason of breach of contract on the part of the Plaintiff. The Plaintiff thereupon on the 10th November, having regard to the attitude of the vendor, instituted the present suit against

the vendor, claiming specific performance of the said contract, or, in the alternative, damages, which he assessed at Rs 1,00,000. The Defendant in his written statement contended that time was of the essence of the contract and that the transaction had to be completed, under the terms of the agreement between the parties, within 14 days from the date of the delivery of the title deeds to the Plaintiff's solicitor and that as the Plaintiff had failed and neglected to complete the transaction within the time limited as above, the Defendant was within his rights in cancelling the agreement. The Defendant maintained that he had performed his part of the contract and although it was the Plaintiff who was not ready and willing to perform his part of the said agreement, the Defendant was willing to return to the Plaintiff the amount of the said deposit. The learned Subordinate Judge, who tried the suit, held by his judgment, dated the 27th November 1920, that time was not of the essence of the contract, but that inasmuch as it appeared that one of the two properties mentioned in the schedule to the said agreement belonged to the wife of the Defendant, who was not a party to the said agreement, and as the Defendant had no authority to enter into any agreement in respect of the said property on her behalf, the Plaintiff could not get any decree for specific performance of the contract so far as that property was concerned. As regards the question as to whether the Plaintiff could enforce partial performance of the contract in respect of the property which belonged to the Defendant, it was held that although under sec. 15 of the Specific Relief Act the Plaintiff could claim such a right, provided the Plaintiff was willing to pay the price agreed upon and take the property

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which belonged to the Defendant, waiving all right to compensation either for the deficiency or for loss sustained by him through the Defendant's neglect or default, yet no such case was made by the Plaintiff and therefore the learned Subordinate Judge dismissed the entire suit.

On behalf of the Plaintiff-Appellant it has been contended by Dr. Dwarka Nath Mitter before us that although the Court will not specifically enforce part of a contract, except where that part can be separately enforced without any possible injustice to the Defendant, where property is sold in distinct lots, there is a separate contract for each lot, and, secondly, that the principle that the Court will not perform part of a contract if it cannot perform all, did not apply to cases where the impossibility of carrying a part into execution was due to the default of the Defendant who set up this defence, for to permit it to prevail would be opposed to the maxim that no man shall take advantage of his own wrong. The learned Advocate-General on behalf of the Defendant-Respondent maintained, however, that the Plaintiff's case came within the four corners of sec 15 of the Specific Relief Act and that inasmuch as the Plaintiff had not complied with the provisions of that section, the entire suit had been rightly dismissed. To this the Plaintiff-Appellant replied that his case was governed by sec 16 of the Specific Relief Act and that sec 15, on which the Defendant relied, had no application whatsoever to the facts of this case.

The learned Advocate-General admitted before us that time was not of the essence of the contract in this case, nor had time been subsequently made of the essence of the contract by notice on the part of the Defendant. It was also admitted on behalf of the Defendant that at the time

of the agreement between the parties he had not disclosed that one of the lots comprised in the schedule to the agreement belonged to his wife. The Defendant stated in his evidence that without consulting his wife he had entered into the agreement, as he was sure that his wife would join with him in executing a conveyance in favour of the Plaintiff. Thus, it was that he had said in the replies to the requisitions that his wife would concur in the sale. He had no power, however, over his wife and if she refused, he could not make her join with him in the conveyance. Asked about whether the replies to some of the requisitions might not have been more satisfactory, the Defendant seemed to imply that they might have been.

According to the learned Advocate-General, the mere fact that there were two plots specified in the schedule to the agreement did not show that the contract could be treated as divisible into two separate and independent parts. He further contended that the parties contemplated one and indivisible agreement, one lump sum price being fixed for the two plots, and in the circumstances it was impossible to assess the prices of the two plots separately. He suggested that sec 16 of the Specific Relief Act applied only where the part sought to be enforced was a separate, independent and self-contained contract.

Now, plot A in the schedule to the agreement relates to an area containing by estimation 11 bighas 13 cottas, bounded on the north by the garden land of Shahbada Mahomed Haider Sultan, on the west partly by the vendor's land purchased from Nvantara Das and Khayrennessa Begum, on the south by a public road and on the east by a dwelling house and garden of Babu Mulla. Plot B re-

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lates to an area containing by estimation 11 bighas 4 cottas and 2 chataks and bounded on the north partly by the purchased land of Annannessa Begum, now the dwelling house of Shahajada Naymat Shahab, partly by the garden land of the late Panchcowrie Doctor and partly by the land of the Tramway Depot, on the east by the garden of Shahajada Moujaddin Shahab, now the tank and land belonging to Panchcowrie Doctor, on the south by a public road, on the west by a land and *ghul* belonging to the daughter of Shahajada Mahomed Anwar Shah, now the land and tank belonging to the Tramway Company. Plot B is the property, which is the subject-matter of the conveyance, dated the 12th July 1904, referred to in requisition No. 9, and is alleged to belong to the wife of the Defendant.

From the descriptions of the two plots, there seems to be little doubt that they are two distinct and independent lots and it is impossible to come to the conclusion that one is important for the enjoyment of the other. In other words, it cannot be predicated that plot B is important for the enjoyment of plot A or that the transaction relating to plot A is dependent on the transaction relating to plot B. It would, therefore, appear that the performance of the contract, so far as it relates to plot A, which belongs to the Defendant, is both practicable and proper, whereas the performance of the contract, so far as it relates to plot B, which belongs to the wife of the Defendant, who was not a party to the agreement, is at once impracticable and improper. No doubt it is of the essence of specific performance that part only of an agreement should not be performed: this is the general rule and the exceptions to this general rule are embodied in secs. 14, 15 and 16 of the Specific Relief Act. In our opinion, the

present case does not come within the purview of secs. 14 and 15 of the Specific Relief Act, but it does come within the purview of sec. 16. Under sec. 14, performance of a contract may be enforced by either the promisor or promisee, provided (a) the part which cannot be performed (a) is inconsiderable and (b) may be compensated for in money, and (ii) provided that such compensation is made. Under sec. 15, the party in default may claim specific performances without compensation, where the part left unperformed is small in value and it admits of compensation, but he cannot have specific performance where such part is considerable and does not admit of compensation. The party not in default, however, may have specific performance with compensation in the first case, but specific performance without compensation in the second case. Under sec. 16, where a contract consists of several parts, which are separate from, and independent of, one another and some of which cannot and ought not to be performed, such part or parts as can and ought to be performed, may alone be specifically enforced. This is on the principle that such a contract, though nominally one, is actually divisible, and when the Court enforces what is apparently a part of the contract it really enforces an entire and complete contract. The question, therefore, whether a contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract.

In the case of *Rutherford v Adon Adams* (1), the principles on which the Court will act in a suit for specific performance are thus stated by their Lordships of the Judicial Committee of the Privy Council:—"In exercising its juris-

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diction over specific performance, Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract, if there has been such a contract."

The principle is well-settled and it was held as early as in *Mortlock v Buller* (2) that—"If a man, having partial interest in an estate, chooses to enter into a contract, representing it and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose

of this jurisdiction, the person contracting under these circumstances is bound by the assertions in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the Court will not hear an objection by the vendor that the purchaser cannot have the whole."

It has been even held that though the difference between the property contracted to be sold and that which the vendor can actually convey may be great the Court will generally, notwithstanding this circumstance, enforce the contract where the vendee is willing to take whatever interest the vendor has [See *Jones v Evans* (3), *Barnes v. Wood* (4) and *Hooper v. Smart* (5)]. No doubt if the vendee is, from the first, aware of the vendor's incapacity to convey the whole of what he has contracted for, he cannot, generally, insist on having, at an abated price, what the vendor can convey. In this case, however, it is not suggested that the vendee was aware of the Defendant's incapacity to convey the whole of what was contracted for; indeed we have, as has already been pointed out, the Defendant's own statement that he did not disclose that one of the properties belonged to his wife. The representation, such as it was, therefore, by the Defendant was that the entirety of the properties mentioned in the schedule to the agreement belonged to him. The learned Advocate-General, however, argues that there can be no abatement of the price in a case under sec. 16 of the Specific Relief Act and that if the vendee wishes to take plot A then he must pay the entire sum mentioned in the contract. We are unable to take such a restricted view of the

(3) 17 L. J. Ch. 469 (1848).

(4) L. R. 8 Eq. 424 (1869).

(5) L. R. 18 Eq. 683 (1874).

(2) 10 Ves. 315 (1804).

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scope of sec. 16 of the Specific Relief Act as has been suggested to us by the learned Advocate-General. The inability on the part of the Defendant to make a good title as regards plot B of the schedule to the agreement is a legal, and not a physical, inability to perform the contract; it would, therefore, follow that it does not lie in the mouth of the Defendant to urge that he is unable to do all the physical acts necessary for the performance of the contract, as far as it related to plot A. There is nothing of which the Defendant can complain. It is his own fault if he has assumed an obligation which he cannot fulfil, and in our opinion, it cannot be inequitable to require him to perform, as far as it is in his power, so much of the contract as relates to plot A. In no just sense can it be said that in requiring the Defendant to perform the contract with reference to plot A, a new contract is being made by the Court for the parties. The Defendant is not compelled to convey anything which he did not agree to convey and the vendee pays for what he gets according to the rate established by the agreement between the parties. The conclusion, therefore, to which we have come on the facts of this case is that the Defendant ought to be compelled to convey to the Plaintiff plot A of the schedule to the agreement with an abatement in the price agreed upon.

It has been said that in circumstances, like the present, the principle on which the abatement in price is calculated is *primâ facie* acreage. Having regard to the view which the learned Subordinate Judge took in this case, he felt that it was not necessary for him to go into any question of abatement in the price and consequently there are no data in the evidence on record from which the amount of compensation, i.e., abatement in the

price, can be ascertained. Even in cases where the ascertainment of the amount of abatement cannot be certain or exact, the Court proceeds to grant abatement, if it can reasonably estimate the amount of abatement from the evidence of competent persons. We have on the present record no materials and we are, therefore, constrained to direct a remand in this case to the lower Court for the purpose of assessing the abatement in the price which should be allowed to the Plaintiff or such evidence as may be adduced by the parties.

The order, therefore, will be that it is declared that the Plaintiff is entitled to specific performance of the agreement, dated the 15th September 1919, in the pleadings in this suit mentioned to the extent of all the interest of the Defendant in the property particularly described as plot A in the schedule to the said agreement with a proportionate abatement of the purchase-money in respect of the property particularly described as plot B in the said schedule and alleged to belong to the wife of the Defendant; and it is ordered that the case be remanded to the lower Court for determining the amount to be paid by the Plaintiff for the purchase-money of the said property, plot A, mentioned in the said schedule, having regard to the declaration aforesaid, and it is further ordered that the Defendant do execute and register a proper conveyance of the said property being plot A mentioned in the said schedule in favour of the Plaintiff or such person as he may direct in terms of the said agreement on making out a good title to the said plot A and do deliver up to him possession of the said property within a time to be fixed by the lower Court, the Plaintiff paying to the Defendant the amount of the purchase-money as may be determined by the lower Court and also all costs and expenses

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necessary to complete and obtain the conveyance of the said property

The result, therefore, is that the judgment and decree of the lower Court are set aside and this appeal is allowed with costs

Let the records be sent down to the lower Court without delay

Appeal allowed.

J N R

Case remanded

CRIMINAL REVISORIAL JURISDICTION]

REF. NOS. 150 AND 150A OF 1922.

NEWBOLD, J	JUDISTHIR GOPE,
SUHRWARDY, J	[Complainant, Petitioner,
1922,	v.
8, December.	SHRIK SAMIR,
	Opposite Party.

Simultaneous trial of a case and a counter-case by two different Magistrates, legality of—Trial by same Magistrate, desirability of

Two counter-cases were made over to two different Magistrates for trial and both the Magistrates proceeded with the trials simultaneously

Held *That it was not desirable that the cases should be simultaneously tried by two different Magistrates and it was desirable that both the cases should be tried by one Magistrate.*

This was a Reference under sec 438 of the Code of Criminal Procedure, dated the 27th October 1922, by the Sessions Judge of Dacca

The facts will fully appear from the order of reference which was as follows

On the 17th July last there was a dispute regarding some land between the two parties—the complainant and the accused party Both parties allege to be raiyats but one party claims a prior right to the other's On that very day Judisthir Gope of one party complained before the Magistrate and the Magistrate at once

issued summons against Samir and others of the other party under sec 147, I P C Then on 18th July 1922 Samir lodged a counter-case which was sent to the police for report and on 25th July 1922 on police report Beni and Gavanath of Judisthir's party were summoned under sec 323, I P C Then it appears the two cases were made over to two different Magistrates for disposal Up to date in Judisthir's case all the prosecution witnesses—7 in number—have been examined and charge has been framed against the accused under sec 147, I P C In the other case, up to date only one witness for the prosecution has been examined

Both parties are agreed—in fact both parties have filed application to the effect that the simultaneous trial of the two cases over one and the same occurrence is undesirable and unsatisfactory and each party has claimed that the trial of the other party's case should be deferred till the disposal of his case

In my opinion the trial of Judisthir's case should be proceeded with and proceedings in Samir's case should be stayed till the disposal of Judisthir's case

It being admitted by both parties that simultaneous trial of two cases by two different Magistrates is unsatisfactory and undesirable, I need not expatiate on the point The ruling in *Bachu Mullah v Sia Ram Singh* (1) clearly and very fully points out the irregularity amounting to illegality of such a course. Now the point is, which case should be proceeded with and which should wait. In this matter, I have given preference to Judisthir's case for the following reasons—

(1) Judisthir's complaint is prior to that of Samir's in time.

(1) I. L. R. 14 Cal. 388 (1886).

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(2) In Judisthir's case already the prosecution case is closed and charge has been framed—whereas practically very little has been done in Samir's case."

Babu Ramgati Sarkar for some of the Accused.

The JUDGMENT OF THE COURT was as follows:—

On the facts stated in the letter of reference we think it desirable that both the cases should be tried by one Magistrate and the learned Sessions Judge's suggestion as to the order of trial accepted. We accordingly transfer the case in which Sheikh Samir is the complainant and Beni Madhab Gope and another accused from the file of Babu J. C. Mazumder, Deputy Magistrate of Mamkangj to the file of Babu J. Chakrabarty, Sub-Deputy Magistrate of Mamkangj, and we also direct that the trial of the case in which Judisthir Gope is the complainant and Samir Sheikh and others accused be proceeded with and the proceedings in the case in which Sheikh Samir is the complainant be stayed until the disposal of the other case.

J. N. R. *Reference accepted*

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

VISCOUNT CAVE.

LORD PHILLIMORE.

LORD JUSTICE CLERK KHAWAJA MUHAM-

SIR JOHN EDGE. MAD HAMID,

MR. JUSTICE DUFF. Appellant,

1922, v.

Heard, 27, 28, 31, July MIAN MAHMUD and
and 1, 3, August. ors, Respondents.

Judgment,

9, November.

Khankahs, what are—Sajadanashin, his rights—Right of succession to the office—Right to surplus

income, if exclusive of other fees—Deduction, proof, though word wakf not used, from user.

On the death of a sajadanashin of a khankah, his eldest son, if qualified, is the natural successor of his father

Ordinarily speaking, the sajadanashin has a larger right in the surplus income than a mutwalli, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the mahant of a Hindu math, has full power of disposition over it

VIDYA VARUHI THIRTHA v BAL SAMI AYYAR (3) referred to.

But this does not mean that in every case the whole income from a khankah is at the disposal of the sajadanashin and it was plain from the authorities as well as from the evidence in this suit that at certain shrines the members of the founder's family other than the sajadanashin are treated as entitled to share in surplus offerings which remain after payment of expenses (including a reasonable remuneration to the sajadanashin)

Dedication may be inferred although the word wakf is not shown to have been used.

The nature and origin of khankahs described.

This was an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 2nd January 1917, reversing a decree of the District Judge of Multan, dated the 11th February 1913.

The chief questions in the appeal are concerning a khankah at Taunsa in the Dera Ismail Khan District

The suit was brought by the Appellant against the Respondents claiming possession of the shrine and the properties connected with it, and asking for an injunction to prevent the Respondent Mian

(3) L. R. 48 I. A. 302, 322; s. c. 26 C. W. N. 537 (1921).

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Mahmud from interfering with the properties or with the Appellant's rights as *sajadanashin*.

The Defendants filed written statements and the main questions in dispute were.—

Whether there was a religious institution (*qaddi*) at Taunsa, and whether certain of the properties in suit were *wakf* or were the ordinary property of Allah Baksh and divisible among his heirs.

There was a further question as to whether the Appellant was the *sajadanashin* of the *khankah*.

The facts of the case and the findings of the lower Courts are fully set out in the judgment of the Judicial Committee.

Messrs. L. DeGruyther, K. C., Brian Pelman and Dubé for the Appellant.—The whole case turns on the foundation of the *khankah*. *Vidya Varuthi Thirtha v. Balusami Ayyar* (3). The Mahomedan law which applies to such institutions is summarised in *Syed Ameer Ali's Mahomedan Law*, Vol. I, 4th Edn., p. 143.

The conditions here are identical.

There is abundant evidence of large gifts of buildings, wells, etc., which would never have been given if they were to be private property on the death of the *sajadanashin*, and liable to partition on sale. The manner in which the property was used affords an inference of dedication. *Mukhdum Hassan Baksh v. Ilahi Baksh* (5).

The Appellant succeeded to the *qaddi* as *sajadanashin* according to the proved custom of primogeniture, and was duly installed and recognised.

Sir Geo. Loundes, K. C., E. B. Raikes and Abdul Rashid for the Respondents.—

(3) L. R. 48 I. A. 302, 322; s. c. 26 C. W. N. 537 (1921).

(5) [1913] P. R. 23, p. 96.

There must be inherent dedication which cannot be inferred from the facts here.

Fakhruddin v. Kifayat Ullah (6), *Hosseini Shah v. Zahoor Shah* (7), *Thakoor Dass v. Hajee Begum* (8) and *Nur Mahomed v. Ghulam Habib* (9).

A shrine is not necessarily *wakf*. It could be of a private character formerly. The distinction between a private and public *wakf* is shown in *Bikani Mia v. Shukhul Poddar* (10).

In neighbouring shrines you find offerings are heritable and there is full testamentary power over buildings and property which are used for religious purposes.

This shrine is comparatively modern and dedication can only be inferred of an ancient foundation.

Zooleka Bibi v. Zunul (11).

Balke's Mahomedan Law, Book 9, Chap. I, p. 529.

Wilson's Digest of Anglo-Muhammedan Law, 3rd Edn., para. 320, p. 343.

There must be clear and unmistakable evidence of endowment, *Konwar Doorga-nath Roy v. Ram Chunder Sen* (12).

This was a case of a Hindu idol and the requisites of Mahomedan law are even stricter than those of Hindu law.

The decision in *Mukhdum Hassan Baksh v. Ilahi Baksh* (5) related to a public cemetery which had been there for hundreds of years and is not applicable.

Allah Baksh had considerable private property out of which many of these

(5) [1913] P. R. 23, p. 96.

(6) 8 Ind. Cas. 578 (1910).

(7) [1868] P. R. No. 67.

(8) [1868] P. R. No. 100.

(9) [1892] P. R. No. 106.

(10) I. L. R. 20 Cal. 116, 147 (F. B.) (1892).

(11) 4 Bom. L. R. 1068 (1904).

(12) L. R. 4 I. A. 12; s. c. I. L. R. 2 Cal. 841, 849 (1876).

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buildings may have been erected. The offerings claimed by the Appellant as offerings to the shrine are in many cases not offerings to the shrine but offerings to the *sajjadanashin*, *quâ-sajjadanashin*.

The property must be actually delivered over to a *mutwalli*. *Fakhruddin v Kifayat Ullah* (6).

Reference was also made to *Vidya Varuthi Thirtha v Balusami Ayyar* (3), *Sethuramaswamiar v Veruswamiar* (13), *Bibee Kuncer Fatima v Bibee Saheba Jan* (14) and *Muhammad Iziz-ud-din Ahmad Khan v Legal Remembrancer, N. W. P. & Oudh* (15).

Mr. L. DeGruyther, K. C. in reply.

It is not necessary for dedication that the word "*wakf*" should be used.

Jewan Dass Sahoo v Shah Kubeer-ood-deen (1), *Puran Bibi v Abdool Karim* (4) and *Bikani Mia v Shukhlal Poddar* (10).

The grant was not to the family for their own use but to the shrine.

Mohiuddin v Sayiduddin (2).

The intention to dedicate is shown by the inscriptions.

He also referred to —*Vidya Varuthi Thirtha v Balusami Ayyar* (3) and *Sayyad Muhammed v Fattah Muhammed* (16).

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT CAVE.—This appeal raises

questions as to the existence of a *khankah* (a Mohammedan religious institution) at Taunsa in the District of Dera Ghazi Khan in the Punjab, and as to the rights of the *sajjadanashin* (or superior) of such an institution. The nature and origin of *khankahs* were described in the judgments of the High Court of Bengal in *Piran v Abdool Karim* (1) and *Mohiuddin v Sayiduddin* (2), and in the judgment of this Board in *Vidya Varuthi Thirtha v. Balusami Ayyar* (3), and need not be further elaborated. It is enough to say that a *khankah* is a monastery or religious institution where dervishes and other seekers after truth congregate for religious instruction and devotional exercises. It has generally been founded by a dervish or a *sufi* professing esoteric beliefs, whose teachings and personal sanctity have attracted disciples whom he initiates into his doctrines. After his death he is often revered as a saint, and his humble *takia* (or abode) grows into a *khankah* and his *dargah* (or tomb) into a *rouzah* (or shrine). The *khankah* is usually under the governance of a *sajjadanashin* (the one seated on the prayer mat) who not only acts as *mutwalli* (or manager) of the institution, and of the adjoining mosque, but also is the spiritual preceptor of the adherents. The founder is generally the first *sajjadanashin*, and after his death the spiritual line (*silsilla*) is extended by a succession of *sajjadanashins*, generally members of his family chosen by him or according to directions given by him in his life-time, or selected by the *jalkira* and *murids*, and formally installed, and the income of the institution is usually received and expended by them.

(1) I. L. R. 19 Cal. 203 (1892).

(2) I. L. R. 20 Cal. 810 (1893).

(3) L. R. 48 I. A. 302, 322: s. c. 26 C. W. N. 537 (1921).

(4) 2 M. I. A. 390 6 W. R. P. C. 3 (1840).

(6) 8 Ind. Cas. 578 (1910).

(10) I. L. R. 20 Cal. 118, 147.

(13) L. R. 45 I. A. 1: s. c. I. L. R. 41 Mad. 296; 22 C. W. N. 457 (1917).

(14) 8 Suth. W. R. 313, 315 (1867).

(15) I. L. R. 15 All. 321 (1898).

(16) L. R. 22 I. A. 4 (1894).

(1) I. L. R. 19 Cal. 203 (1892).

(2) I. L. R. 20 Cal. 810 (1893).

(3) L. R. 48 I. A. 302, 322: s. c. 26 C. W. N. 537 (1921).

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In the present case events followed closely the course above described. Khawaja Muhammad Suleman, who was a disciple of Nur Muhammad Muharvi of Mahar in the State of Bahawalpur (a member of the well-known Chishti family of *sufis*), came to dwell at Taunsa, a place situated in a sandy desert under the Suleman range and then uninhabited. It is recorded in a book called *Manakab-ul-mahbubin* (the history of the beloved of God), which was written in or about the year 1860 by one of his disciples and was referred to by both parties in the suit, that Suleman built a house and a *dalan* (or gallery) for his lodging, a *hujra* (or room) for his worship, and a *dalan* for the society of *fakirs*, and further that he erected a *katcha* mosque where he said prayers in congregation, and to the east of the mosque a wooden canopy shaded by reeds, under which he held Court. Mention is also made of other *hujras* and a *langar* (or kitchen) for the use of his adherents, and a well, and it is said that an auditor of accounts and a legal adviser and a counsellor were appointed. Suleman was much revered as a religious teacher and made many disciples, including the Nawab of Bahawalpur, who demolished the *katcha* mosque of earth and built a *pacca* mosque in its place.

Suleman died in or about the year 1849, and, his sons having predeceased him, he was succeeded by his grandson (the elder son of his elder son) Khawaja Allah Bakhsh, who on the third day after the death of Suleman was "made to sit on the *musalla* of Hazrat Suleman" with the usual ceremonies, including the tying of the turban, and with the assistance of holy men who had come from Ajmere. Khawaja Suleman was buried in his house at Taunsa, and his tomb became a

sacred place of pilgrimage, particularly on the occasion of the *urs* or celebrations held on the anniversary of his death; and Taunsa became known as Taunsa *sharif*, or holy Taunsa. In memory of Suleman, the Nawab of Bahawalpur erected a marble shrine over his place of burial and rebuilt the mosque in marble.

Khawaja Allah Bakhsh carried on his grand-father's work with zeal and success, and with the assistance of a number of *pirs* and *khalifas* who had been ordained by him, and made many disciples, and many thousands of pilgrims were attracted to the shrine. Allah Bakhsh obtained grants of more land from the tribes in the District, and with the help of his followers put up huts and bungalows for the *fakirs* and dervishes, and *sewais* and *langars* for the accommodation of the pilgrims, so that at the time of his death the mosque and shrine, with the buildings used in connection with them, occupied some acres of ground. Remission of revenue was granted to Allah Bakhsh as *sajjada-nashin* of the *khanqah* at Taunsa, and he was exempted under that designation from appearing personally in a civil Court.

On the 13th September 1901, Khawaja Allah Bakhsh died, and his eldest son Haziz Muhammad Musa was duly installed as *sajjada-nashin* in his place. Shortly afterwards, differences arose between Muhammad Musa and his half-brother Mian Mahmud (the first Respondent in this appeal) as to the position and authority of Muhammad Musa as *sajjada-nashin* and the rights and interests of the two brothers in the property left by their father Khawaja Allah Bakhsh, and at the instance of the Deputy Commissioner, these differences were referred under the Frontier Crimes Regulation to the Tumandars (or headmen of the District) with a view to a settlement. The

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Tumandars, after hearing the parties, made an award, dated the 30th September 1903, whereby they determined (in effect) first, that Muhammad Musa was *sajjadanashin* of the *khan-kah* with the right to manage the mosque and shrine, secondly, that the income of the shrine, consisting of the offerings of the pilgrims, should belong as to one-fifth to Muhammad Musa as *sajjadanashin*, and as to the balance to the two brothers equally, and, thirdly, that while the mosque was *wakt* property and the shrine, with its inner and outer *astanas* (or courtyards) and certain other properties were joint and impartible, the remaining properties, including the *serais*, bungalows and *langars*, were divisible between the brothers equally. The following clauses in the award, which relate to the properties above-mentioned, have a bearing on what follows :-

“ 4 - The building of the Astana Kalan (which includes the Astana of the *khan-kah* shrine), and as well as the houses of the Mubari people situate on the northern side of the mosque, shall be considered joint. However, the compound of the Astana of the Rauza Mubarik, which is situate on the west of the mosque and is attached to the Rauza, shall not be considered as liable to partition, because it is an Ibadat-khana. The dervishes who formerly lived there shall, in future, also stay there, in accordance with the previous practice.

5 - The mosque is *wakt* property. The appointment of its Imam and Muzan shall be in the hands of the *sajjadanashin*. Saying of prayers and call to prayers shall be in accordance with the practice of the previous *sajjadanashins*, in the hands of the *sajjadanashin* for the time being. The prayers should be said during that portion of the time in which they were formerly said, according to the practice of the

sajjadanashins. The same practice shall be acted upon in future.

8 - The residential buildings, consisting of Haram Sara,* dwelling-houses, guest-houses, and *langar khana*s (charitable kitchens) shall be the property of both the parties in equal shares. But the *langar khana* and Makan-i Itikat, which are in front of the shrine, and where the Kuran and Wazifa are recited, are specifically declared with the consent of Mian Mahmud, to be the exclusive property of the *sajjadanashin*. Mian Mahmud shall have no concern with these buildings. There are also two *khuras* (mills for grinding corn) in the *langar khana* (charitable kitchen). They shall also belong to the *sajjadanashin*. The boundaries of the *langar khana* (charitable kitchen) are as follows :-

On all three sides, namely, west, south and east, there is a public thoroughfare. The said building is confined within a wall with the exception of shops.

9 - Haram Sara buildings, outer residential houses and guest-houses have all been held to be the property of the parties in equal shares. They shall be divided accordingly in a gentlemanly manner.

10 - Dah Dardah well and Thalawala well shall be joint property. None of the parties shall be entitled to interfere with the supply of water for the time being.

16 - The place “ Musallah ” in front of the shrine where the late Hazrat sat and recited his prayers should be considered as specially meant for the *sajjadanashin*, and in his absence the person whom he authorises can sit there.”

These decisions were apparently accepted by Muhammad Musa, and to some extent by Mian Mahmud, and they proceeded to partition between them by ar-

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rangeinent the properties declared to be divisible. But further differences arose, and the whole matter was again referred to the arbitration of a *Maulvi* named Najam-ud-din, who, after hearing the parties, made his award, dated the 17th June 1904. This award went into much detail, and it is unnecessary to state its conclusions at length, but the short effect of it was to confirm the decisions of the *Tumandars* except as to the income from the *ghrune*, which the arbitrator directed to be divided equally, and to confirm with certain modifications the partition arranged between the parties. This award was accepted by Muhammad Musa, who applied to have it filed in Court, but the application was opposed by Mian Mahmud, who was still not content, and was rejected on the ground that the award was incomplete.

Meanwhile, the two brothers, being still in difference, joined in a request to Nawab Ahmad Yar Khan to endeavour to bring about a settlement, and the latter prepared a deed of compromise under which both parties were to accept the award of Najam-ud-din, subject to some small modifications of detail. Muhammad Musa by a letter to Ahmad Yar Khan assented to this proposal, and Mian Mahmud was apparently willing to agree to it, but before formal effect could be given to the compromise, Muhammad Musa died on the 9th February 1906.

Upon the death of Muhammad Musa a further quarrel broke out between his eldest son Khawaja Muhammad Hamid (the Appellant in this appeal) and the Respondent Mian Mahmud as to the right of the former to succeed his father as *sajjadanashin*, and as to the rights and interests of the disputants in the property of Khawaja Allah Bakhsh, but on the intervention of Mr. Casson, the Deputy Com-

missioner, terms were arranged, and a few days after Muhammad Musa's death the following agreement was signed:—

I, Mian Hamid, very willingly consent to Mian Mahmud sitting in front of me and shall have no objection thereto, but he should not sit on my *Mussallah*. On every occasion I shall consider him, who is my uncle, as deserving respects from me. I shall be going to my uncle once a day. I shall act upon and abide by the settlement made by Ahmad Yar Khan with my deceased father.

(Sd.) FAKIR HAMID,
Sajjadanashin of Taunsa.

I would very willingly take part in the *Dastarbandi* and installation on *gaddi* of Mian Hamid and shall perform the ceremony with my own hands. I shall ever be loving my dear nephew Mian Hamid.

(Sd.) FAKIR MAHMUD.

The effect of this agreement was that the Appellant was to be installed as *sajjadanashin* in succession to his father, and that the settlement proposed by Ahmad Yar Khan was to be accepted and carried into effect.

In pursuance of the last-mentioned agreement the Appellant was duly installed as *sajjadanashin* by the ceremony of *dastarbandi* (the tying of the turban), the Respondent Mian Mahmud and a number of *purs* assisting in the ceremony, but a few days later the Respondent Mahmud, apparently repenting of his bargain, procured himself to be invested by other *purs* with the like rank, and thenceforth began to usurp some of the functions of the *sajjadanashin* and in other ways to interfere with the rights secured to the Appellant by the agreement. This new quarrel continued for some years, and ultimately on the 22nd July 1911, the Appellant commenced this suit against the Respondent Mian Mahmud and the two

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younger brothers of the Appellant (who also claimed an interest in the succession of Hafiz Musa), alleging in effect that the shrine and all the property used in connection with it, including a great part of the properties which had been partitioned, were dedicated to the religious purposes of the *gaddi*, and that the Respondent Mian Mahmud was interfering with such property and with the Appellant's rights as *sajadanashin*, and claiming an injunction and possession of the property. The Defendants filed written statements in answer and a number of issues were framed, of which the most important were the following:

"(1) Is there a religious institution (*gaddi*) at Taunsa, and is Plaintiff its manager (*mutazim*)?"

(2) Does property 1-31 of the plaint belong to this institution, and (or or) is this property *wakf* and is Plaintiff its *mut-walli*?

(3) Is Plaintiff *sajadanashin* of this institution, and what are his rights as such?

(4) Is the partition invalid?"

The suit was heard by the District Judge of Multan (Mr. H. F. Forbes) who decided the first and third issues and the greater part of the second and fourth in favour of the Plaintiff-Appellant, holding that there was a religious institution at Taunsa of which the Plaintiff alone was the manager, and that the shrine with its inner and outer *astanas* and the schools, bungalows, *serais* and *langars* used in connection with it, were religious buildings and *wakf* property under the Plaintiff's sole control. He accordingly on the 4th February 1913, made a decree containing a declaration that the properties above-mentioned were under the management of the Plaintiff as *sajadanashin* and that the Defendants had no proprietary rights in them, an injunction restraining the Defendant Mian Mahmud

from interfering with the Plaintiff's management of the above property and an order for possession and for the costs of the suit.

The Defendants having appealed to the Chief Court of the Punjab, the learned Judges of that Court (Sir Donald Johnston, C. J., and Leslie Jones, J.) differed from the District Judge on all the above points, and held that (apart from the mosque), there was no such religious institution as alleged, that the Plaintiff was no *sajadanashin*, and that none of the property in suit was *wakf*, but that all of it was ordinary property of Allah Bakhsh divisible among his heirs. They accordingly reversed the decree of the District Judge with costs and dismissed the Appellant's suit, except that (the Defendant Mahmud not objecting) an injunction was granted restraining the Defendant Mahmud from attempting to lead prayers in the presence of the Plaintiff when the latter was there with the intention of leading prayers. The Plaintiff thereupon appealed to His Majesty in Council.

The appeal was strenuously argued on behalf of the Appellant and of the Respondents. Difficulty is caused by the contradictory evidence given by the witnesses, including the *Maulvis* who were called as experts in Mohammedan law, and by the difference of opinion in the Indian Courts; but then Lordships, after considering all the arguments brought before them, have come to clear conclusions upon the several points raised, which may be stated in the following order:—

1. Is there at Taunsa a religious institution (a *khankah* or *mazhab gaddi*) for devotional exercises, and the instruction of pupils in the Mohammedan faith?

In their Lordships' opinion there is such an institution. The history of the foundation of the institution by Suleman

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and Allah Bakhsh agrees closely with the history of other institutions always recognised as *khankahs* and is consistent only with the existence of such a foundation. The life and teaching of Suleman, his recognition as a saint, the thronging of pilgrims to his shrine, the swarm of *fakirs* and dervishes who have been there engaged in teaching and devotional exercises, the large number of disciples constantly present, and the recognition of Allah Bakhsh, Muhammad Musa and the Appellant successively as *sajjadanashins* of the institution—these and other facts which are beyond dispute—show that a religious institution such as described by the Plaintiff has existed and flourished at Taunsa for many years past. The foundation is expressly referred to in some of the documents, such as the award of the Tumandars, as a *khankah*, and has been described by the Respondent himself as a *qaddi*, and the evidence shows that it is acknowledged by Mohammedaas throughout India as a legitimate off-shoot of the *khankah* at Mahan and of the great shrine at Ajmere, and as the mother of a number of other shrines which are frequented by the faithful. Upon the whole, then, Lordships consider that the existence of this foundation must be taken as established.

2 Is the Appellant *sajjadanashin* and manager of the *khankah*? With deference to the opinion of the learned Judges of the Chief Court, then Lordships feel no doubt that he is. Notwithstanding the practice hitherto followed at Taunsa, they would hesitate to say that on the death of a *sajjadanashin* his eldest son is entitled as of right to succeed him, but the eldest son, if qualified, is the natural successor of his father. And, however, that may be, the evidence is clear that the Appellant was formally recognised and installed by the *pirs* with the express consent and assist-

ance of Mian Mahmud; and this being so, it is not now open to Mahmud to question the Appellant's position as *sajjadanashin* or his right to manage the mosque and the property attached to the *khankah*.

3 What property is attached to the *khankah*? Or, in other words, what properties were made *wakf* by Khawaja Suleman or Khawaja Allah Bakhsh and dedicated to the religious purposes of the institution?

This is a question of considerable difficulty, as it is not proved by direct evidence that either Suleman or Allah Bakhsh used the word *wakf* or made formal dedication of any property to religious uses. But, as pointed out in *Jewan Dass Sahoo v. Shah Kubeer-ood-deen* (4), dedication may be inferred although the word *wakf* is not shown to have been used and there are facts proved in this case from which the dedication of some property to religious purposes may be inferred.

First, as to the shrine of the saint, with its *astana*, the place of worship for the *sajjada*, and the surrounding *hupas* and gates—being the property shown in the plan P1—then Lordships are of opinion that this is *wakf*. Not only is the shrine the burial-place of the founder, but the tomb with its adjuncts have been used and recognised for upwards of half a century as a place of pilgrimage and as the home and centre of the religious and educational community founded by the saint and continued by his grandson. The marble shrine erected by the Nawab was obviously intended to be used, not as private property, but as a place of pilgrimage and a focus of religious teaching. The place of worship in the courtyard has been reserved for the *sajjadanashin*, and the *huyras* for the use of the *fakirs*. Some of the buildings contain inscriptions point-

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ing to a religious use. The Tumandars, who had local knowledge, held these buildings to be impartible, and their view was confirmed by Najam-ud-din and Ahmad Yar Khan and accepted by all persons concerned, including the Respondent Mahmud. In view of all these facts it is difficult to believe that this property is now to be treated as the absolute property of the heirs of Allah Bakhsh, so that it would be in the power of any of them to claim his share and practically to destroy the religious foundation, and it seems reasonable to infer a dedication to the purposes of the *khankah*.

Secondly, as to the mosque, with its inner and outer courtyards, well, tanks, *huyras* and schools, and the Maharwi bungalow—being the property shown in the plan P2—like considerations apply. The mosque is admittedly *wakf* property. The *astanas* are used by the *takris* and pilgrims, and are holy ground, for Allah Bakhsh directed that shoes should be taken off there. The huts are for the use of the dervishes, and the schools are religious schools connected with the *khankah*. The Maharwi bungalow was given by an adherent for the use of the superior of Mahar, the parent shrine, on his visits to Taunsa. This property therefore must also be held to be *wakf*.

As to the remaining properties in dispute, such as the *serais* and *langars*, these stand in a different position. They have, no doubt, been used for the accommodation of the pilgrims, but they were never appropriated to the religious purposes of the *khankah*. There is no evidence showing that they were erected out of the offerings at the shrine. The Tumandars and the arbitrators, all of them skilled in Mohammedan law, treated these houses as private property and partible, and the parties to the dispute accepted this view and agreed

to a partition. As to these items, therefore, that is to say, all the properties except Nos. 1 and 2, the Appellant's claim fails.

4. To whom do the offerings at the shrine belong?

It was stated in the judgment of this Board in *Ludya Varuthi Thyntha v. Balusami Iyyar* (3) that "ordinarily speaking, the *sajjadanashin* has a larger right in the surplus income than a *mutawalli*, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the *mahant* of a Hindu *math*, has full power of disposition over it." But this does not mean that in every case the whole income from a *khankah* is at the disposal of the *sajjadanashin*, and it is plain from the authorities, as well as from the evidence in this suit, that at certain shrines the members of the founder's family other than the *sajjadanashin* are treated as entitled to share in the surplus offering which remain after payment of expenses. Thus, it is stated in the *Patawa Azizi* (page 90) that "the offerings daily made at the Dargah should be spent in connection with the expenses of the descendants of the saint and the service of the Dargah according to their needs. An honest person should be appointed as *mutawalli* to collect the offerings and distribute them properly," and it appears from the evidence at Mahar—the parent shrine of Taunsa—and at some of the shrines which have sprung from Taunsa, the right of the descendants of the founder to share in the offerings is recognised. In the case of Taunsa itself, it is difficult to draw from the evidence any clear rule. Allah Bakhsh disposed of the whole income as he pleased, but Musa's right to do so was challenged, and the

3) L. R. 19 F. A. 302, 323. A. C. 26 G. W. N. 537 (1921).

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claim of Mian Mahmud to a share in the offerings was admitted by the Tumandars and the arbitrators. Further, the Appellant was installed as *sajjadanashin* upon an express undertaking by him to carry out the award of Ahmad Yar Khan; and under that award, which confirmed in this respect the award of Najam-ud-din, the surplus offerings were to be shared equally with Mahmud. Upon the whole, their Lordships think that the Appellant must be held to his undertaking, and accordingly that he must share the surplus offerings, after deducting all outgoings (including a reasonable remuneration to the *sajjadanashin*), with the Respondent Mian Mahmud during their joint lives.

In the case of these offerings, as in the case of the immoveable property, their Lordships have dealt only with the rights of the Appellant and the first Respondent *inter se*, and have not considered the rights of the other Respondents.

For the above reasons their Lordships are of opinion that this appeal should be allowed, and that the decree of the Chief Court should be set aside, except so far as it grants an injunction against the first Defendant enjoining him in future not to enter the mosque with his congregation and lead prayers in the presence of the Plaintiff when the latter is there with the intention of leading prayers with his congregation, and that in lieu thereof it should be declared that the properties numbered 1 and 2 in the list attached to the decree of the District Judge are under the management of the Plaintiff as *sajjadanashin*, and there should be a decree for the delivery of possession of those properties to the Plaintiff, and for an injunction restraining the first Defendant from interfering with the management of those properties by the Plaintiff, or with the exercise by him of his rights and duties as

sajjadanashin. There should also be a declaration that the Defendant Mian Mahmud is entitled during the joint lives of himself and the Plaintiff to one-half of the surplus offerings at the shrine after deducting all outgoings (including a reasonable remuneration to the *sajjadanashin*), with liberty to him to apply for an account and payment of what may be found due. Their Lordships will humbly advise His Majesty accordingly.

As both parties have throughout the proceedings put forward claims which cannot be supported, there will be no order as to the costs of the proceedings in the Courts below or of this appeal.

Solicitors: *Messrs. Lewis and Yglesias* for the Appellant.

Solicitors: *Messrs. Ranken, Ford and Chester* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 110 OF 1919.

CHATTERJEE, J. RAJANI KANTA ROY and
PEARSON, J. ors., Defendants,
Appellants.

1922,

Heard, 10 and

11, May.

Judgment,

9, June.

RAJA JYOTI PRASAD

SINGH DEO, Plaintiff,

and ors., Defendants,

Respondents.

Civil Procedure Code (Act V of 1908), Or. 22, r. 10, conversion of application for substitution of heirs into one for adding Respondents on the ground of devolution of interest. Such application, if made during appeal—Partition suit—Failure to substitute heirs of deceased Defendants, owing to ignorance—Omitted heirs made parties in appeal—Suit, if should be dismissed.

In an appeal from a final decree in a suit for partition one of the Respondents, whose share in the property had been sold and which share had been subsequently re-acquired by his heirs, having died, the

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Appellant applied for substitution of his heirs out of time.

Held—That on the death of the said Respondent, his interest was not in his heirs, but having devolved on a third party, who was made a party before the appeal came on for hearing, Or. 22, r. 10 of the Civil Procedure Code applied. The three months' limitation does not apply to a case of assignment or devolution of interest pending the suit.

An application under Or. 22, r. 10 can be made in the Appellate Court, even though the devolution of interest occurred when the case was pending in the trial Court.

When, in a partition suit, all the heirs of certain deceased Defendants were made parties to the appeal and all persons interested in the property were before the Court, though the deaths occurred and the heirs of the deceased Defendants were not substituted while the suit was pending in the Court below.

Held—That inasmuch as it appeared that the Plaintiff was not aware of the deaths of the Defendants in the Original Court, the suit should not be dismissed at that stage on the ground that the heirs were not substituted in the Original Court.

This was an appeal preferred on the 5th of May 1919, against the decree of Babu Nagendra Nath Ghose, Subordinate Judge, 2nd Court of Zillah Burdwan, dated the 19th of December 1918.

The facts will fully appear from the judgment.

Babus Dwarka Nath Chakrabutty and Bankim Chandra Mookerjee for the Appellants.

Dr. Dwarka Nath Mitter and Babus Karunamoy Ghose, Sukhamoy Chatterjee and Krishna Chatanya Ghose for the Respondents.

Babu Sib Chandra Palit for the minor Respondent.

The JUDGMENT OF THE COURT was as follows --

This appeal is against the final decree in a suit for partition of a Mouza called Ismail.

There is a preliminary objection to the hearing of the appeal on the ground that the Defendant No. 2 Rakhal died and no substitution was made within time, that another Defendant No. 41 Sibam Debya also died and no substitution was made in time, and that the suit being one for partition the appeal cannot proceed.

Rakhal died on the 24th May 1920. The application for substitution of his heirs was made on the 5th February 1921, and substitution was ordered to be made subject to objection at the hearing.

It appears that Rakhal's interest was sold away in execution of a decree in 1918. On Rakhal's death, therefore, the interest was not in his heirs but devolved on a third party. It was re-purchased on the 23rd January 1921 by his heirs and they were brought on the record on the 5th May 1921, subject to objection at the hearing. The Appellant was not bound to recognise the purchaser and could have proceeded against the heirs of the deceased, but there was a devolution of the interest of Rakhal, and before the appeal came on for hearing the persons on whom the interest devolved were made parties to the case. 'Three months' limitation does not apply to a case of assignment or devolution of interest pending the suit.

It is contended for the Respondents that the application even if treated as one under Or. 22, r. 10 not having been made in the Court below, the suit cannot be made in this Court and that as a matter of fact,

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the application was not under that rule but substitution of the heirs of the deceased.

So far as the first point is concerned, it has been held by a Division Bench of this Court (Civil Rules Nos S-147 and S-148 of 1920 disposed of on the 11th March 1921) that the application can be made on appeal.

With regard to the second contention there is no doubt that the application was not under Or. 22, r. 10. But the application can be allowed to be amended and having regard to all the circumstances we are not inclined to dismiss the case on such a ground when all the parties are before the Court, and the application for substitution may be allowed to be amended.

As for Sibani, her heirs are already on the record and it is only necessary to have a note made on the record that her interest survives to those Respondents.

The Appellant is accordingly allowed to amend the application dated the 5th May 1921 by adding a prayer under Or. 22, r. 10, and we direct that the persons mentioned in the application be added as Respondents in supersession of the order for substitution passed on the 5th May 1921. We also direct that a note be made in the record that the interest of the deceased Sibani survives against the Defendant No. 37.

The Appellant, however, must pay the costs of this application for amendment, five gold mohurs, to the Respondents on or before the 12th July in this Court. The Plaintiff-Respondent will be entitled to withdraw the said amount if it is deposited in this Court. If the said costs are not paid within the time aforesaid, this appeal will stand dismissed with costs.

This disposes of the preliminary objection.

The first contention raised in this appeal is that a number of Defendants died

while the suit was pending in the Court below and their heirs were not substituted.

It appears that some of these deaths took place before the case came on for hearing. It also appears that certain minors were represented by the Deputy Registrar when the case came up to this Court in Appeal No. 197 of 1910. When the case went back on remand, no guardian *ad litem* was appointed for them in the Court below and the decree bears the name of Mr. Joyce as then guardian *ad litem*. Those of them who have attained majority after the decree of the lower Court have (along with others) preferred this appeal and two of them are still minors and are Respondents represented by the present Deputy Registrar in this appeal. It is accordingly contended that the partition proceedings and the decree are bad as there was no substitution of the heirs of the deceased and the minors were not properly represented.

The Court below observed: "There is nothing to show that any of the Defendants died before the Commissioner did the survey work and the Khanapuri work." But if the partition affects 15 annas co-sharers—a question which we will deal with presently—the decree for partition should not have been made in the absence of the legal representatives of the deceased Defendants, and without the minors being properly represented.

But it is not only the Plaintiff but the Court below also seem to have been under the impression that substitution of the heirs was not necessary, as the death appeared to have taken place before the survey and Khanapuri works were finished. The fact of the death of the Defendants does not appear to have been brought to the notice of the Court below except the death of one of them incidentally in an application filed on the 7th September 1908.

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objecting to the Commissioner's proceedings, and it does not appear that the Plaintiff had any knowledge of these deaths. All the heirs of the deceased Defendant have now been made parties to the appeal and all persons interested in the property are before the Court. In these circumstances, we think that the suit should not be dismissed on the ground that the heirs were not substituted.

It is unnecessary to make any further order for substitution seeing that all the heirs have already been substituted and all the necessary parties are before the Court.

The second contention is that there should have been a partition of the Mouza among all the co-sharers and not merely of the Plaintiff's one anna share. It is urged that the judgment of the High Court dated the 25th August 1915 must be given effect to only so far as the share of the Plaintiff is concerned, but that it did not prevent a partition of the shares of the other co-sharers nor prevent a determination of the other issues in the suit.

It appears that the Plaintiff purchased one anna share of one Ramanuj and Elokeshi in Mouza Ismail and a certain share in Barathol and asked for a partition of those shares. The Court below originally dismissed the claim for partition of Ismail on the ground that the share of Ramanuj had previously passed to one Dinesh who preferred a claim to 2 annas 1 gandas share which had been attached by the Plaintiff's ancestor and the claim was allowed. This share subsequently passed by successive transfers to Jogendra, the son of Ramanuj and that therefore Ramanuj had no share in Ismail which could pass to the Plaintiff under his purchase, and the Court merely declared the Plaintiff's right to 8 gandas share in Barathol which was let out in *mokurari*.

On appeal to this Court (R. A. No. 197 of 1910) it was held that Ramanuj had other share which he obtained from another branch of the family, sufficient to meet the claim of the Plaintiff. This Court directed that "there must be a partition by metes and bounds of Ismail, it being declared that the Plaintiff is entitled to the one anna share he claims in Ismail and two annas five gandas in Barathol." After this decision the other issues raised in the case cannot be gone into, nor can the shares of other co-sharers be partitioned as those shares were not defined by the High Court, and the High Court did not direct the lower Court to determine those shares. It is no doubt hard that the co-sharers should not have their shares partitioned in this suit for partition but they did not ask the High Court for such an order. They did not do so probably because most of the lands were in the separate possession of each co-sharer. However that may be, having regard to the decision in R. A. No. 197 of 1910, the other issues cannot be gone into, nor can the shares of other co-sharers be partitioned. The decree passed in that appeal must be taken to be the preliminary decree which is to be worked out. This contention, therefore, must be overruled.

The third contention relates to the allotment of the lands of Mouza Ismail to the Plaintiff. It is strongly pressed before us that the partition has seriously prejudiced the Defendant No. 37, Jogendra.

There are 138 bighas of *khas kanali* lands. The Plaintiff purchased only one anna share of Ramanuj, and 2 annas 4 gandas share is alleged to have been acquired by his son Jogendra. The Commissioner classified the lands under various classes. There are as stated above 138 bighas of *khas kanali* lands; but Ramanuj alone was recorded as the owner of 12

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bighas 9 cottas and nothing was recorded in the name of Jogendra. The total area of *khas danga* land is 115 bighas. The Plaintiff under his one anna share would be entitled to about 7 bighas and Ramanuj was recorded as being in possession of 3 bighas 8 cottas, nothing being recorded in the name of Jogendra.

It is contended that Jogendra's share was more than the share of Ramanuj, that a proportionate quantity of land should have been left for him and that the whole of the lands should not have been given to the Plaintiff.

It appears that Jogendra, on the 7th September 1918 put in a petition to the Court below in which he complained as follows:—"The Commissioner instead of dividing and partitioning into shares according to the classification of lands is allotting the lands and *jamas* in the rightful possession of this Defendant to the share of the Plaintiff separately. He is not listening to any objections and is not admitting any documents and is expressing the opinion that he is not finding any land in the rightful possession of this Defendant in the said Mouza. This Defendant has got 3 annas 4 gaudas *moharari* interest and 3 annas 4 gaudas *lakheraj* interest in the said Mouzah, and there are many lands in *khas* possession and there is a Mouza, Chak Aral, at a permanently fixed rent. The Plaintiff has been admitting the said rights in the possession of the Defendants over and over again. But the Commissioner without noticing that and by dividing the lands in the rightful possession of the Defendant is about to allot them to the share of the Plaintiff. On representing it to the Commissioner, he said that he would make the division according to the convenience of all the parties and for that reason he asked all the parties to be present. The pleader

for this Defendant having appeared before the Commissioner in accordance herewith, he said that the other parties had not been attending and so he would do as he pleased, and would refuse to take any documents on behalf of this Defendant. This Defendant would be greatly prejudiced by that. By classifying all the lands of the Mouza and by delimiting the Plaintiff's share at one definite extremity, the convenience of all parties would be met and justice would be done."

The Court directed the Commissioner to be informed of the said petition, and the latter reported as follows:—"During Khanapuri work I could not ascertain which lands are in possession of Ramanuj and which are in possession of Jogendra Naram Roy, nor did they point out those lands to me at that time. So far as I could ascertain from local enquiry I recorded the lands in possession of Defendant Ramanuj Roy. And as Plaintiff purchased the share of Ramanuj Roy, I think Plaintiff should be given lands in possession of Ramanuj Roy as far as possible and on that principle I have allotted the lands to Plaintiff's share."

The Court by its order dated 9th September 1918 held that under the circumstances no action could be taken in respect of Jogendra's application.

It is contended that an enquiry should have been made into the allegations against the Commissioner, and that the matter should not have been disposed of in the manner it has been done.

In the absence of any enquiry on the point we are not in a position to determine the merits of the application of Jogendra. But he does not appear to have acted promptly, as the application was made after the Commissioner had finished the field work. At the same time it does appear that although Jogendra has a share,

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no land has been recorded in his name. We think therefore that Jogendra has been prejudiced.

The Commissioner appears to have given notice to the co-sharers by post as well as by beat of drum several times. The Commissioner says that only some of them appeared before him occasionally. But there were certain minors, they were not properly represented in the Court below and then interests do not appear to have been properly looked after in the partition proceedings as the Commissioner himself says that only some of the Defendants attended and that not regularly. In his report of the 19th September 1918 he says —“ I have allotted the Plaintiff's one anna share mostly from the lands in possession of Defendant Ramanuj Roy whose share the Plaintiff purchased. In a few cases I departed from this rule—one in case of partitioning tanks held in *khas* possession by the co-sharers and another in case of *patit danga* lands. In the first case, I found no tank exclusively in *khas* possession of Ramanuj Roy. So I allotted one entire tank which was held in *khas* possession jointly by all the co-sharers. I did so because in giving one entire tank to Plaintiff instead of one anna share in all the tanks, it would be convenient to the Plaintiff as well as to the Defendants to use and enjoy the tanks. In the second case, as the *patit danga* lands in possession of the tenants under Ramanuj Roy did not meet the demands of the Plaintiff, so I allotted to Plaintiff the small portion of *khas patit* lands in possession of Ramanuj which was left after giving the Plaintiff his share of the same class. But this even did not make up the deficiency. So I had to take a portion of the *emali patit danga* land (Plot No. 859) and I allot the same to the Plaintiff's share.”

The tank and the *patit danga* lands being joint, the allotments certainly affected the minors.

The suit was instituted in 1907 about 15 years ago and a large sum has been spent in the partition proceedings; and although under the circumstances we are reluctant to remand the case, we think that the minors as well as Jogendra have been prejudiced though Jogendra himself is partly responsible for it. Having regard to the fact that the minors have not been properly represented, that the partition affects their interests and that the heirs of the deceased were not brought on the record before the decree, we think that the final decree should be set aside.

The Khanapuri of the classified lands made by the Commissioner will stand. But the Commissioner will proceed to record the lands in the possession of Ramanuj and Jogendra separately in the presence of all the Defendants after giving notice to them, and then proceed to allot lands in one anna share of the Plaintiff. There will also be a partition of the tanks and *patit danga* lands in the Plaintiff's one anna share in the presence of all the Defendants. To this extent only the proceedings of the Commissioner are set aside and there will be a fresh partition, as indicated above.

As regards Mouza Barathol the Commissioner (Bibhut Babu) reported (as would appear from the judgment of the Court below) that the Plaintiff should get a certain sum as his share of the rents of the Mouza and neither party took any objection to the same.

As regards Chak Aral the Commissioner says :—“ The men present stated it to be a separate Mouza and not a part and parcel of Mouza Ismail, but the revenue survey map shows that it is a part of Ismail. Defendants did not produce any

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document before me to show that it was a separate Mouza. So I could not leave it aside. But I have made a separate list of the lands in this chak and have partitioned these lands separately so that it this chak be not a part of Ismail, this portion of the partition work may be left aside without affecting the partition of the rest of the Mouza."

It is contended, on behalf of the Appellant that, Mouzah Ismail is held under the Raja of Pachant, whereas in the petition of claim made by Ramesh Chandra Mukerjee on the 24th April 1895 in Execution Case No. 293 of 1895 in which the ancestor of the Plaintiff was the decree-holder and Ramannu and Ramgopal were the judgment-debtors, it was asserted that Chak Aral was held under one Priva Sakhi Debi and that it was released from attachment. Now, if this assertion is true we cannot decide that point here; *prima facie* it would not form part of Mouzah Ismail. This question does not appear to have been gone into fully by the Court below. The learned Subordinate Judge merely says that "Aral Chak being within Mouza Ismail is liable to partition."

We accordingly direct the Court below to go into this question and if that Court finds that Chak Aral is not a part and parcel of Mouza Ismail, then it will be excluded from partition. If, on the other hand, it finds that it is a part and parcel of Mouza Ismail as purchased by the Plaintiff, then it must be partitioned along with the Mouza.

The Court will decide this question of Chak Aral before the Commissioner is directed to make fresh allotments.

The final decree of the Court below is accordingly set aside and the case sent back to that Court in order that fresh partition may be made as directed above.

and the case then disposed of according to law.

The Appellant must put in the costs of the fresh partition within the time to be fixed by the Court below, failing which the partition, already effected, will stand.

So far as the costs of Chak Aral are concerned, we assess the hearing-fee at three gold mohurs which will abide the result and as regards the rest of the lands, we assess the hearing-fee at Rs. 100.

The Plaintiff-Respondent must pay the costs of this appeal to the Appellant.

As the case has been pending for a very long time, we trust that the Court below will take it up at an early date.

J. N. R.

Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 163 to 165 OF 1921.

RANKIN, J.	TINKARI ROSE and ors.,
BUCKLAND, J.	Defendants, Appellants,
1923	v.
Heard, 22, March	NAGENDRA PRASAD BASU
Judgment,	and ors., Plaintiffs,
24, March. J	Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 148 (c) — Claim for rent against tenants joined with a claim for money had and received against persons who have wrongfully realised same—Trial of the case as a rent suit, without raising formal issues—Trial whether irregular or without jurisdiction—Prejudice.

Where with a claim for rent against the principal Defendant, the Plaintiff joined an alternative claim against the pro forma Defendants in case they should have realised the same from the principal Defendant, and the suit was tried as a rent suit without framing formal issues.

Held—That in dealing with the latter claim, which was not a claim for rent but for money had and received, according to

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the procedure laid down in sec. 148, cl. (c) of the Bengal Tenancy Act, the trial Judge did not act without jurisdiction and in the absence of proof that the Appellants were prejudiced, the case was covered by sec. 99 of the Civil Procedure Code

The procedure prescribed in sec 148 of the Bengal Tenancy Act is not a special jurisdiction but a summary procedure

These were appeals preferred on the 12th January 1921 against the decrees of the Subordinate Judge of Howrah (Mr B. L. Banerji), dated the 29th September 1920, confirming the decrees of the Munsif of that place (Babu Jotindra Nath Sen), dated the 22nd September 1919

The suits out of which these appeals arose were instituted by the Respondents for the recovery of a two annas share of the rent alleged to be payable to the Plaintiffs by Defendant No. 1 in each case. There was a prayer in each plaint that if it was found that this rent had been paid by the Defendant No. 1 to the *pro formâ* Defendants who claimed that share adversely to the Plaintiffs, a decree might be passed in favour of the Plaintiffs against the *pro formâ* Defendants. The principal Defendant in each case denied that he was a tenant under the Plaintiffs and averred that the rent in question had been paid all along to the *pro formâ* Defendants, and the latter supported the principal Defendant's case. The suits were tried as rent suits and no issues were framed, but the Munsif in his judgment dealt with the questions that arose not merely as between Plaintiffs and the principal Defendants but also as between the former and the *pro formâ* Defendants. The suits were decreed upon the finding that the two annas share in the landlord's right in question belonged

to the Plaintiffs and not to the *pro formâ* Defendants, that the rent for the period in suit had been realised by the latter and it was ordered that the *pro formâ* Defendants should pay the amount claimed with interest and costs to the Plaintiffs. On appeal, the Subordinate Judge found that the principal Defendant in each case had never paid any rent to the Plaintiffs, and if the *pro formâ* Defendants had not been made parties, he would have dismissed the suits. But the *pro formâ* Defendants being parties, and the questions that arose for decision having been fully investigated in the lower Court, though no issues had been expressly framed, the lower Court's judgment was correct. He accordingly dismissed the suits. The Defendants preferred this second appeal.

Babu Nagendra Nath Ghose, for the Appellants, submitted with reference to sec. 148 (c) of the Bengal Tenancy Act that the suit had not been properly tried. It was really not a suit between landlord and tenant but between rival claimants to the landlord's interest. Specific issues of title as between them should have been framed, so that the parties would have had notice of the points on which they were to lead evidence. The only question the Munsif expressly put before himself in the judgment was whether there was relationship of landlord and tenant between the Plaintiffs and principal Defendant. The question of title was gone into incidentally in determining this point. Further, there was a claim against the *pro formâ* Defendants for money realised by them from principal Defendant and it is that claim, which was not a claim for rent, which has been decreed. The Court acted without jurisdiction in trying this claim as a rent suit without framing issues.

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Dr. Jadunath Kanjilal for the Respondents submitted that there was nothing in law to prevent a joinder of a claim for rent against the tenant with a claim for money had and received against persons who have wrongfully received that rent. *Sham Singh v. Krishna Sahai* (2). It was at the worst an irregularity to which sec. 99 of the Civil Procedure Code applied. Relied on *Iswar Dalm v. Girindra Kumar Nay* (1).

Babu Nagendra Nath Ghose in reply - The point now in question was not argued in the last mentioned case nor did the Court consider the question with reference to sec. 118 (c) of the Bengal Tenancy Act. The other case cited supports me. When a case not triable by a Small Cause Court is so tried, the decision is regarded as passed without jurisdiction. The same rule should apply here.

The JUDGMENT OF THE COURT was as follows :-

S. A. No. 163 of 1921

RANKIN, J. - 'This is an appeal by certain co-sharer Defendants who were impleaded together with the tenants in a rent suit. The Plaintiffs claim to have a two annas share in the landlords' interest. The Appellants contend that the whole interest belonged to them. A claim was made against the tenants for a two annas share of certain rent in arrear and an alternative claim was made against the present Defendants-Appellants that the Plaintiffs' share of certain rent which had been received by the Appellants from the tenants should be paid over to the Plaintiffs. A decree has been given both against the tenant and against the Defendants-Appellants.

On this appeal it has been contended

that a serious question of title was raised as between the Plaintiffs on the one hand and the Appellants on the other and treating the case as a rent suit the trial Judge did not formally settle issues that would determine the question of title but proceeded in the manner prescribed in sec. 148 of the Bengal Tenancy Act. A further question has arisen in the course of the argument. The claim against the present Appellants was not a claim for rent at all. It was a claim for money had and received to the Plaintiffs' use. The question arises if such a claim as that may be joined with a claim for rent and can be tried properly by the procedure prescribed in sec. 148 of the Bengal Tenancy Act.

Taking the first point first, I am of opinion that it is quite plain that there is no rigid rule of law to the effect that in a rent suit properly so called and filed under the provisions of sec. 148, a question of title may not be determined if it arises. In the present case although formal issues were not framed, the judgment of the learned Judge is an extremely lucid and careful judgment; and I am quite satisfied that so far as regards the claim for rent upon which claim the present Appellants may be *pro forma* Defendants, there has been nothing in the way of miscarriage of justice. It was suggested as a possibility, though I am satisfied that it is a possibility entirely in the air, that if issues had been framed the Appellants might have had a better chance of producing evidence. I see no reason to think that the Appellants had in fact any evidence that they did not adduce and they had ample opportunity in many stages of the case for taking that point if there was anything in it.

So far as this is a suit regarding the claim for a share of rent, I see no sub-

(1) 48 Ind. Cas. 726 (1918)
2, 6 C. L. J. 180 (1907).

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stance in this appeal. The suit, however, as I have said, was not merely a suit for rent but there was coupled with it a claim in the alternative, upon which the present Appellants were not *pro forma* Defendants but were contesting Defendants—a claim that they should disgorge to the Plaintiffs their share of the rent which had been paid to those Defendants in full. Now a question arises, when a claim which is not for rent is included in a suit which is tried under sec. 148, whether there is any lack of jurisdiction on the part of the trial Judge to deal with the claim. An analogy has been suggested in argument of the case where the Judge has purported under the Small Cause Court Jurisdiction to try a case which apart from that jurisdiction he might have been quite competent to try. In my judgment, there is this distinction between provisions as regards the Small Cause Courts and the provisions of sec. 148 regarding rent suit. In the former case this Court has always regarded the matter as one of jurisdiction—special jurisdiction which is given by the provisions of the Small Cause Courts Act. In the case of sec. 148 of the Bengal Tenancy Act, I am satisfied that the view which has been consistently adopted by this Court is that the prescribed procedure is not a special jurisdiction but a summary procedure. If I can find that as regards the cause of action for money had and received, there was any indication that the present Appellants had been prejudiced by the fact that issues were not formally framed in advance, it would, I think, become my duty not to allow the decree made against the present Appellants to stand, but I think that this case is a case which is amply covered by sec. 99, C. P. C. I cannot find that in the present case anything has been done that is not in conformity with

the provisions of the Civil Procedure Code except that the present Appellants are unable to show that issues were not formally framed. Having considered generally the manner in which the case was tried by the trial Court I am of opinion that no prejudice has been shown or can be presumed in the circumstances of the present case by reason of that fact.

For these reasons it appears to me that this appeal must be dismissed with costs. This judgment will govern the other two appeals (S. A. Nos. 161 and 165 of 1921).

BUCKLAND, J. Before we part with this case I desire to say something about *Jurqi Dalim v. Girindia Kumar Nay* (1), which was cited in argument by the learned vakil for the Respondents whose contention it may superficially appear to support. In that case the question considered was one of misjoinder. The point which has been argued here seems to have arisen but was treated as one of jurisdiction, for I observe from the report that it was contended that the Plaintiffs could not get a decree for recovery of their share of the rent against co-sharer landlords in a suit framed under sec. 148A of the Bengal Tenancy Act. The judgment, however, proceeded upon the former question for the learned Judges observed as follows:—

‘It is contended that the prayer for this relief could not be joined to the prayer for the recovery of rent against the principal Defendants, but in our opinion Or. 1, r. 3, C. P. C. provides for the joinder of such claims, and it is a well-established practice to join such claims.’ The point to which my learned brother has addressed himself was not argued or considered, and though possibly it might have been taken in that case, it by no means follows that it would have affected the result. It seems to me therefore that that case is distin-

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gushable and is not an authority for the proposition advanced by the learned vakil for the Respondents. I agree with the judgment delivered by my learned brother for the reasons stated by him.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2674 of 1920.

NAWAB KHAJEH HABIB-

ULLA and ors., Defend-

ants, Appellants,

C. C. GHOSE, J.

PANTON, J.

1923,

15, January.

v.

SRIMATI GOTA ASMATER

KHATUN and ors.,

Plaintiffs, Respondents

U. P. Code (Act V of 1908), sec. 148, Judgment on time for payment of deficit court-fee ordered to be paid by decree passed by his predecessor-in-office, legality of

In decreeing a suit by a judgment, dated 20th February 1918, the Judge made the decree dependent upon Plaintiffs paying within one month from the date of the order a further court-fee of Rs. 65, and signed the decree on the 26th February 1918. The Plaintiffs did not carry out the order within the time limited by the order. On an application dated 5th July 1920, after the Judge who passed the decree had been transferred, his successor permitted the Plaintiffs to deposit the further court-fee of Rs. 65 as mentioned in the aforesaid judgment and decree.

Held—That assuming, though not deciding, that no appeal lay, the circumstances of the case demanded that the appeal should be treated as a petition under sec. 115 of the U. P. Code, the order made being without jurisdiction.

That the decree which was drawn up on the 26th February 1918 was in itself a final decree and, the default provisions mentioned in the judgment of the 20th

February 1918 having been incorporated in it, it was a self-contained decree. Therefore, subject to such rights of amendment as, for instance, the rectification of a clerical error and so forth, it could not be modified by the Court which passed the decree.

This was an appeal preferred on the 16th of November 1920 against the decree of C. Sells, Esq., Additional District Judge of Zillah Tipperah, dated the 20th of February 1918, modifying the decree of Babu Kunja Behari Ghosh, Munsif, 3rd Court at Comilla, dated the 30th of November 1916.

The facts and arguments are fully set out in the judgment.

Babus Surendra Nath Guha and Situr Kumar Ghosal for the Appellants.

Mr. I. K. Fuzlal Huq and Babu Radhikaranjan Guha for the Respondents.

THE JUDGMENT OF THE COURT was as follows —

This appeal has arisen under very peculiar circumstances. The suit out of which this appeal has arisen was brought by the Plaintiffs for recovery of possession of two plots of land after establishment of title thereto. In the Court of first instance the suit was decreed in the following manner — "The Plaintiffs' title was declared to 1 kam of plot No. 1 and the entirety of plot No. 2 as against Defendants Nos. 1 to 19 and 23 to 26 after contest and *ex parte* as against the remaining Defendants. In the Court of appeal below, the following order was passed — "The suit be decreed in part, the title of Plaintiffs Nos. 2 to 7 be declared to 1 kam of plot No. 1 and to plot No. 2 of the plaint; and Plaintiffs Nos. 2 to 7 do remain in possession of the same. So far as Plaintiff No. 1 is concerned, the suit is dismissed with costs. The parties (except Plaintiff No. 1)

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do get costs in the lower Court in proportion to their success. But all this is dependent upon Plaintiffs' Nos. 2 to 7, paying within one month from to-day, a further court-fee of Rs. 65. Appeal No. 79 is, therefore, dismissed with costs. Appeal No. 34 is partially allowed with proportionate costs, as against other Respondents, Plaintiffs' appeal No. 34 is dismissed with costs, on condition that Plaintiffs Nos. 2 to 7 do pay within one month from to-day, a further court-fee of Rs. 65 in default of which appeal No. 34 will be allowed in full, i.e., the original suit will be dismissed with costs in both Courts to Defendants. This order was made by Mr. C. Sells, Additional District Judge at Tipperah on the 20th February 1918. On the 26th February, the decree which was the formal expression of opinion on the part of the Court of appeal below, was signed by Mr. Sells. This decree is in accordance with the ordering portion of the judgment which has been set out above. It appears that the Plaintiffs Nos. 2 to 7 did not carry out the order of the Court by which they were directed to pay a further court-fee of Rs. 65 within the time limited by the order and by the decree which was signed on the 26th February 1918. On the 5th July 1920 an application was made on behalf of the Plaintiffs Nos. 2 to 7 for permission to deposit in Court a further court-fee of Rs. 65 as mentioned in the judgment which was delivered on the 20th February 1918 and in the decree which was signed on the 26th February 1918. Mr. Sells had been transferred from Tipperah and the matter came on before Mr. Martin, who was acting as an Additional District Judge. The further court-fee was actually deposited in Court by the Plaintiffs Nos. 2 to 7 on the 30th July 1920 and thereupon Mr. Martin ordered that the

decree (described as the final decree) should now be passed in this case. In accordance with Mr. Martin's order dated the 30th July 1920 a clause was inserted in the original decree which ran as follows:—In accordance with order No. 11 of the order-sheet dated the 20th July 1918, court-fee of Rs. 65 having been paid, the decree is made final, the appeal, that is, being dismissed with costs, as against the other Respondents (sic) and the Plaintiffs Nos. 2 to 7 will get Rs. 65 as costs in addition to that already awarded to them. (Under the judgment, dated the 20th February 1918) Defendants Nos. 1 to 26 complain that inasmuch as Plaintiffs Nos. 2 to 7 did not carry out the order made by Mr. Sells on the 20th February 1918, as regards paying into Court a further court-fee of Rs. 65 which was ordered by him to be paid into Court within one month from the 20th February 1918, the decree by Mr. Sells could not be re-opened again and extension of time granted after the expiration of more than two years from the date of the original order on the Plaintiffs Nos. 2 to 7 to pay into Court a further court-fee as referred to above. It is argued on behalf of Defendants Nos. 1 to 26 that notwithstanding the terms of sec. 148 of the Code of Civil Procedure the application of Plaintiffs Nos. 2 to 7 made on the 5th July 1920 was incompetent and that the Court below had no jurisdiction whatsoever to amend in July 1920 the decree by Mr. Sells and to enlarge the time granted by the decree of Mr. Sells to pay into Court the further court-fee of Rs. 65. In support of this contention our attention has been drawn to a number of cases amongst which may be mentioned the cases of *Suranjan Singh v. Ram Bahal Ram* (1), *Sajjadi Begam v. Dilawari*

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Husain (2) and *Dharmaraja Ayyar v. Srinivasa Mudaliar* (3) Mr. Huq on behalf of the Respondents has vigorously contested the Appellants' right of appeal to this Court and has argued, firstly, that there was no right of appeal from the order of Mr. Martin, which was merely an order for amendment of the previous decree. Secondly, that even if the appeal preferred by Defendants Nos. 1 to 26 be treated by this Court as a petition by way of revision under sec. 115 of the Code of Civil Procedure the Appellants cannot get any relief whatsoever, for the order complained of, was made by the lower Appellate Court in the exercise of its discretion and that it is not usual for this Court to interfere with orders made by the Courts below in the exercise of their discretion. Thirdly, that the decree signed by Mr. Sells on the 26th February 1918 was merely a preliminary decree which had to be made final by a further decree and that no such decree having been made by the Court below for a period of more than two years from the 26th February 1918 or at any rate, before the 5th July 1920, it was open to the Plaintiffs Nos. 2 to 7 to apply to the Court to put in further court-fees as mentioned in the original order of the 20th February 1918 and to make such application at any time before the final decree was passed. We are of opinion, for the reasons about to be given, that there is no substance whatever in any of the contentions urged before us on behalf of the Respondents but that the contentions urged on behalf of Defendants Nos. 1 to 26 should prevail. In the first place, it is quite unnecessary for us to go into the question as to whether the Appellants had a right of appeal to this Court. Assuming, however, that they had not, the cir-

cumstances of this case demand of us that we should treat the appeal preferred by the Defendants Nos. 1 to 26 as a petition under sec. 115 of the Code of Civil Procedure. The circumstances are so extraordinary that it would amount to a denial of justice if we were to hold that our powers are so limited that we cannot give any relief to Defendants Nos. 1 to 26 in the circumstances which have happened. In the second place, we are of opinion that the decree which was drawn up shortly after the 20th February 1918, namely, on the 26th February 1918, was in itself a final decree. No doubt, it would have been better if the Court after determining that the extra fee was payable had ordered the fee to be paid within a certain time and had delayed passing the decree until the time limited by the order had expired. But the fact that the decree was drawn before the expiration of one month from the 20th February 1918 did not in any way amount to this that it was to be treated as a preliminary decree and that it was to be followed by a further formal expression of opinion of the Court, namely, by a further final decree. The default provisions mentioned in the judgment itself of the 20th February 1918 are incorporated in the decree which was signed on the 26th February 1918 and it was a self-contained decree in every sense of the word and it was to all intents and purposes the final formal expression of opinion of the Court. That being so, it now remains for us to consider as to whether the Appellants before us have brought their case within the four corners of sec. 115. As we have already held, the decree signed on the 26th February 1918 was a final decree. If it was a final decree, then subject to such rights of amendment as, for instance, the rectification of a clerical error and so forth, that decree

(2) I. L. R. 40 All. 579 (1918).

(3) I. L. R. 39 Mad. 876 (1915).

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could not be amended by the Court which passed the decree. That being so, there was clearly an exercise of jurisdiction by the Court below which had not been vested in it. In the circumstances, there is therefore no other alternative but to set aside the order made by Mr. Martin on the 2nd August 1920 and we accordingly do so.

The result, therefore, is that the decree as drawn up and signed by Mr. Sells on the 26th February 1918 must stand and all necessary results must follow therefrom.

The Appellants have succeeded and they are, therefore, entitled to their costs. We assess the hearing-fee at two gold mohurs.
J. N. R. Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1894 of 1921

WAINSLIFF, J.	UKILUDDI AKAN
B. B. GHOSH, J.	and anr., Plaintiffs,
1923,	Appellants,
17, March	v.
	ASMAT ALI MUNSHI
	[and ors., Defendants,
	Respondents.

Bengal Land Revenue Sales Act (XI of 1859), sale of a kish under a howla of which management had been resumed by Government before expiry of lease, legality of Act VII of 1868, sec. 1, tenure, such kish if fall within the meaning of.

A howladar holding a howla under Government regretted his bargain and asked Government to manage the howla during the unexpired term. In the howla there was a karsha, and after the howla had been placed in the hands of the Government by the howladar, the karsha fell into arrears and, to realise the arrears, a sale was held under Act XI of 1859 at the instance of the Government.

Held—That the karsha was liable for the rent payable to the howladar, but the

arrangement which the latter entered into with the Government could not have the effect of changing the rent into revenue, and thereby rendering the karsha liable to sale under the provisions of Act XI of 1859. Consequently the sale held under the Act was made without jurisdiction.

This was an appeal preferred on the 12th of August 1921, against the decree of Babu Sush Chandra Banerjee, Subordinate Judge, 1st Court of Zillah Bakarganj, dated the 26th of May 1921, affirming the decree of Babu Ashutosh Ghose, Munsif, 1st Court at Barisal, dated the 24th of January 1921.

The subject-matter of the suit, out of which the present appeal arose, was a karsha, appertaining to a howla under a Government Khas Mahal. The facts alleged were that the karsha had by succession and transfers devolved on the Defendants Nos. 1 and 2, that they executed a bond mortgaging in the simple form the karsha in favour of the Plaintiff, that a large sum of money becoming due under the bond the Plaintiff threatened the Defendants that he would sue them on the bond, that in the meantime the superior landlords made over their howla to the khas tahsil of Government, that the Plaintiff was fraudulently kept in ignorance of the fact by the Defendants Nos. 1 and 2 who from time to time showed him receipts purported to have been granted by the superior landlords, that with the object of depriving him of his mortgage money the Defendants Nos. 1 and 2 became defaulters by withholding the rent payable in respect of the karsha, and that there being a default in the payment of rent the karsha was sold by Government under the provisions of Act XI of 1859. The Plaintiff brought the present suit to set aside the sale amongst others on the

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following grounds :—That Act XI of 1859 and Act VII of 1868 were inapplicable as the *karsha* was neither an “estate” as defined in Act XI of 1859, nor a “tenure” as defined in Act VII of 1868, that the sale of the *karsha* under Act XI of 1859 was without jurisdiction and *ultra vires*, that the notices had not been duly published and served, and that the Defendants Nos. 1 and 2 auction-purchased the *karsha* in the *benami* of Defendants Nos. 3 and 4. The Munsif held that Act XI of 1859 and Act VII of 1868 were applicable to the *karsha* in suit, that there was no irregularity in the publication and service of the notices and that there was no fraud or collusion. He accordingly dismissed the suit. On appeal the lower Appellate Court dismissed the appeal and in the course of his judgment observed :—

“The *karsha* was held by Defendants Nos. 1 and 2 under the *houla* of Pratap Chandra Roy and others who again held their *houla* under Government *khas* Mahal. Pratap Chandra Roy and others made an application to Government expressing their inability to keep the *houla* in their own management and placing it under the *khas* management of Government. This proposal was accepted by Government. Subsequently during the management of Government, Defendants Nos. 1 and 2 made default in the payment of rent and consequently the *karsha* was sold when it was purchased by Defendants Nos. 3 and 4. It is this sale which the Plaintiff wants to be set aside. I agree with the learned Munsif in holding that there was no fraud and that there was no collusion between Defendants Nos. 1 and 2 and Defendants Nos. 3 and 4.

The learned Munsif says that when Government took the management in *khas*, the holders of the *karsha* became directly liable to pay the rent to Govern-

ment. The learned Munsif further says that the *karsha* in suit falls within the meaning of a tenure as defined in Act VII of 1868. This is, however, denied by the Plaintiff, and the learned pleader for the Appellants argues that transferability is the essence of what is made to constitute a tenure, and as a *karsha* could not be sold before the passing of the Bengal Tenancy Act, a *karsha* could not constitute a tenure when the Bengal Tenancy Act VII of 1868 was passed. The argument is very ingenious, but it appears that this *karsha* was sold by means of the *kabala*, Ex. 2. Moreover this objection was not taken in the plaint nor in the memorandum of appeal. Had the Plaintiff taken this objection in time, it would have been possible for the Defendants to show that a *karsha* was transferable according to custom. I therefore hold that the *karsha* in suit fell within the definition of a tenure as given in Act VII of 1868, and Act VII of 1868 and Act XI of 1859 became applicable. Now a sale under these Acts cannot be set aside unless the irregularity complained of was specified in an appeal made to the Commissioner. It appears that the only ground of appeal before the Commissioner was that the *karsha* had been wrongly described as *ammulla jote*.

As to the merits I agree with the learned Munsif in holding that the notices required by the law have been duly served.

For all these reasons I hold that the appeal fails and is accordingly dismissed with costs. The decree of the lower Court is hereby affirmed.”

The Plaintiff thereupon preferred the present second appeal to the High Court.

Babu Abinash Chandra Guha for the Appellants.

Babus Gunada Charan Sen and Prasanta Bhusan Gupta for the Respondents.

UKILUDDI AKAN v. ASMAT ALI MUNSHI.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal is preferred by the Plaintiffs and it is the result of a sale purporting to be held under the provisions of Act XI (B. C.) of 1859 and Act VII (B. C.) of 1868. The facts briefly stated are that a *howladar* holding a *howla* under Government Khas Mahal regretted his bargain and asked Government to manage the *howla* during the unexpired term. In the *howla* there is a *karsha* and after the *howla* had been placed in the hands of the Government by the *howladar*, the *karsha* fell into arrears and, to realize the arrears, a sale was held under Act XI of 1859 at the instance of the Government. The Plaintiffs sought to have the sale set aside by appealing to the Commissioner, but in vain. Consequently they brought this suit.

I am unable to follow the reasoning of the learned Munsif, adopted by the learned Subordinate Judge and repeated before us on behalf of the Respondents that sec. 3 of Reg. VII of 1822 has anything to do with the matter. The position was that the *karsha* was liable for the rent payable to the *howladar*. But I am unable to see that the arrangement which the *howladar* entered into with the Government had the effect of changing the rent into revenue and thereby rendering the *karsha* liable to sale under the provisions of Act XI of 1859. Consequently, in my judgment, the sale purporting to be held under Act XI of 1859 was without jurisdiction and I think the Plaintiffs are entitled to have the declaration made as requested as also a further declaration that their right, title and interest on the mortgage have not been affected by the sale, that is to say, the appeal is decreed with costs in all Courts.

GHOSH, J.—I agree

J. N. R. Appeal decreed with costs

PRIVY COUNCIL.

[APPEAL FROM MADRAS]

LORD PHILLIMORE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS

LORD SALVESEN.

1922,

Heard, 16, 17 and

20, November.

Judgment,

11, December.

MERLA VEN-
KANNA and anr.,

Plaintiffs,
Appellants,

v.

MERLA AGAS-
THIAH and ors.,

Defendants,
Respondents

Limitation Act (IX of 1908), Sch. I, Arts. 62, 83
—*Joint Hindu family—Partition—Dealing with*
moneys by a separated member on behalf of self
and others—Suit for accounts—Limitation.

Where members of a joint Hindu family after separation continued to maintain intimate relations, so that moneys were received and dealt with by the members of one of the separated branches on behalf of themselves and members of the other branch.

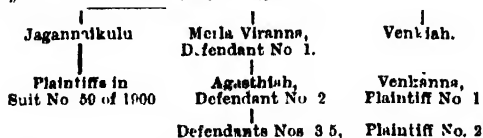
Semle --1. *suit for accounts brought by the latter against the former is governed by Art. 89 of the Limitation Act and not by Art. 62.*

This was an appeal from a decree of the High Court of Judicature at Madras, dated the 28th September 1917, which varied a decree of the Subordinate Court of Rajahmundry, dated the 27th December 1915.

The suit out of which the appeal arose was instituted by the Appellants in April 1910 claiming a partition of certain immoveable property and milch cattle, and an account of certain money-lending transactions, and a half share of the paddy jointly cultivated by the Plaintiffs and Defendants.

MERLA VENKANNA v. MERLA AGASTHIAH.

The relationship of the parties is shown by the following pedigree —



The Subordinate Judge on the 27th November 1915 passed a preliminary decree in favour of the Plaintiffs, holding the Defendants accountable, and on the 27th December 1915 passed a final decree in their favour for Rs. 77,682, which was the sum found by him to be due from the Defendants on the adjustment of the family accounts.

From the preliminary decree the Defendants appealed to the High Court at Madras, but the record before the High Court contained the final decree and the proceedings that led up to it.

On the 28th September 1917, the appeal was allowed by the High Court who reversed the findings of the Subordinate Judge and dismissed the suit.

From this decree the Plaintiffs (Appellants) appealed to His Majesty in Council.

The facts of the case and the contentions of Counsel are fully set out in the judgment of their Lordships.

Sir Geo. Lowndes, K. C. and Mr K. V. L. Narasimham for the Appellants.

Messrs L. DeGruyther, K. C. and Kenworthy Brown for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by .

LORD PHILLIMORE — This is a family dispute arising in this manner. There were five brothers, sons of one Venkanna. The first Plaintiff is the son of one of these brothers, and the second Plaintiff is his son. The original first Defendant, now dead, was one of the five brothers.

The second Defendant was a brother of the first Plaintiff, adopted by the second Defendant as his son. The first Plaintiff's father and the first Defendant married sisters, so these two families are brought into very close relation.

The five brothers originally formed a joint Hindu family. There were divisions in 1861 and in 1885, and in 1900 the representatives of the other three brothers brought a suit against the first Plaintiff, as representing his deceased father's interests and the first Defendant and members of the other branches, claiming that the division of the estate was incomplete, and that the two lines of the first Plaintiff and the first Defendant were keeping as their own what was, as they said, joint family property. This claim was resisted by the first Plaintiff and the first Defendant, who alleged that the separation had been complete, and that all that they possessed was the separate property of one or other of them. In the course of this suit the first Plaintiff made a deposition, in which he carried this contention very far, and with a view of showing how complete the separation had been, said that not only had the two separated from the three, but the two had separated *inter se*. And this evidence has, as will appear later, been used against him in the present suit.

However this may be, the suit brought by the representatives of the three against the two was, under the influence of mediators, compromised. Their Lordships have not been put into possession of all the details of the compromise, nor is it necessary; but it would appear that the three succeeded to this extent that they recovered a portion of the lands which the two held. The consent decree made in pursuance of the compromise gave these lands to the three, and went on not

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merely to divide the lands and money as between the three and the two, but further to divide them as between the two

From this time forward there was no question of the two being members of one joint Hindu family, and though, in the course of the present suit, this position may have been at times suggested on behalf of the Plaintiffs, their real case rests, if it can be supported, upon other grounds. From the date of the compromise on the 5th day of March 1902, the line of the Plaintiffs and the line of the Defendants must be treated as for legal purposes distinct.

Notwithstanding this, these two families or lines continued to maintain intimate relations, their lands were jointly cultivated, and they lived and messed together as if they formed parts of a joint Hindu family. They were land-owners and money-lenders. For the purposes of their business the principal member was the representative of the elder generation, the first Defendant. The father of the first Plaintiff died during his minority, and his mother thenceforward represented him during his minority. No doubt after his majority the first Plaintiff took up much of the business which his mother had undertaken. But he and his mother remained under the leadership of the first Defendant.

The mother seems to have lived till 1913; and as her sister also lived on till about 1909, it seems probable that the two women kept the families from drifting apart. It should be noted that the High Court made a mistake in stating that the wife of the first Defendant died before the adoption of the second Defendant. She lived on for many years.

The date of the *razinama* embodying the compromise, and of the consent decree thereupon was the 5th March 1902, and

some little time afterwards a certain amount of estrangement began to grow up between the two lines.

The first Plaintiff, who is described as a studious man devoted to the study of Sanscrit, says that he took little notice of or part in business affairs, and this is to a certain extent correct, but as his son, the second Plaintiff, grew up, he apparently became active and desirous of taking his share in the business, though he was at a disadvantage as being in so junior a position in relation to his great-uncle and uncle on the other line.

One of the matters in dispute in the suit is the age of this second Plaintiff. It is suggested by Counsel for the Defendants that he was born in 1887; on behalf of the Plaintiffs his birth would be put in 1890. It was probably somewhere between these two dates, and he probably began to assert himself after he had had some training in the business, about, or soon after, the time that he came of age.

Be this as it may, by the beginning of 1909 matters had come to a crisis, and the first Defendant is found writing on the 14th March in that year to one of the debtors on joint account that several family disputes had arisen, and on the 12th March to another debtor that his people were now effecting a division. Certain arrangements were made about this period between the two lines, but in the view of the Plaintiffs they were not sufficient to give them their share of the various properties and loans in which they were jointly interested, and on the 22nd April 1910, this suit was brought. By it the Plaintiffs claimed a partition of certain immoveable property and milch cattle, their half of the paddy grown on the two estates which were in joint cultivation, and an account in respect of money lending transactions. No ques-

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tion now arises as to the immoveables or the cattle, or upon money-lending transactions generally. The disputes are limited to a claim for the proceeds of the paddy, and the half of a loan of Rs. 2,60,000 lent to a lady, called Chellavamma, who was a large landed proprietor.

In respect of these two matters the Subordinate Judge, by his preliminary decree, dated the 27th November 1915, found the Defendants accountable, and by his final decree of the 27th December, the half-share of the sum payable in respect of the paddy was fixed at Rs. 10,040, and the Plaintiffs, after receiving credit in respect of the Chellavamma matter, and a half-share of the paddy, and being debited the expenses of the marriage of the second Plaintiff and his sister, and the amount of a mortgage executed by the zemindar of Polavaram, were found entitled to a net sum of Rs. 77,682.

An appeal was brought from the preliminary decree to the High Court of Madras, when the learned Judges reversed the decision of the Subordinate Judge and dismissed the suit; and it is from this dismissal that the present appeal is brought.

Though it would appear as if the appeal was from the preliminary decree only, and therefore that what may have passed subsequently in the suit had no bearing on the appeal, nevertheless the final decree and the proceedings leading up to it formed part of the record presented to the High Court at Madras, and have been brought before their Lordships, and they are not without a bearing of some importance upon the present appeal.

Unfortunately the Subordinate Judge who took the evidence was not the Judge who heard the arguments and decided the case. Their Lordships have not therefore the advantages of knowing the opi-

nion formed of the witnesses by the Judge of first instance, except in so far as remarks were noted at the end of the depositions by the Judge who took them; and the matter being all on paper, the High Court may be said to have had as good an opportunity of judging of the materials as the Judge of first instance. It results, however, that their Lordships are also much in the same position. They have, however, the benefit of the very long and carefully reasoned judgment of the Subordinate Judge, and of the opinion of the High Court upon it—an opinion which, it is to be regretted, is somewhat brief and gives the impression of being rather superficial.

In this condition of the record, and there being oral evidence both ways, both sides have naturally laid stress upon probability and the inferences to be drawn from mutually accepted facts. For the Defendants stress is laid upon the statements made by the first Plaintiff in the previous suit to the effect that while his mother had acted for him during his minority, he had afterwards himself taken control of his own affairs, his insistence upon the entire separation between him and his uncle, and several documents which show that he was to some extent, at any rate, carrying on a separate business, making loans and purchases of land; and lastly, the complete division and settling up in 1902. It was suggested that the Plaintiffs' case must be that whereas the first Plaintiff had been doing his own business till 1900 or 1902, he, without reason and just as his son was beginning to grow up and be likely to help him, surrendered or remitted the conduct of the business to his uncle and brother, and that no reason was shown for this conduct.

On the other hand, Counsel for the

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Plaintiffs relied upon the facts that the estates were jointly cultivated; that commensality was clearly proved, though the Defendants at one time seemed to deny it; that at the time of the compromise with the other three branches of the family the Defendants entered jointly with the first Plaintiff into an obligation to the other three lines; that the first Defendant was the one representative of his generation, that, having regard to Indian social customs, the family would act as one in business matters through their natural head, the elder man; that as it turned out that the paddy when harvested was not divided in specie but sold by the first Defendant, he would naturally be left to invest the net proceeds in money-lending or land-buying on behalf of all interested; and attention was called to the important statements made in letters both to the Rajah of Polavaram and to the lady called Chellayamma, in which the first Defendant professed to act on behalf of himself and those whom he called "my boys," spoke of disputes arising between those for whom he acted and himself and talked of a division of interest as a thing about to happen. Stress was also laid on his dealings with the official of the revenue with regard to income tax, which he unquestionably paid for all upon one assessment till the disputes arose, and where again he stated that there was to be a division of interest and requested future separate assessment.

Bearing these considerations in mind, their Lordships will approach the question of the specific items, division of which is now claimed by the Plaintiffs and resisted by the Defendants.

The first matter concerns the mortgage given by Chellayamma. This lady had effected previous loans with the family, which were consolidated in a mortgage

dated the 21st January 1902, and expressed to be made in favour of the second Defendant and the second Plaintiff, the sum secured being Rs. 2,25,154. On the 28th October 1904, by which time the debt had been swollen by the addition of interest to Rs. 2,36,502, Rs. 66,502 were paid off, the money to make this payment having been lent to Chellavamma by the Court of Wards, acting on behalf of some estate under its charge, and the first mortgage was cancelled; while for the balance a new mortgage dated the following day, was given to the same nominal parties.

The first question is what happened to this sum of Rs. 66,502. It should be stated that at the foot of the first mortgage, where the discharge of it is entered, the whole sum of Rs. 2,36,502 is said to have been paid by cheques. That the Court of Wards would give a cheque was what was to be expected. That the process of effecting a fresh loan for the balance might have been carried out by a cheque or cheques is possible, but there is no trace of the Defendants having a bank on which they had a drawing account, and indications presently to be mentioned point the other way. However, as there is no dispute about the sum re-lent, this matter is immaterial. That the Court of Wards would pay by cheque is a matter of some importance. It is probable that all four persons were present when this transaction took place, but the two who give most details are the second Defendant and the second Plaintiff. According to the story of the second Defendant the money was received in cash, and was there and then divided between the two lines, Plaintiffs on one side and Defendants on the other, in the lady's house, in the haveli. He carried his own and his father's share to his village and lent it out in small sums. He

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was specially challenged as to whether there had not been a deposit of the money at the bank, and whether he had not withdrawn Rs 36,000 odd on the same day, but he denied it

The first Plaintiff says that he might have been present at one or two of the payments made by Chellavamma to the first Defendant, but he could not give any details of such payments because he never cared to know such details when the first Defendant was attending to all their affairs

The first Defendant, who was a very old man, when he was examined, had no particular recollection of the transaction, but made a general statement to the effect that the Chellavamma business concerned the Plaintiffs and the second Defendant and not himself; that he could not recollect any of the details, and did not know what the others did with the balance. Later on in his examination he said that the first Plaintiff and the second Defendant each received a half

The story of the second Plaintiff, who was at that time between 14 and 17, is that he and the second Defendant were sent in with the money to the bank at Cocanada, that it was not convenient that the others should go, as they wished to attend to the cultivations. His account was that Rs. 46,000 out of the amount paid by the Court of Wards was deposited in the bank in his name, and that he afterwards drew back the whole and handed it to the second Defendant. He said that the amount was in deposit in the bank for two months or so, that the money was taken charge of by the second Defendant; that he did not even touch it; and he knew that some part of it was lent out at once in one mortgage for Rs 10,000 and another for Rs. 1,000.

Both these witnesses gave evidence

before the bank documents had been produced. When these came to be produced they showed what had really happened. There is first of all a deposit receipt showing that Rs 66,502 was received from the second Plaintiff on the 28th October 1904, and deposited for his credit in a suspense account. Of this sum Rs 36,502 was drawn out the next day, leaving a balance of Rs 30,000, for which there is an undated receipt on the same paper signed by the second Plaintiff. There is then a debit slip debiting the suspense account with the Rs 36,502 signed by the second Plaintiff, and also signed by the second Defendant and a third person as witnesses. Finally, on the 2nd December, there is a second debit slip for Rs 30,000 signed by the second Plaintiff alone. There was an opportunity of recalling both the witnesses after these papers had been produced, and the second Plaintiff was recalled and accepted the facts that the bank documents showed. He was not cross-examined. The second Defendant was not recalled. It is clear to their Lordships, as it was to the Subordinate Judge, that the second Defendant had told an untrue story with regard to this matter and told it with a motive.

The judgment of the High Court fails to show that the learned Judges appreciated the importance of this point. They comment on the fact that the second Plaintiff understated his age, and say that it is incredible that the first Plaintiff did not make enquiries. With regard to the second Defendant they merely say that his account was that he had nothing to do with the deposit or withdrawal, without apparently seeing that he must have had to do with the withdrawal of Rs. 36,502, and therefore must have known of the deposit.

The case therefore made that the money was divided in the haveli fails. It was

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taken to the bank and deposited in the name of the second Plaintiff, with the knowledge of the second Defendant, who came next day with his young nephew, and signed as one of the witnesses the receipt on the debit slip for the sum withdrawn. If the second Defendant had told a true story it would have been possible to suppose that though more than an equal share was drawn out for the second Defendant, still the Plaintiffs were left in possession of Rs. 30,000 towards their half. But his story, being untrue, and the story of the second Plaintiff being substantially true, erroneous no doubt in respect of the sum actually paid in and in apparently making one withdrawal at the end of two months, instead of a withdrawal of more than half next day and the balance at the end of two months—their Lordships think that his evidence must be accepted. His name was treated as a convenient one in which to put the money, because his elders might be engaged in the cultivations. He was so young that he did what he was told, and their Lordships take it that the whole sum came under the control of the Defendants, and was from time to time invested by the first or second Defendant in investments which either were intended to be, or ought to have been, on joint behalf, and that this sum is one for which the Defendants must account.

One observation should be added. The second Plaintiff made, as has been said, an erroneous statement as to the amount of the deposit. He said it was Rs. 46,000. This apparently gave the second Defendant, who was examined after him, a chance. He said in substance, "The deposit of Rs. 46,000 must have been made up as follows—The Plaintiffs took their Rs. 33,251. They had Rs. 8,000, as I know, coming to them from another source; that is getting on to the

Rs. 46,000," with the suggestion that the balance must have been made up of other separate monies of the Plaintiffs. When he made these statements he either had forgotten that he had signed that receipt or he hoped that it would never see the light.

Now as to the reduced sum secured by the second mortgage. This was paid off in nine instalments. The first five certainly, and probably the sixth, which is for a small sum, though the High Court thinks only the five, were received on joint account. The last three, which occurred after the dispute, were immediately arranged for, so as to keep the accounts equal between the parties, and no question arises as to them. Here again the Plaintiffs' case is that the Defendants had control of the money, and were supposed to take it and re-invest it on joint behalf, and the Defendants' case is that on each occasion the money was received in cash, and divided between the two parties there and then.

Now the second mortgage had a curious clause:—

"It is agreed that you should accept payment of the said entire debt in whole or in part, whenever we please. In case of disagreement between you we shall divide it into two equal halves and pay each his respective half-share of the amount and obtain receipts."

There are no written receipts, none apparently were given for these various payments, though they were in large sums. The only documentary record is in the books of the mortgagor. These contain entries in which each payment is said to be in respect of a loan from, or a mortgage deed and promissory note executed in favour of, Merla Viranna—that is, the first Defendant (now dead). When a later stage is reached, and the parties are approaching a division, the language is changed and the payment is said to be

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made in respect of money due under a mortgage to Merla Agasthiah and Merla Venkanna, the second Defendant and the second Plaintiff, in whose names as nominees the mortgage stood

The man of business of Chellayamma was examined, and he described the payment of the first instalment which was Rs. 50,000. The first and second Defendants, the second Plaintiff and some others came to Pitapur in a cart; he could not fix any particular person as the payee, but they all received the money and carried it away in a cart. He could not say whether the second Plaintiff was present at any of the later payments; and, as will be noted, he has entered them as paid to the first Defendant. The first Plaintiff says, as already stated, that he might have been present at one or two of the payments made by Chellayamma to the first Defendant, but he could not give any details of such payments, because he never cared to know such details when the first Defendant was attending to all then affairs. He may have somewhat exaggerated his devotion to study and his unworldliness, but there seems no doubt that he was a man who did not care for business, and preferred to have it done for him so that he might devote himself to his favourite pursuits. It should perhaps here be stated that when the first Defendant had his dealings with the revenue officer he produced certain accounts. At his examination in this suit he was asked for these accounts, but they were never produced.

Upon the whole, their Lordships think that the Subordinate Judge was right in saying that the proper presumption from these facts was that these instalments got under the control of the first Defendant, either directly or through the second Defendant, and that he had to account for them.

The other item is the proceeds of the paddy. If the case had been, as at one time it seemed probable it would be, that these proceeds after payment of wages and expenses in kind were divided in kind between the two lines, each of which might have occupied two of the four godowns in which the paddy could be stored, it might have been difficult for the Plaintiffs, particularly after the deposition of the first Plaintiff in the previous suit, to have proved a case. But it now being agreed that the paddy was not divided in specie, but was sold by the first Defendant, it seems to their Lordships that he had to discharge himself in respect of it. They are fortified in this conclusion by the falsity of the case set up in respect of the Chellayamma mortgage. So, in respect of both matters, they prefer the judgment of the Subordinate Judge.

Their Lordships have the less difficulty in accepting this judgment in preference to that of the High Court because their attention has been drawn to a certain number of misapprehensions or failures of appreciation on important points which are to be discovered in the judgment of the High Court. For instance, the learned Judges have not noticed the point that when the second Plaintiff and his sister were married, a large sum, Rs. 10,000, was disbursed by the first Defendant for the expenses of these marriages. It was suggested on behalf of the Defendants that this was a present from a generous uncle. But to their Lordships, as to the Subordinate Judge, it seems much more natural to suppose that it was a disbursement by the virtual *karta* of the two families out of the common funds. Moreover, when the accounts were taken for the purposes of the final decree these expenses were actually debited to the Plaintiffs. The High Court make no allusion to the

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income tax business, nor to the absence of the accounts then produced, nor to the presumptions to be derived from the entries in the books kept for Chellayamma by her man of business, nor to the false case set up by the Defendants in respect of the loans to the Rajah of Polavaram, a complicated transaction which was worked out for them in minute detail by the Subordinate Judge.

There remains a further defence founded on Art. 62 of Sch I of the Limitation Act. The Subordinate Judge rejected this defence, thinking that the matter was governed by Art. 89; the High Court found it unnecessary to decide upon it, but were inclined to think that it was governed by Art. 62 rather than by Art. 89. In their Lordships' judgment it is not necessary to determine which of the two articles applies. If it was, they would agree with the Subordinate Judge. But the plea of limitation would in any case only cover some of the earlier items, and inasmuch as there are cross debts which the Plaintiffs have to discharge, and which they could attribute to the earlier items, the matter becomes unimportant.

Upon the whole their Lordships will humbly recommend that this appeal should be allowed; that the judgment of the Subordinate Judge should be restored, and that the Appellants should have the costs of this appeal and in the Courts below.

Solicitor: Mr. Edward Dalgado for the Appellants.

Solicitor: Mr. Douglas Grant for the Respondents.

G. D. M.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 7 of 1923.

MOOREJEE,

RANKIN, J.

1923,

Heard, 10 May.

Judgment.

11, May. J

MR. J. S. A. C. O.
R. M. D. O., A. C. O. C. O.

H. R. M. L. & C. O.,
Respondents.

Suit by transferee of contract, if maintainable when notice of assignment does not state the address of the transferee—Transfer of Property Act (IV of 1882), sec. 130, exception to the proviso in, when comes into operation—Sec. 131, provisions of, whether mandatory or may be waived—Statement of the address of the transferee's solicitor, if sufficient compliance with sec. 131.

A having entered into certain contracts with B assigned them by a deed of assignment to C. The notice of assignment which was sent to B did not state C's (the transferee's) address. B refused to deal with C under the contracts and settled the same with A. C thereupon brought this suit against B for damages for breaches of the contracts.

Held—That in order that the exception mentioned in the proviso to sec. 130 of the Transfer of Property Act may be operative, there must be a strict compliance with the requirements of sec. 131 of the Act.

That the notice of assignment not having stated the transferee's address did not comply with the provisions of sec. 131 of the Act, and the suit must therefore fail.

HUNSAJ v. NATHOO (1) and BASANT SINGH v. BURMAH RAILWAY Co. (2) followed.

MULRAJ v. VISWANATH (3) referred to.

(1) 9 Bom. L. R. 838 (1907).

(2) 8 Burmah L. T. 266; 8 L. B. R. 288.

(3) L. R. 40 I. A. 24; s. c. 17 C. W. N. 209 (1912).

MESSRS. SADASOOK RAMPROTAP v. HOARE MILLER & Co.

Held also—That a statement of the address of the transferee's solicitor was not a sufficient compliance with the provisions of sec. 131 of the Transfer of Property Act.

Quære :—Whether the provisions of sec. 131, Transfer of Property Act, may be waived.

Per MOOKERJEE, J.—If the object of the legislature is to protect or benefit an individual litigant, it is open to him to waive the provisions of the statute. On the other hand, if the provision has been enacted from reasons of public policy, he cannot be permitted to waive it. The provisions of sec. 131 fall, in my judgment, within the latter category, but I am not prepared to maintain as an abstract proposition of law that under no conceivable circumstance can the provisions of sec. 131 be waived by the debtor.

VENKATA v. SUBBA (7) referred to

Per RANKIN, J.—At common law a chose in action was not assignable, in equity it was freely assignable upon certain principles as to notice. The Indian legislature . . . has composed a new scheme which has some of the features of both, and, as I read sec. 130, it says that the law, while regarding the transfer of an actionable claim as valid if effected in a certain manner, will not undertake to enforce against a debtor the assignment, except upon the terms that the debtor may arrange with his original creditor, unless and until he has received a particular kind of notice. If, therefore, the Plaintiffs' claim is entirely on the basis of an assignment and if the claim is wholly without any other juristic basis, it seems to me that the section which enacts certain conditions must be rigidly complied with.

The facts of the case as alleged by the
(7) 18 Mad. L. T. 682 (1915), [1915] Mad.
W. N. 822.

parties were as follows :—By two contracts the firm of Balfour & Co purchased from the Defendant Company a certain quantity of cornsacks, delivery in August, September and October 1921, on terms and conditions set out in the said contracts. It was alleged by the Plaintiff firm that by a registered deed of assignment dated the 16th of July 1921 executed by their general Manager, the firm of Balfour & Co absolutely assigned the said contracts to the Plaintiff firm, that Balfour & Co gave notice of the assignment to the Defendant Company and issued two *kutchas* delivery orders on them requesting them to give delivery of the goods under the said contracts to the Plaintiff firm or order; but that the Defendant Company refused to acknowledge the assignment or have any dealings with the Plaintiff firm. The Defendant Company in their written statement after denying that there was any valid assignment of the contracts or that there was any consideration for them stated that they received notice on the 27th of June 1921 from Balfour & Co asking them to stop any delivery of orders not signed by the general Manager himself and that having received the said notice they declined to recognise the assignment unless confirmed by Balfour & Co; that Balfour & Co requested them not to recognise the Plaintiff firm as assignees and threatened legal proceedings if they did so; and that further, the Defendant Company had settled with Balfour & Co. the said contracts by paying them a sum of Rs 10,980. At the trial before Buckland, J., the only issue on which the decision of the Court was sought was—Did the Plaintiff give a valid notice in terms of sec. 131 of the Transfer of Property Act of the assignment, if any? The notice of assignment was as follows :—

MESSRS SADASOOK RAMPROTAP v. HOARE MILLER & Co.

Messrs Hoare Miller & Co. Ltd.,
Gunny Department
5, Farlie Place Street,
Calcutta.

Re—Contracts Nos. 38409 of Messrs. Moran & Co and 2130 of Jannidis Bajpath for cornsacks.

Dear Sirs,

I am instructed by my clients Messrs Sadasook Ramprotap to inform you which I hereby do that Messrs Balfour & Co have this day assigned unto my clients the above-mentioned two contracts and have issued *kutchu* delivery orders in respect of the same. I enclose herewith a letter in original addressed to you by Messrs Balfour & Co informing you of such assignment and requesting you to accept the letter.

Please confirm the assignment and make necessary amendments in your contract books.

Yours faithfully,

(Sd) N. G. Roy,

Attorney-at-law & Attorney for
Messrs Sadasook Ramprotap.

Buckland, J. decided the issue against the Plaintiff firm and dismissed the suit. The Plaintiff firm appealed.

Sir B. C. Mitter, Mr. S. R. Bannerjee and Mr. J. C. Hazra, Counsel for the Plaintiffs-Appellants.

Mr. Pugh and Mr. Ameer Ali, Counsel for the Defendants-Respondents.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an appeal from the judgment of Mr. Justice Buckland in a suit for damages for breach of contract. On the 4th May 1921, and 9th June 1921, the Defendants entered into two contracts with a firm of the name of Balfour & Co. for the sale of cornsacks. On the 15th July 1921, Balfour & Co. assigned their

interest in the contract to the Plaintiffs, Sadasook Ramprotap, a firm carrying on business as commission agents and bankers. On the 11th November 1921, the Plaintiffs instituted this suit as assignees of the contracts to enforce their rights thereunder. Mr. Justice Buckland has dismissed the suit on the ground that the Plaintiffs had not complied with the terms of sec 131 of the Transfer of Property Act. No oral evidence has been adduced in the case, and it appears to have been taken as common ground before Mr. Justice Buckland that if notice was not given under sec 131, though the transfer might have been valid, the suit against the Defendant Company must fail. In these circumstances, Mr. Justice Buckland proceeded with the trial on the footing that if the Plaintiffs failed on this point, nothing else would require consideration. He decided this point first, and adopted that course with the concurrence of Counsel on both sides.

Sec 130 of the Transfer of Property Act provides that the transfer of an actionable claim shall be effected only by the execution of an instrument in writing, signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer, as is hereinafter provided, be given or not. Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim shall (save where the debtor or other person is a party to the transfer or has receiv-

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ed express notice thereof as hereinafter provided) be valid as against such transfer. The provision as to notice is contained in sec. 131 which is in these terms : " Every notice of transfer of an actionable claim shall be in writing signed by the transferor or his agent duly authorised in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent and shall state the name and address of the transferee "

In the present case a notice of transfer in writing was given; but it has subsequently been discovered that the notice, while stating the name of the transferor, did not specify the address of the transferee. Consequently the position is that the notice contemplated by the statute has not been given. In other words, the exception mentioned in the proviso to sec. 130 has not come into operation, for the debtor has not received express notice of the transfer as prescribed in sec. 131. On these facts, Mr Justice Buckland has held that such dealing with the debt by the debtor as has taken place between the debtor and the original creditor is valid as against the transferee. In support of this proposition, reference has been made to the decision of Sir Lawrence Jenkins, C. J., in *Hunsraj v. Nathoo* (1), where it was ruled that in order that the exception mentioned in the proviso to sec. 130 may be operative, there must be a strict compliance with the requirements of sec. 131. This view was also adopted by Sir Charles Fox, C. J., in *Basant Singh v. Burmah Railway Co.* (2). I am in agreement with the opinion expressed by Sir Lawrence Jenkins and by Sir Charles Fox and I do not consider it right to whittle away the unambiguous provisions of the statute. In this connection, reference may be made

to the observations of Lord Moulton in *Mulraj v. Viswanath* (3), where an attempt was made to modify the effect of secs. 130 and 131 of the Transfer of Property Act by reference to general principles of law. The Judicial Committee reversed the decision of the Bombay High Court as erroneous because the Judges had failed to appreciate that the positive language of the section precluded the application in India of the principles of the English law on which they based their judgment.

I may incidentally mention that the Appellants urged that the requirements of sec. 131 were substantially fulfilled because the address of the attorney of the transferee was given. The contention is futile. The section requires the name and address of the transferee, and the name and address of the solicitor of the transferee manifestly cannot be taken as a substitute therefor. It has further been urged that the omission of the Defendants to take exception to the validity of the notice operates as a bar to the maintenance of the objection. There is clearly no foundation for this argument. There was no duty imposed on the debtor to speak or to rectify the error. It is further immaterial that the debtor asserted that he would deal with no third party. This also does not disentitle him to insist upon strict compliance with the requirements of sec. 131.

We observe that Mr Justice Buckland has ruled that the provisions of sec. 131 could not be waived under any circumstance. Sir Benode Mitter has controverted this view, which I am not prepared to accept as well-founded. Our attention has been drawn to the cases of *Asutosh Sekhar v. Beharilal Kirtania* (4), *Manin-*

(1) 9 Bom. L. R. 838 (1907).

(2) 8 Burmah L. T. 266; 8 L. B. R. 288.

(3) L. R. 40 I. A. 24; s. c. 17 C. W. N. 209 (1912).

(4) I. L. R. 35 Cal. 61; s. c. 11 C. W. N. 1011; 6 C. L. J. 320 F. B. (1907).

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dra Chandra Nandi v. The Secretary of State for India in Council (5) and *Bholanath Ray v. The Secretary of State for India in Council* (6) to establish the position that even though a statutory provision may be expressed in a mandatory form, non-compliance therewith does not necessarily invalidate a transaction. This position is incontestable, and the answer to the question whether it is permissible to waive a particular provision depends upon its true nature. If the object of the legislature is to protect or benefit an individual litigant, it is open to him to waive the positive provisions of the statute. On the other hand, if the provision has been enacted from reasons of public policy, he cannot be permitted to waive it. The provisions of sec. 131 fall, in my judgment, within the latter category, but I am not prepared to maintain, as an abstract proposition of law, that under no conceivable circumstance can the provisions of sec. 131 be waived by the debtor. This harmonises with the view adopted in *Venkata Subbiah v. Subba Naidu* (7) as to the applicability of the principles of estoppel and waiver to assignments of actionable claims under secs. 130 and 131 of the Transfer of Property Act. Reference may be made to the decisions in *Griffin v. Weatherby* (8), *Walker v. Rostron* (9), *Macfarlane v. Lister* (10) and *Liversidge v. Broadbent* (11) see also *Gopalakrishna v. Gopalakrishna* (12).

(5) I. L. R. 34 Cal. 257. s. c. 5 C. L. J. 148 (1907)

(6) I. L. R. 40 Cal. 503. s. c. 17 C. W. N. 64 (1912)

(7) 18 Mad. L. T. 533 (1915); [1915] Mad. W. N. 822.

(8) 9 B. & S. 726.

(9) 9 M. & W. 411, 60 R. R. 770 (1842).

(10) L. R. 37 Ch. Div. 88 (1887).

(11) 4 H. & N. 603 (1859).

(12) I. L. R. 33 Mad. 123 (1909).

The real difficulty of the Appellants is that no foundation was laid for a case of waiver or estoppel in the trial Court. The pleadings do not state facts which might justify a plea of waiver. The question also does not appear to have been raised in the issues. The correspondence makes it abundantly clear that there is no foundation for the plea of waiver. Even in this Court Sir Benode Mitter has not been able to furnish the slightest indication that there are facts capable of proof which may support a plea of waiver. In such circumstances I shall not explore the attractive problem, whether a plea of waiver may not be analysed and distributed into one or other of the four heads, election, estoppel, contract and release. To my mind, the course which the trial took before Mr. Justice Buckland has in no way prejudiced the Plaintiffs who have no enforceable claim as against the Defendants. The decree made by Mr. Justice Buckland must be affirmed although I am not prepared to accept all the reasons assigned by him for his decision. The appeal is dismissed with costs.

RANKIN, J. — I also think that this appeal fails and that it would be vain and unreasonable to direct a remand. In view of the issues, the learned Judge, with the consent of the Counsel, was very reasonably desirous of settling first the question whether due notice of assignment had been given to the debtor. It is plain from the facts, from the judgment, and even from the memorandum of appeal that if the Defendant Company were entitled to deal with their original contractee, then the Plaintiffs' suit must fail. The case, however, illustrates the difficulty and danger of short cuts because, while it was reasonable and proper to dispose first of the question of the notice, it

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was also very necessary to dispose of that question as a whole. On the question of notice it was not disputed that secs. 130 and 131 of the Transfer of Property Act governed the case. The Plaintiffs by their Counsel appear to have contended first that the address of the attorney was sufficient under sec. 131 and also that the mention of any address was not imperatively required by the section. In my opinion, the word "shall" in the section means the same thing each of the two places where it occurs and the attorney's address is not the address of the transferee any more than the attorney's name is the name of the transferee for purposes of the section. Whether because the learned Judge showed that the Plaintiffs on this point were not persuading him or because some further matter occurred to learned Counsel in the course of his argument, it seems that, on this point, the Plaintiffs' Counsel had recourse, during the argument, to a suggestion of which there is no mention in the issues previously settled—a suggestion that the statute left it open to them to make a case of waiver—what case of waiver and waiver of what, being at that stage none too clear. If the Plaintiffs had any such case they would have acted more intelligibly if they had refused to assent to the question of notice being tried as a preliminary point on the correspondence. If they had asked to have an issue framed and for leave to adduce evidence thereon if they had such evidence, I think for the reasons to be stated in a moment that the learned Judge at this stage might very well have told the Plaintiffs' Counsel that, while he was prepared on the face of the issues settled to deal with the question of notice as a preliminary point, he was not prepared so to deal with it if the Plaintiffs were to introduce a new issue as to

waiver. In this Court learned Counsel for the Plaintiffs was asked to indicate what was the case of waiver he desired to have an opportunity to raise. He informed us quite frankly that he was not able to say whether it was a case to be raised by oral evidence, but that, in any case, he would contend on the correspondence and pleadings that as the Defendant Company repudiated the assignment altogether and made no point at all as to the absence of the Plaintiffs' address from the written notice, their conduct amounted to a waiver of this requirement of sec. 131. Apart from this last mentioned contention on the correspondence which is before us and which we can deal with, I do not collect any further fact save that the Plaintiffs are willing to make a further case of waiver if they can find one. It would be quite impossible, on the materials before us, even to frame an issue at this late stage except as regards questions on the correspondence. In my opinion, the fact that the Defendant Company from the first refused to recognise any assignment or to deal with any third party is no waiver of any defect in the notice, and the fact that the Defendant Company at no time tutored the Plaintiffs as to the proper form of the notice or took express objection to anything in particular in the notice is no waiver either. I do not doubt that a debtor may by parole or by conduct represent that he will be responsible to an assignee whose notice is defective and that the statute would in such a case be no answer to a claim based on or re-enforced by contract or estoppel. Again, if it were suggested that the assignor had offered to let a debtor have the transferee's address in writing and that the debtor had replied that there was no need to trouble as he would make no point of the omission that would raise a

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different case I am not prepared to hold that such a case as that properly pleaded and proved would not succeed. It might amount to a conditional promise to the assignee. The truth is that the statute is not concerned to prevent any one who is willing to incur a liability from so doing. It merely states the conditions on which the law imposes liability under an assignment. Nevertheless, I incline to think that the Plaintiffs' case, if not within the statute, is demurrable unless it has an independent basis. In construing secs. 130 and 131 of the Transfer of Property Act, it has to be remembered that they contain a very special scheme which must be regarded as a whole in itself. At common law a chose in action was not assignable, in equity it was freely assignable upon certain principles as to notice. The Indian legislature in 1900 has composed a new scheme which has some of the features of both, and, as I read sec. 130 it says this that the law, while regarding the transfer of an actionable claim as valid if effected in a certain manner, will not undertake to enforce against a debtor the assignment except upon the terms that the debtor may arrange with his original creditor unless and until he has received in writing a particular kind of notice. If, therefore, the Plaintiffs' claim is entirely on the basis of an assignment and if this claim is wholly without any other juristic basis, it seems to me that the section which enacts certain conditions must be rigidly complied with. I do not assent to all the learned Judge has said with regard to the general impossibility of making any case of waiver. It is difficult to distinguish between waiver and estoppel. Under the name of waiver, it may be said that liability or responsibility to an assignee has been in-

curred by a debtor independently of sec. 130 by conduct or by representation. In this case, however, there is no reality at all in that suggestion. I do not complain that no such case was pleaded, but no issue as to such a case was taken, and, even at this stage, it does not appear that there is anything capable of being stated apart from the argument on the first point. For these reasons it seems to me that it is impossible to direct a remand and that the present appeal fails and must be dismissed.

Mr. R. L. Dutt, Solicitor for the Appellants.

Messrs. Orr Dignam & Co., Solicitors for the Respondents.

P. K. C. *Appeal dismissed.*

[INSOLVENCY JURISDICTION.]

No. 133 of 1922.

GREAVES, J.

1:22,

8, August.

Re BALLAV CHAND
SEROWGEE.

Presidency Towns Insolvency Act (III of 1909), adjudication of insolvency after a previous adjudication on the same facts and materials had been annulled, legality of.

An insolvent was adjudicated on his own petition but having failed to apply for his discharge within the time provided by the Act, his adjudication was annulled. Subsequently on his own application, on the same facts and materials, his second adjudication took place, and a creditor applied to annul the adjudication.

Held—That the presentation of the second insolvency petition by the debtors was an abuse of the process of the Court, and the second adjudication order founded upon it must be annulled.

MAL CHAND v. GOPAL CHANDRA GHOSAL (1) followed.

Re BALLAV CHAND SEROWGEE

CHHATRAPAT SINGH DUGAR v. KHARAG SINGH LACHMIRAM (2) *distinguished*

This was an application by a creditor to set aside an adjudication order of insolvency, dated the 21st June 1922

The facts will fully appear from the judgment.

The JUDGMENT OF THE COURT was as follows -

GREAVES, J. - This is an application by a creditor to annul the adjudication order dated the 21st June 1922 made at the instance of the insolvent himself.

The facts are as follows - On the 22nd February 1919 the insolvent was adjudicated on his own petition. On the 12th May 1919 he filed a schedule but failed to apply for his discharge within the time provided by the Act and his adjudication was annulled on the 9th May 1922

As already stated his second adjudication took place some five or six weeks after, viz. on the 21st June, on the same facts and on the same materials, so far as I can gather, upon which the order of adjudication had been made

Under these circumstances it seems to me that I ought to annul the order of adjudication for the reasons stated in the case of *Mal Chand v Gopal Chandra Ghosal* (1). It is suggested on behalf of the insolvent that this is not good law having regard to the subsequent decision of the Judicial Committee in *Chhatrapal Singh Dugar v Kharag Singh Lachmiram* (2), but so far as I can see that case was decided by the Judicial Committee on the ground that an order of adjudication was refused because of misconduct of the debtor which they point out should be dealt with at the time he applies for his discharge; but it seems to me that

the facts of the present case and of the case of *Mal Chand v Gopal Chandra* (1), to which I have just referred, stand on quite a different ground, and, in accordance with the decision in *Mal Chand v Gopal Chandra* (1), I set aside the adjudication

The applicant is entitled to the costs of the application

Mr Durga Prasad Khaitan, Solicitor for the Creditor

Mr I C Ghosh, Solicitor for the Insolvent

J. N. R. Application allowed

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 431 of 1919

NARENDRA LAL CHOW-
DHURY and anr., Plain-
tiffs, Appellants,
v.

MOOKERJEE, J.
WALMSLEY, J.
1923,
25, January

BENODE BEHARI SADHU-
KHAN, Defendant,
Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 50 occupancy raiyat if entitled to the benefit of the presumption under—Rent-receipts for 20 continued years if necessary to establish the presumption—Sec 115, if excludes the presumption under sec. 50 in proceedings under sec. 105.

In certain proceedings under sec 105 of the Bengal Tenancy Act, for settlement of fair and equitable rent by way of enhancement of the existing rent, the Defendant, who had been entered as an occupancy raiyat in the record-of-rights, contended that he had the status of a raiyat at a fixed rate, and produced rent-receipts, though not for 20 continued years, to show that he had held at the same rate for more than 20 years:

Held—That there is no reason why an occupancy raiyat should be excluded from the category of a raiyat for the purpose of

(1) 21 C. W. N. 298 (1916).

(2) 21 C. W. N. 497 (1916)

(1) 21 C. W. N. 298 (1916).

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the presumption under sec. 50 of the Bengal Tenancy Act. A raiyat at fixed rate is not created by sec. 50 which merely furnishes a rule of evidence to enable a person to prove with facility that he is a raiyat at fixed rate.

SARBESWAR PATRA v. MOHARAJA SIR BIJOY CHAND MOHATAP (1) and BANSIDAS v. JAGADIP NARAIN CHOWDHURY (2) referred to and relied on.

That the Defendant was entitled to the benefit of sec. 50 notwithstanding the fact that he was recorded as an occupancy raiyat.

If the discontinuous receipts produced show that rent has been paid at the same rate for the years covered thereby, the Court may, by an application of the principle of continuity, infer that there has been no change in the intervening periods. What has to be established is not actual payment of rent but the fact that the tenancy has been held at a certain rate.

KATTYANI DABEA v SOONDUREE DABEA (4), ELAHEE BUKSH v ROOPUN TPLEE (5), SECRETARY OF STATE v UPENDRA (7) and MOHINIKANTA v PRIYANATH (8) referred to.

Held further—*That sec. 115 does not debar the Defendant from the benefit of sec. 50, as that section does not come into operation until all possible proceedings under Chap. X have been exhausted.*

PIRTHI CHAND LAL v. BASARAT ALI (3) referred to and followed.

This was an appeal preferred on the 12th of March 1919 against the decree of

(1) 26 C. W. N. 15: s. c. 34 C. L. J. 233 (1921)

(2) I. L. R. 24 Cal. 152 (1896)

(3) I. L. R. 37 Cal. 80 s. c. 13 C. W. N. 1149 (F. B.) (1909).

(4) 2 W. R. (Act X Rulings) 60 (1865)

(5) 7 W. R. 284 (1867).

(7) 86 C. L. J. 336 (343) (1922)

(8) I. L. R. 49 Cal. 661: s. c. 85 C. L. J. 389 (1923).

G. N. Roy, Esq., District Judge of Zilla Hughly, dated the 13th December 1918, reversing the decree of Babu Khitish Chandra Haldai, Assistant Settlement Officer of that District, dated the 27th of June 1917.

The facts of the case are briefly as follows.—In certain proceedings by the Plaintiffs landlords under sec. 105 of the Bengal Tenancy Act for settlement of fair and equitable rent by way of enhancement of the existing rent, the Defendant, who had been entered as an occupancy raiyat in the record-of-rights, contended that he had the status of a raiyat at a fixed rate. In support of this position he produced rent-receipts to show that he had held the tenancy at the same rate for more than 20 years. The settlement officer held that inasmuch as he was an occupancy raiyat he was not entitled to the benefit of the presumption under sec. 50. On appeal the Special Judge held that although the Defendant might be an occupancy raiyat, he was entitled to the benefit of the presumption mentioned in sec. 50. The Plaintiffs landlords thereupon preferred the present second appeal to the High Court.

Dr. Jadunath Kanjilal for the Appellants.

Babu Santosh Kumar Pal for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Plaintiffs landlords in a proceeding instituted by them under sec. 105 of the Bengal Tenancy Act for settlement of a fair and equitable rent by way of enhancement of the existing rent of the disputed holding. The Defendant has been entered as an occupancy raiyat in the record-of-rights. But in answer to the claim for enhancement of rent he contended that he had the status

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of a raiyat at a fixed rate. In support of this position he produced rent-receipts to show that he had held the tenancy at the same rate for more than 20 years. The settlement officer held that inasmuch as he was an occupancy raiyat he was not entitled to the benefit of the presumption formulated in sec 50 of the Bengal Tenancy Act. On appeal, the Special Judge held that although the Defendant might be an occupancy raiyat, he was entitled to the benefit of the presumption mentioned in sec. 50. The Special Judge then considered the rent-receipts, and although receipts for twenty continued years had not been produced, he held that there was sufficient evidence to show that the tenant had held at a uniform rate for more than twenty years. This presumption, in his opinion, was not rebutted in any way. In this view he dismissed the application for enhancement of rent.

On behalf of the Plaintiffs we have been pressed to hold that an occupancy raiyat is not entitled to the benefit of sec 50. We are of opinion that this contention is opposed to the clear terms of sub-sec (1) of that section which provides that where a raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of alteration in the area of the holding. This embodies the substantive rule of law. Sub-sec (2) then proceeds to lay down that if it is proved in any suit or other proceeding under the Bengal Tenancy Act that a raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they

have held at that rent or rate of rent from the time of the Permanent Settlement. This deals with the mode of proof and raises a rebuttable presumption. We can see no reason why an occupancy raiyat should be excluded from the category of a raiyat for the purposes of this section. Sec. 4 mentions the following classes of tenants, namely, tenure-holders including under-tenure-holders, raiyats and under-raiyats. Raiyats are then classified as (a) raiyats holding at fixed rates, (b) occupancy raiyats and (c) non-occupancy raiyats. This, implies, it is argued, that a person cannot come under two of these categories. This contention is opposed to the decision in *Sarbeswar Patra v. Moharaja Sir Bijoy Chand Mohatap* (1), where it was held that a raiyat at a fixed rate may become a settled raiyat of the village under sec 20 and thus acquire a right of occupancy within the meaning of sec 21, that the status of a raiyat at a fixed rate can be combined with that of an occupancy raiyat, that the higher status would supersede so much of the lower as might be inconsistent with it, and that either status might be used as a shield so far as it extended. There is nothing in the decision in *Bansidas v. Jagadip Narain Chowdhury* (2), which militates against this view. We may add that a raiyat at fixed rate is not created by sec 50, which merely furnishes a rule of evidence to enable a person to prove with facility that he is a raiyat at a fixed rate. We hold accordingly that the Defendant was entitled to the benefit of sec. 50 notwithstanding the fact that he was recorded as an occupancy raiyat.

It has finally been urged that sec 115 debars the Defendant from the benefit of sec. 50. This contention is based on—

(1) 26 C. W. N. 15; 2, C. 34 C. L. J. 238 (1921)

(2) I. L. R. 34 Cal. 162 (1906).

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tirely on a misapprehension. That section, as has been pointed out by a Full Bench of this Court in the case of *Pirthi Chand Lal v Basarat Ali* (3), does not come into operation until all possible proceedings under Chap. X have been exhausted. The proceeding now before the Court is a proceeding under sec 105

As a last resort, we have been pressed to hold that as the rent-receipts for twenty continuous years have not been produced, the presumption under sec 50 has not been established. This argument is opposed to the decisions in *Kattiyant Dabea v Soonduree Dabea* (4) and *Elahee Buksh v. Roopun Telee* (5), which were accepted as good law in *Satis Chandra Biswas v. Nilmadhab Saha* (6) (decided by Mookerjee and Rankin JJ., 10th August 1922). If the discontinuous receipts produced show that rent has been paid at the same rate for the years covered thereby, the Court may, by an application of the principle of continuity, infer that there has been no change in the intervening periods, see *Secretary of State v. Upendra* (7). We must further remember that what has to be established is not actual payment of rent but the fact that the tenancy has been held at a certain rate. Reference may in this connection be made to the decision in *Mohinikanta v. Priyanath* (8).

The result is that the decree made by the Special Judge is affirmed and thus appeal dismissed with costs. We assess the hearing fee at one gold mohur.

J. N. R.

Appeal dismissed

(3) I. L. R. 37 Cal. 80; a. c. 18 C. W. N. 1149 (F. B.) (1909).

(4) 2 W. R. (Act X Rulings) 60 (1865).

(5) 7 W. R. 284 (1867).

(6) Unreported.

(7) 26 C. L. J. 806 (343) (1922).

(8) I. L. R. 49 Cal. 661; a. c. 35 C. L. J. 809 (1922).

CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 262 OF 1923.

RANKIN, J.
1923,
21, May.

DEBA KANTA CHATTERJI, Accused,
Petitioner,

v.

BUCKLAND, J.
CUMING, J.
1923,
19, April.

GOUR GOPAL MUKERJI,
Complainant, Opposite
Party.

Criminal Procedure Code (Act V of 1898), sec. 342—Accused may be examined after examination-in-chief of prosecution witness but before cross-examination—“Examination,” meaning of—“Called on for his defence,” meaning of

Held per CURIAM (CUMING, J., contra)—That the provisions of sec. 312 of the Criminal Procedure Code are not sufficiently complied with by examining the accused person after the prosecution witnesses have been examined-in-chief but before they have been cross-examined. In all cases, whether additional witnesses are called after a charge has been framed or not, the obligatory examination of the accused under sec. 342 of the Code should take place after all the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence.

Per RANKIN, J.—The phrase “called on for his defence” in sec. 342, means the same thing as the phrase “called on to enter on his defence” or similar expressions in secs. 256 and 289 of the Code.

This was a Rule granted on the 5th March 1923 against the order of the Deputy Magistrate of Hughly (Mr S. C. Mitra), dated the 15th November 1922, which order was on appeal affirmed by the Sessions Judge of Hughly (Mr S. C. Mullick) on 10th January 1923.

On 31st May 1922 one Gourgopal lodged a complaint against the Petitioner charging him with having called Gour-

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gopal thief, cheat, rogue publicly in the shop of witness No. 2 and having defamed him thereby. The Petitioner was summoned and placed on his trial before Mr S C Mitra, Deputy Magistrate of Hughly. At the trial prosecution adduced evidence to prove the case. After the examination-in-chief of the prosecution witnesses, the Petitioner was examined in reference to some allegation, but never afterwards was he examined again and the Magistrate did not examine him at all after the cross-examination of the prosecution witnesses. The Magistrate framed a charge against the Petitioner and convicted him under sec 500, I P C, for having made and published defamatory statements about Gourgopal and sentenced him to pay a fine of Rs. 200. On appeal the Sessions Judge upheld the aforesaid conviction and sentence by his order, dated 10th July 1923.

The Rule came on for hearing before Buckland and Cuming, JJ, who having differed, the case was laid before Rankin, J.

Babus Manmatha Nath Mukerjee and *Jajneswar Mazumdar* for the Petitioner.

Babu Debendra Nath Mondal for the Opposite Party.

The JUDGMENTS OF BUCKLAND AND CUMING, JJ, were as follows:—

BUCKLAND, J.—The point involved in this Rule has come before the Court recently on several occasions, and it arises upon the interpretation to be given to sec 342, Cr P C. The complainant and five witnesses for the prosecution were examined-in-chief on the 7th July 1922. On the 20th July 1922 five other witnesses for the prosecution were examined-in-chief. The accused was then examined under sec. 342. On the 7th August a charge was framed. No further witnesses for the prosecution were examined-in-chief, but

on that and on subsequent dates the witnesses for the prosecution were cross-examined. On the 18th September six witnesses for the defence were examined. The question is whether or not the obligatory examination of the accused under sec. 342 of the Criminal Procedure Code should have taken place after the witnesses for the prosecution had been cross-examined.

It has been submitted to us that inasmuch as there was no examination of the accused under that section after the witnesses for the prosecution had been cross-examined and before he was called upon to enter upon his defence, the provisions of the section have not been complied with. In point of fact the accused was examined after the witnesses for the prosecution had been examined-in-chief and before he was called on for his defence. But the contention is that the word "examined" in sec. 342 includes cross-examination and that in consequence the provisions of the section have been contravened.

We have been referred generally to recent decisions of this Court and particularly to the judgment in *Mazahur Ali v. King-Emperor* (1) in which the learned Chief Justice referring to the words of the section said: "That must mean after the witnesses for the prosecution have been examined and after the cross-examination and re-examination, if any, of such witnesses, for ordinarily the accused is not called on for his defence until the case for the prosecution is closed." I do not understand that by this it is necessarily meant that the word "examined" includes cross-examination and re-examination, if any. It seems to me that the decision is based upon broader grounds, for a few lines earlier in the judgment I find it stated:—"In my judgment it is

(1) 27 C. W. N. 99 (1922).

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clearly indicated in that part of the section that the time at which the Court shall question the accused generally on the case, is, after the prosecution case is completed and before the accused person is called on for his defence "

I agree with this conclusion and I desire to state my reasons with reference to the procedure laid down in Chap. 21 for the trial of warrant cases. Sec. 252 provides for the examination of the complainant and of witnesses for the prosecution in the first instance. As regards them it is open to the defence to cross-examine them if they choose to do so as they are called or to reserve the cross-examination until the opportunity provided later. When those witnesses have been examined or at any previous stage of the case, which means before they have all been examined, the Magistrate under sec. 254 is entitled to frame a charge in writing against the accused. The charge is then read and explained to the accused and he is asked to plead to it. Then, if he does not plead guilty or has to be tried, the accused is given an opportunity of cross-examining the witnesses for the prosecution whose evidence has already been taken, and after those whom he desires to re-call for that purpose have been cross-examined and re-examined they are discharged. Next the evidence of the remaining witnesses for the prosecution is taken and after cross-examination and re-examination they too are discharged. There the case for the prosecution closes and it is at that stage and before the accused is called upon to enter on his defence which is the next stage that the obligatory examination of the accused under section 342 should take place.

There may therefore be cases where all the witnesses for the prosecution are examined before a charge is framed and they are only cross-examined thereafter

and cases where additional witnesses are called for the prosecution after a charge has been framed.

With regard to trials in which such additional witnesses are called for the prosecution, in my opinion— which I might have to reconsider if the point directly arose for decision at any further time— such additional witnesses for the prosecution should be cross-examined and re-examined one by one as they are called. As regards witnesses called before a charge is framed an opportunity is provided to them for cross-examination but there is no such provision as regards the additional or remaining witnesses for the prosecution. Failure to observe this procedure is one source of error with regard to questioning the prisoner under sec. 342, Cr. P. C. But if the additional witnesses for the prosecution are examined-in-chief, cross-examined and re-examined one by one then as a matter of course it will follow that the stage at which the Court shall question the accused generally on the case will be after the prosecution case is complete and before the accused is called on for his defence and no question can possibly arise as to whether the word "examined" in sec. 342 does or does not include the word "cross-examined."

In cases, however, where no additional witnesses are called after a charge has been framed, errors in the observance of sec. 342 are even more frequent. As to these cases the procedure laid down, even if followed with the utmost precision, does not lead with the same directness to the point of which sight cannot be lost at which the obligatory questioning of the accused must take place. The reason for this is that if the accused is questioned after the witnesses for the prosecution have been examined-in-chief, but before

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they are cross-examined, and also, of course, before he has been called on for his defence, the terms of the section so far as they require him to be questioned "after the witnesses for the prosecution have been examined and before he is called on for his defence" have been complied with unless the word "examined" is held to include "cross-examined." But this is not all that the section says. The words quoted indicate that the accused is to be questioned at least after all the witnesses for the prosecution have been examined-in-chief, and I know of no case where it has even been argued that the section is not contravened if witnesses for the prosecution are examined-in-chief after the accused has been examined and he is not again questioned before he is called on for his defence. The section also provides that the accused shall be questioned "generally on the case" and to hold that to question him before the witnesses for the prosecution have been cross-examined is sufficient is to lose sight of this very important phrase. For it may well be that circumstances demanding explanation have been elicited by the cross-examination, and whether that is so or not it cannot by any stretch of language be said that to question the accused for the purpose of enabling him to explain the examination-in-chief but to give him no opportunity to explain any or even only a part of the cross-examination of the witnesses for the prosecution is to question him generally on the case. This reasoning applies equally to cases where additional witnesses for the prosecution are called after a charge has been framed but for reasons which I have given its application to such cases should be unnecessary.

For these reasons I am of opinion that in all cases, whether additional witnesses

are called after a charge has been framed or not the obligatory examination of the accused under sec. 342 should take place after all the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence.

Before I conclude I should say that my judgment is not intended by such general observations as I have made to suggest that where in his discretion the Judge or Magistrate rightly permits a witness or witnesses for the prosecution to be called or cross-examined after the accused has been called on for his defence a further examination of the accused under this section must take place. The section only deals with all obligatory examinations of the accused before he is called on for his defence, and should any such question arise hereafter the point will then have to be decided.

In my judgment this Rule should be made absolute and the order of the trial Court, dated the 15th November 1922, should be set aside and the trial should be resumed by the Magistrate from that point at which the obligatory examination under sec. 342 should have taken place.

As my learned brother dissents, the case will have to be referred under sec. 420, Cr. P. C.

CUMING, J. - I would discharge this Rule. The Rule was granted on the ground that in the absence of examination of the Petitioner according to the mandatory provisions of sec. 342 of the Criminal Procedure Code, the conviction of the Petitioner cannot be sustained. From the body of the petition it appears that it is alleged that the provisions of the section were not complied with in that the accused person was not examined after the cross-examination of the prosecution witnesses and it would appear from the order-sheet that this was so. It appears that after

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the examination of the prosecution witnesses in chief the accused was examined and the prosecution witnesses were subsequently cross-examined. In my opinion and with great respect to the learned Judges who decided the case of *Mazahur Ali v. King-Emperor* (1) this was a sufficient compliance with the provisions of the section. Sec. 342 states "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any enquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." As I read the section the expression "examined" means examination-in-chief and does not include cross-examination or re-examination of the prosecution witnesses. A perusal of the Code will show that the Code apparently contemplates three distinct stages in the examination of the witness—his examination, his cross-examination and his re-examination, and where the Code uses the expression "examined" in sec. 342, it seems to me that the Code intended to refer to examination and not necessarily to cross-examination or re-examination; in other words, the expression "examined" as set out in sec. 342 does not include cross-examination or re-examination. My reasons are these. Consider for instance the sections dealing with the trial of warrant cases. Sec. 252 provides that the Magistrate will hear the complainant and take all the evidence which may be produced in support of the prosecution. After taking their evidence the Magistrate

examines the accused under sec. 253. The Magistrate may then either discharge him or frame a charge. The charge could be framed previously at any stage under sec. 254, but as soon as the charge is framed the accused is called on to cross-examine the witnesses for the prosecution who have already been examined. They are then re-examined if necessary and discharged. The remaining witnesses for the prosecution are then examined, cross-examined and re-examined; the accused then is called on to enter on his defence. Sec. 257 provides for the accused re-calling and cross-examining prosecution witnesses after he has entered on his defence.

It will be noticed that the different stages, examination, cross-examination and re-examination, may take place at different times. These sections set out the procedure to be followed in warrant cases and after sec. 253 which alone provides for the examination of the accused no mention whatever is made of such examination. No doubt the Code contemplates in certain cases further witnesses for the prosecution being examined after the charge and reading sec. 342 which is in the general provisions for trials, the accused must also be examined after these witnesses have been examined in order that he may explain anything that may appear against him in the evidence. Now if the object of the examination is to allow the accused to explain anything which may appear against him in the evidence of the prosecution there would be no necessity to examine him after the cross-examination, for the object of the cross-examination is, I understand, to destroy the evidence for the prosecution and in itself to explain away facts which might appear against the accused. I am therefore of opinion that the expression "examined" in sec. 342 refers

(1) 27 C. W. N. 90 (1922)

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to the examination-in-chief of the prosecution witnesses and does not include their cross-examination or re-examination and that therefore in the present case the requirements of the Code have been complied with

[The case was heard again by RANKIN, J., as the third Judge.]

Babu Narendia Kumar Bose for Babus Manmatha Nath Mukerjee and Jagmohun Mazumdar for the Petitioner

Babu Debendra Nath Mondal for the Opposite Party.

The JUDGMENT OF RANKIN, J., was as follows --

RANKIN, J.—In this case the accused person was standing his trial in a warrant case on a charge under sec. 500 of the Indian Penal Code. After the prosecution witnesses had been examined-in-chief, the accused was questioned generally on the case by the Magistrate. Thereafter cross-examination of the prosecution witnesses took place and the objection now under consideration is this. That sec. 342 Criminal Procedure Code was not complied with as after the cross-examination of the prosecution witnesses the accused was not again examined generally on the case in terms of the section. The view taken by Mr. Justice Buckland following the decision in *Mazahur Ali v. King-Emperor* (1) was that in those circumstances the provisions of sec. 342 had not been complied with, the requirements of the section being that after the witnesses for the prosecution have been examined in the sense that the examination, cross-examination and re-examination have concluded, the accused is entitled to the advantage of being called upon to explain any matter against him. Mr. Justice Guming has taken the view that upon the wording of

the section the words "after the witnesses for the prosecution have been examined," do not mean more than that the witnesses for the prosecution have been examined-in-chief.

To begin with in this reference the learned Vakil for the complainant has drawn my attention to secs. 255, 256 and 289 of the Code of Criminal Procedure. He has contended that the words of sec. 342, "and before he is called on for his defence," mean the same thing as the expression, "he shall be asked whether he is guilty or has any defence to make," and that they do not mean the same thing as the words in sec. 256 where it says that the accused "shall then be called upon to enter upon his defence and produce his evidence." In like manner he distinguishes the language of sec. 342 from the concluding words of sec. 289 "the Court shall call upon the accused to enter on his defence." Now, it is quite true that the phrase "before he is called on for his defence" is slightly different from the phrase "called on to enter on his defence" but in my judgment they mean exactly the same thing and the reference at the end of the first sub-section of sec. 342 is to the same point, or to the same matter as is dealt with at the end of the first sub-section of sec. 256. Sec. 255 deals with plea. The question is not one of calling on the accused for his defence or of entering upon a defence but only of ascertaining whether there is any defence or not. If there is a plea of guilty it will not be necessary to hear further evidence for the prosecution. In most cases the stage in the case pointed out by the first sub-section of sec. 255 will not immediately be followed by the accused person entering on his defence or being called upon for his defence but will be followed by the prosecution proceeding to prove their case,

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The next point taken is that if one looks at various sections of the Code, one will find that examination, cross-examination and re-examination are used in contradistinction to one another. It is, however quite clear that examination-in-chief, cross-examination and re-examination are different sub-species of what is called more broadly examination. A witness is said to be examined when the whole process has been completed. In this connection I will refer to sec. 231 of the Code. It seems to me that it is quite clear that the word "examined" is there used in the larger sense and that it would cover cross-examination. In the same way it seems to me that the frame of sec. 342 must be considered. A particular stage of the trial is indicated by saying "after the witnesses for the prosecution have been examined and before he is called on for his defence." Does that mean that the witnesses for the prosecution have been completely heard and finished and the evidence for the defence is about to begin or does it mean that the witnesses for the prosecution have been part heard . . . have been examined-in-chief and that at any time during the succeeding stages but before the accused is called on to enter on his defence the accused is to be examined by the Court. In my judgment the end of sub-sec. (1) of sec. 342 indicates a perfectly definite stage, namely, after the prosecution case is finished and before the defence case is begun. It is difficult in a long Code to maintain a special meaning for ordinary English words, and in sec. 342 just as in sec. 231 the word "examine" is to be taken in my judgment in the ordinary English sense in which it covers all kinds of examination including cross-examination and re-examination. The language of sec. 137 of the Indian Evidence Act

shows the primary meaning of the word because it says that the examination of a witness shall in some circumstances be called examination-in-chief, in others cross-examination, and in others re-examination.

For these reasons I am of opinion that the judgment of Mr. Justice Buckland and the order proposed by him is right and the judgment of Mr. Justice Cuming dissenting from it ought not to be upheld. I propose in this case to make the same order as Mr. Justice Buckland proposed to make, namely, to make the Rule absolute, to set aside the order of the trial Court and direct the trial to be resumed by the Magistrate from that point at which the examination under sec. 342 should have taken place.

N G

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS

LORD SALVESEN.

1922,

Heard, 9. November.

Judgment,

28, November.

MAHOMED SOLAIMAN, Appellant,

v.

KUMAR BIRENDRA CHANDRA SINGH,

since deceased,

and ors.,

Respondents.

Evidence Act (I of 1872), sec. 114, illus. (e) and (f)—Sale of estate for arrears of revenue—Accounts kept in the Collectorate—Presumption that they are correct—Revenue Sale Act (XI of 1859), sec. 37, 4th Frep—"Garden," "wells," meaning of—All important points in issue to be decided by Courts below to avoid remand.

Under sec. 114, Illus. (e) and (f) of the Indian Evidence Act, the Court is entitled to presume that the accounts of arrears due in respect of a revenue-paying estate kept by a clerk in the Collector's office under the supervision of the Collector were correctly kept until the contrary is proved.

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"Gardens" in the fourth exception to sec. 37 of Act XI of 1859 must mean permanent gardens, and very shallow and small wells are not covered by that exception.

The desirability, in appealable cases, of the Courts in India pronouncing their opinions, as far as may be practicable, on all important points in order to enable the Judicial Committee to dispose of the case finally and thus avoid a remand, adverted to.

TARA KANT BANNERJEE v. PUDIM MONEY DOSSEE (2) referred to

These were consolidated appeals from two decrees, dated the 25th May 1920 of the High Court of Calcutta, reversing two decrees, dated the 31st January 1918 of the Subordinate Judge of the 24-Parganahs.

The properties which were the subject-matter of these decrees were purchased by the Appellant at an auction sale held for arrears of revenue, and the present suits were instituted by him to eject the Respondents from their under-tenures.

The facts of the case are fully set out in the judgment of their Lordships.

Sir G. Lowndes, K. C. and Mr. Dubé for the Appellant.—The *jamma* for the Bengali year was due at the latest in April 1914, and the evidence shows that that was the time when revenue dues were collected.

The decision in *Haji Buksh Elahi v. Durlav Chandra Kar* (1) was based on the evidence in that case. The question turns on the terms of the *kabuliyat* not on the date on which it is executed.

Mr. Kenworthy Brown (with him Mr. DeGrayther, K. C.) for the Respondents.—The High Court have put the

natural construction on the *kabuliyat* according to which rent became due on the date of the document, i.e., November 10th, so that at the date of sale there were no arrears of revenue for which the property could be sold.

Mr. Wallach for other Respondents.

Sir Geo Lowndes, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are two consolidated appeals from two decrees, dated the 25th May 1920, of the High Court at Calcutta, which reversed two decrees, dated the 31st January 1918, of the Subordinate Judge (Second Court) of the 24-Parganahs. The decrees from which these consolidated appeals have been brought were respectively made in suits numbered 19 and 20 of 1917. In each of these suits the present Appellant was the Plaintiff, and some of the present Respondents were the Defendants in one of the suits and others of the present Respondents were the Defendants in the other of the suits. The suits were tried together, as were the appeals to the High Court. The suits are suits by an auction-purchaser under Act XI of 1859 of lands for ejectment of under-tenants and for mesne profits.

The lands to which the suits relate are situate within the Collectorate of the 24-Parganahs, a permanently settled District of Bengal, to which Act XI of 1859 applies. On the 14th April 1915, the Collector of the District issued notice and proclamation under Act XI of 1859 that the holding number 20A, which is the land now in question, would be sold under Act XI of 1859 for the realization of Rs. 6, 10 annas and 5 pies revenue in arrears from the year 1320 B. S. The holding was sold by auction on the 17th

(1) L. R., 39 I. A. 177; s. c. I. L. R. 39 Cal. 981; 16 C. W. N. 843 (1913).

(2) 5 W. R. P. C. 68; 10 M. I. A. 476, 478 (1886).

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May 1915, and was purchased by the Plaintiff, who subsequently received a sale certificate. The Government revenue for an arrear of which the holding was sold was the revenue for 1320 B. S. The Defendants were at the date of the auction sale under-tenants of lands in the holding sold, and the Plaintiff claims to be entitled to eject them.

The plaint and the written statement of Kumar Birendra Chandra Singh, a Defendant in suit No. 19 of 1917, and the plaint and written statement in suit No. 20 of 1917, are in the printed record.

In his plaint the Plaintiff alleged that the Collector of the District, on the 17th May 1915, put the holding No. 20A up for sale by auction under the provisions of Act XI of 1859 for arrears of the Government revenue, and that he (the Plaintiff), having purchased it at the sale, and having obtained the sale certificate, had, under sec. 37 of Act XI of 1859, acquired it free of all encumbrances and had become entitled to annul all the subordinate rights, and to recover *has* possession of the holding by ejecting the tenants holding any subordinate right, and claimed a decree for ejectment and mesne profits. The defence, so far as it is now material, was that there was no arrear of the Government revenue to recover which the Collector was entitled to sell the holding, and that in any case the Defendants were within the exceptions of sec. 12 of Bengal Act VII of 1868; that sec. 37 of Act XI of 1859 did not apply; and that the Plaintiff was not entitled to eject the Defendants. The Subordinate Judge fixed five issues, of which issues (2) and (3), are now alone material. Issue (2) was as follows: "Is the sale valid and operative, and has the Plaintiff acquired any title under the same by his purchase?" Issue (3) was:—"Are the under-tenancies of

the Defendants protected under sec. 12 of Act VII of 1868, and whether they can be annulled?" Their Lordships will later have some observation to make as to issue (3).

The Subordinate Judge found that there was an arrear of the Government revenue of Rs 6, 10 annas 5 pies for 1320 B. S., which entitled the Collector to sell the estate and that the sale was good, and that the Defendants were not within the exceptions of sec. 12 of Bengal Act VII of 1868, and he gave to Plaintiff a decree for possession and mesne profits in each suit. From these decrees the Defendants in each suit appealed to the High Court. In the Memorandum of Appeal to the High Court in suit No. 19 of 1917, the 3rd ground of appeal was—"That the Court below should have held that there were no arrears due for which the sale could be held." The 17th ground of appeal was—"That the Court below ought to have held that the tenure of this Defendant has been existing from the time of the Permanent Settlement," and the 20th ground of appeal was—"That at any rate the Court below should have held that the tenure of this Defendant is protected under the provisions of sec. 12 of Act VII of 1860 (1868)." In the Memorandum of Appeal in suit No. 20 of 1917, the 4th, 10th and 14th grounds of appeal were the same as the 3rd, 17th and 20th grounds of appeal in suit No. 19 of 1917. The High Court on appeal found that there was no arrear of the Government revenue which entitled the Collector to sell the estate and by its decrees dismissed the suits. From these decrees of the High Court these consolidated appeals have been brought.

The first issue which their Lordships have to consider is—Was there an arrear of the Government revenue for 1320 B. S.

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which entitled the Collector to sell the estate? That is an issue which depends upon the evidence in these suits and not upon the decision of the Board on the facts as found by the Board in *Hajr Buksh Elahi v. Dular Chandra Kar* (1), as the High Court apparently thought it did.

There was no evidence as to when the holding, of which the estate sold by the Collector in 1915 formed part, was granted, but there is evidence that one Syed Abdul Ali, who had purchased the holding No. 20-1 in Mauza Pakpara from Srimati Dellarus Banu Begum on the 17th day of Bhadra 1269 B. S., appointed on the 15th September 1862, Mokhtars to apply on his behalf to the revenue authorities for mutation of names in his favour, and that on 10th November 1862, he gave to the Deputy Collector the following acknowledgment of having received a pottah :-

"Holding No. 21-1 - Bounded as on the map and on the pottah

"I, Syed Abdul Ali, do hereby acknowledge to have received a pottah for (17-5-1-2) of ground found by survey to be contained in the above Holding and assessed at the rent of Company's Rs. 20-12-4 per annum and I give this document as my *kabuliyat*, consenting to pay the above annual jumma. Dated the 10th day of November 1862

"SYED ABDUL ALI

"Through the pen of

"BIPRADAS BOSE,

"Mokhtar"

The pottah was evidence of his title to possession. In exchange for the pottah Syed Abdul Ali gave to the Deputy Collector on the 10th November 1862, a *kabuliyat* which so far as is material was as follows :-

"Holding No. 20-1. - Boundaries as shown on the pottah and map

"This deed of *kabuliyat* is executed by Syed Abdul Ali to the following effect: -

(1) L. R. 39 I. A. 177; s. c. I. L. R. 39 Cal 981; 10 C. W. N. 842 (1912).

"That I have got a permanent *mourasi* pottah in respect of lands measuring 17 bighas 5 cottaks 4 chattaks and 10 gundahs the particulars of which are stated above, acknowledging as yearly rent thereof at Company's Rs. 20-12 annas 4 pies I shall pay the rent year by year. Accordingly on receiving a pottah I execute this *kabuliyat*. Finis. The 10th November 1862"

Apparently, Syed Abdul Ali held direct from the Crown and not as an under-tenant, but whether his holding was recognised by the Government as an "estate" then Lordships do not know. Admittedly and obviously the holding of Syed Abdul Ali of 1862 was subsequently partitioned and after that partition the yearly revenue of the partitioned part which was sold by the Collector was Rs. 6, 10 annas, 5 pies.

By sec. 2 of Act XI of 1859, it is enacted that :-

"If the whole or a portion of a Kist or instalment of any month of the era, according to which the settlement and Kistbundee of any Mahal have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue."

By sec. 3 of that Act it is enacted so far as is material as follows :-

"Upon the promulgation of this Act, the Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue and all demands which by the Regulations and Acts in force are directed to be realized in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder."

According to the notification of the Board of Revenue, in force at the date of the sale here in question, the 28th June 1914 was the day when the arrears of revenue which had become due for 1320 B. S. should be paid.

The *kabuliyat* given by Syed Abdul Ali in 1862 does not expressly state when the

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yearly revenue should be paid. The learned Subordinate Judge came to the conclusion that the letting was for the Bengali year, and having regard to Act XI of 1859 and the notification of the Board of Revenue which was applicable at the time of the sale, he found that one year's revenue, Rs 6, 10 annas and 5 pies, was due on the 1st May 1914 and was in arrear on the 17th May 1915, and that the sale was consequently a valid sale.

The learned Judges of the High Court construed Sved Abdul Ali's *habuliyat* of 1862 as a letting by which the yearly rent should be payable not at the end of the Bengali year but on the 10th November during the tenancy, and finding that in that view of the case there was no revenue in arrear at the date of the sale, for which the estates could be sold, they held that the sale was invalid and dismissed the suit.

In their Lordships' opinion the learned Judges of the High Court misconstrued the *habuliyat* of 1862 in holding that by it the letting was a yearly letting from the 10th of November and not for the Bengali year, and incorrectly found that at the date of the sale there was no arrear of revenue for which the Collector could sell the estate. The 10th November 1862 was merely the date when Sved Abdul Ali signed the *habuliyat*, he had, in September 1862, taken over a then existing tenancy of the estate. It appears from the accounts in the Collector's office that the tenancy was for the Bengali year. Although the accounts relating to this estate which were kept in the Collector's office may not be in some matters easily understood by those who are not familiar with the system of keeping accounts in Collectors' offices in that part of India, it has not been proved that they

were not correctly kept by the native clerk in the office, who was under the supervision of the Collector who would understand what those accounts showed, and their Lordships are entitled to presume, and do presume, under sec. 114, Illustrations (e) and (f), of the Indian Evidence Act of 1872, that they were correctly kept, and that there was a Government revenue of Rs 6, 10 annas and 5 pies in arrear for 1320 B. S., to realize which the estate might have been, and was, in fact, sold on the 17th May 1915, by the Collector.

There remains to be considered the issue as to whether the Defendants were or were not protected by the exceptions of sec. 37 of Act XI of 1859, or by the exceptions of sec. 12 of Bengal Act VII of 1868.

The learned Subordinate Judge considered all the evidence in any way relating to the tenure of the Defendants, and he found that none of those under-tenures was shown to have existed at the time of the Permanent Settlement, and that none of the Defendants was within the fourth exception of sec. 12 of Bengal Act VII of 1868. With those findings their Lordships agree. It may, however, possibly be, as the Plaintiff's case in his plaint apparently was, that this was the case of a sale of an estate under Act XI of 1859 and not of a tenure not being an estate under sec. 11 of Bengal Act VII of 1868, and consequently that the exceptions to be considered were the exceptions of sec. 37 of Act XI of 1859 and not the exceptions of sec. 12 of Bengal Act VII of 1868. That question has not been considered by either of the Courts below, and on the evidence before their Lordships they are unable to decide it. In these consolidated appeals, however, the question as to whether the Defendants were within the exceptions of sec. 37 of Act XI of 1859 or were within the excep-

MAHOMED SOLAIMAN v. KUMAR BIRENDRA CHANDRA SINGH.

tions of sec 12 of Bengal Act VII of 1868. is not substantially material, as it has not been proved that the third exception of sec 37 of Act XI of 1859 or the third exception of sec 12 of Bengal Act VII of 1868 applies to the Defendants or to any of them, and the wording of the fourth exception of sec 37 of Act XI of 1859 and of the fourth exception of sec 12 of Bengal Act VII of 1868 are for present purposes practically the same, as it is not suggested that in any of these under-tenancies mines have been sunk, and the gardens of the fourth exception of sec 37 of Act XI of 1859 must mean permanent gardens. There was some evidence that there were wells on the lands, but they seem to have been very shallow and small wells, and not such wells as were meant by the fourth exception, and it has not been suggested that this exception would apply to them. The Subordinate Judge did not refer to "the evidence of Baiju Nunia, who said that on one of these under-tenancies there was a two-storied *pucca* house. Probably the Subordinate Judge thought that that witness's evidence was not worth considering. In their Lordships' opinion it was worthless. No one else said that there was a *pucca* two-storied house on any of the holdings, and the witness, when he gave his evidence, was about 80 years of age and had been blind for 10 years.

Before concluding this judgment, their Lordships must allude to the fact that the learned Judges of the High Court, before whom the appeal to their Court was heard, did not express any opinion as to whether the Defendants or any of them were protected from ejection by any of the exceptions of sec. 37 of Act XI of 1859, or of sec 12, Bengal Act VII of 1868. The issue on that subject was before them and they should have considered it and found

upon it. Their Lordships will quote for the information of those learned Judges what Lord Justice Turner, in delivering the judgment of the Board in *Tara Kant Bannerjee v Puddo Money Dossee* (2), said as to the duty of High Court Judges to pronounce their opinions on all important issues in cases before them. The Lord Justice said:—

"The cause has not been decided in either Court on the principal point—whether the lands formed part of the *jote* tenure or of the *Talook*. Their Lordships are unfortunately unable to decide this appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below, should, as far as may be practicable, pronounce their opinions on all the important points."

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed with costs, the decrees of the High Court should be set aside with costs and the decrees of the Subordinate Judge should be restored.

Solicitors *Messrs Watkins & Hunter* for the Appellant.

Solicitors. *Messrs T. L. Wilson & Co.* for Kumar Birendra Ch Singh.

Solicitors: *Messrs Pugh & Co.* for M. N. Mullick.

G D M

(2) 5 W. R. P. C. 63; 10 M. I. A. 476, 488 (1866).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL
JURISDICTION

No. 11 of 1923.

LAKSHAN CHUNDER

MOOKERJEE, J.

RANKIN, J.

1923,

8, May.

DEY, Purchaser,

Appellant,

v.

[SM. NIKUNJAMONI DASSI

and ors. Plaintiffs,

Respondents.

Civil Procedure Code (Act V of 1908), Or. 22, r. 10—Settlement of suit—Terms of settlement filed in Court, but no decree drawn up, whether suit is pending and whether purchaser of Plaintiff's interest in suit may be substituted as Plaintiff.

Where in a suit, terms of settlement between the parties had been filed in Court, but no decree was drawn up in accordance therewith and a stranger to the suit who had bought the interest of the Plaintiff before the terms of settlement were filed in Court applied to be substituted as the Plaintiff in the suit

Held—That as the decree had not been drawn up the suit was pending at the time the application was made.

JOTINDRA MOHAN TAGORE v. BEJOY CHAND MAHATAB (1) and MADANESWAR SINGH v. MOHAMAYA PRASAD SINGH (2) referred to

SCRIPT PHONOGRAPHY CO. v. GREGG (3), KING v. DAVENPORT (6) and METCALFE v. BRITISH TEA ASSOCIATION (7) distinguished.

Held also—That an applicant who invokes the aid of r. 10, Or. 22, C. P. C. is not entitled as a matter of right to an order in his favour, regardless of delay or laches and the Court has undoubted-

ly a discretion in the matter which must be judicially exercised

VEERARAGHAVA REDDI v. SUBBA REDDI (3) and AFZAI BEGAM v. AKBARI KHANUM (4) referred to.

Held, on the facts of the case—That to avoid multiplicity of litigation the purchaser should be substituted as the Plaintiff in the suit so that the bona fides of the settlement might be investigated

This was an appeal preferred against the judgment of Greaves, J., delivered on the 11th day of January 1923

The Plaintiffs filed in this Court a suit for partition with respect to their one-third share in premises No. 5-2, Gour Charan Dey's Lane (being Suit No. 1305 of 1914) wherein Srimati Kadombini Dassi and others were Plaintiffs and Srimati Premmony Dassi and others were Defendants. In the said suit pursuant to a decree dated the 28th day of November 1918 the Registrar of this Court was directed to sell premises No. 5-2, Gour Charan Dey's Lane which was the subject-matter of partition and on the 22nd November 1919 the Registrar sold the said premises, and one Lakshman Chunder Dey purchased the same at the price of Rs. 17,150. The premises No. 5-2, Gour Charan Dey's Lane, were bounded on the north by premises No. 6, Gour Charan Dey's Lane, on the south partly by a ditch and partly by premises No. 5, Gour Charan Dey's Lane, on the east by premises No. 6, Gour Charan Dey's Lane, on the west partly by premises No. 5, Gour Charan Dey's Lane, and partly by No. 5-1, Gour Charan Dey's Lane and partly by Gour Charan Dey's Lane itself. The said premises No. 5-2, Gour Charan Dey's Lane included among others a

(1) I. L. R. 32 Cal. 483 (1904).

(2) 13 C. L. J. 487 (1911).

(3) 59 L. J. Ch. 406 (1890).

(6) 4 Q. B. D. 402 (1879).

(7) 46 L. T. Rep. 81 (1881).

(3) I. L. R. 48 Mad. 37 (1919).

(4) I. L. R. 37 All. 326 (1915).

LAKSHAN CHUNDER DEY v SM NIKUNJAMONI DASSI

room on the first floor situated above a room appertaining to and forming part of premises No. 5, Gour Charan Dey's Lane and on the western side of No. 5-1, Gour Charan Dey's Lane. The Defendants Nos. 1 and 2, Subal Chand Dey and Balai Chand Dey, were the owners of No. 5, Gour Charan Dey's Lane over a portion of which the aforesaid first floor room appertaining to No. 5-2, Gour Charan Dey's Lane was situated. The present Suit No. 1309 of 1914 was instituted by the Plaintiffs against the Defendants for a declaration that the aforesaid first floor room belonged to the Plaintiffs and the Defendants Nos. 3 to 8 jointly, that the said room was entitled to support by the ground floor room of the Defendants Nos. 1 and 2, that the Plaintiffs were entitled to repair the walls, ceilings of the said ground floor and to do all things necessary and proper to maintain the said ground floor room in a fit condition to support the said first floor room, and praying that the Defendants Nos. 1 and 2 might be restrained from interfering with the Plaintiffs' right to repair the said support and from further damaging and injuring the support of the first floor room and Rs. 2,000 was claimed by way of damages for the injury already done. In this suit the Plaintiffs and the Defendants entered into a settlement on the 2nd December 1919 which terms of settlement were filed on the 10th April 1922 but no decree was drawn up. By the said settlement the Plaintiffs agreed to abandon all rights of use and occupation of the first floor room and also the right of access to that room through premises No. 5-2, Gour Charan Dey's Lane and allowed the Defendants Nos. 1 and 2 to close up the opening in No. 5-2, Gour Charan Dey's Lane lead-

ing into the aforesaid first floor room by building a wall on their own land for a sum of Rs. 650 only. The Petitioner (Appellant), Lakshan Chunder Dey, purchaser as aforesaid at the Registrar's sale, applied on these facts that he might be substituted as the Plaintiff in this suit. Greaves, J., dismissed the application and the purchaser appealed.

The JUDGMENT OF GREAVES, J., was as follows ---

GREAVES, J. --- This is an application by one Lakshan Chunder Dey, under circumstances which I shall state, to be substituted as Plaintiff in this suit No. 1309 of 1914. The suit was commenced by Srimati Nikunjamoni Dassi and others to establish a right in respect of a room which had been built over the porch of a certain house. While that suit was still pending, another suit No. 1305 of 1914, which was a suit for partition of the property to which the porch room was said to belong, was decreed and the Commissioner of partition finding that the property could not adequately be partitioned, the property was sold and was purchased by Lakshan Chunder Dey on the 28th November 1919. There is no doubt that on that date the interest, whatever it was in the cause of action in suit No. 1309 of 1914, would pass to Lakshan Chunder Dey. Some few days after the sale, namely, on the 2nd of December 1919, terms were arrived at by the parties in suit No. 1309 of 1914. By those terms a sum of money was paid to the Plaintiffs and certain terms were drawn up which are Ex. B to the petition herein. They provided for the withdrawal of the suit and for the recording of the terms in Court, and that the Plaintiff's right of use and occupation of the porch room should cease and that the Defendants should be en-

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titled to close up the opening by a wall on their land if they chose to do so. I am told that this wall has in fact been built.

Although the terms were filed in December 1919 the order was not in fact drawn up but on the 10th February 1922 the present applicant provided the necessary stamp for having the order drawn up. It is under these circumstances that the application is made to me under the provision of Or. 22, r. 10, to have the applicant added as a party in what is said is still a pending suit.

The application is opposed by the Defendants in suit No. 1309 of 1914 who say that the suit is no longer a pending suit, the terms having been carried out and they further say, which of course is the fact, that if the Defendant is right in his contention he is not affected by these terms but that he can get the consent terms set aside in appropriate proceedings and pursue what remedy he is entitled to in respect of the relief claimed in suit No. 1309 of 1914. I think myself, notwithstanding the argument addressed to me, that the suit is no longer a pending suit. The terms were arrived at and filed and the actual order drawn and I think that the mere fact that the order was not in respect of the relief claimed in suit still a pending suit. Even if I am wrong in this view, I do not think that in the exercise of my discretion at this time I ought to make the order that I am asked to make.

A letter has been read to me dated the 17th December 1919 from which it is clear that on that date the present applicant had notice of what had been done, and if he had any remedy at that time it was surely his duty to have pursued that remedy diligently and not to have waited for 3 years as he has done before asking to be made a party to the suit. Under

these circumstances I do not think that I ought to exercise my discretion under Or. 22, r. 10 in his favour. Consequently the application fails and must be dismissed with costs.

Sh B. C. Mitter and *Mr J. C. Ha in* for the Appellant.

Mr S. K. Chakrabarti and *Mr R. N. Mitter* for the Respondents.

The JUDGMENT OF THE COURT was as follows.

This is an appeal from an order of dismissal made by Mr. Justice Greaves on an application under Or. 22, r. 10, C. P. C.

The Plaintiffs sued the Defendants for a declaration of their right to a room which had been built over the porch of another house. The right, title and interest of the Plaintiffs were sold on the 22nd November 1919. On the 4th December 1919 terms of settlement between the Plaintiffs and the Defendants were intimated to the Court and the following order was thereupon made:—"Mr. Mitter states that this has been settled. He puts in terms of settlement. Let decree be made in terms of settlement signed and put in by Counsel." The sale in favour of the Appellant was duly confirmed and the sale certificate was granted to him on the 14th June 1920. On the 1st December 1922, he made the present application for leave to be added as a party Plaintiff. Mr. Justice Greaves dismissed the application on the 4th January 1923.

Two reasons have been assigned in support of the order, namely, first, that at the time the application was made there was no suit pending and, secondly, that there was such delay on the part of the Petitioner as would justify a dismissal of the application under Or. 22, r. 10 C. P. C.

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As regards the first point, it has been urged that as the decree had not been drawn up, the suit was not yet dead; *Jotindra Mohan Tagore v. Bejoy Chand Mahatab* (1) and *Madanewar Singh v. Mohamaya Prosad Singh* (2). In the first case, it was ruled that a suit for partition must be regarded as a pending suit till the final decree had been drawn up and signed. In the second case, it was ruled that a suit must be deemed to be pending so long as it is possible to make an order therein relating to the subject-matter of the litigation. We are of opinion that the suit could not be deemed to be dead at the time when the application was made.

As regards the second point, it has been argued very forcibly that there was such delay on the part of the Petitioner that the Court could justly refuse the application. An applicant who invokes the aid of r. 10 of Or. 22 is not entitled as a matter of right to an order in his favour, regardless of delay or laches. The Court undoubtedly has a discretion in the matter, which must be judicially exercised; *Veeraraghava Reddi v. Subbi Reddi* (3) and *Afzal Begam v. Akbar Khanum* (4). At the same time, we cannot overlook the fact that though there has been delay on the part of the Petitioner, there has been equal delay on the part of his opponent which has rendered possible the application under r. 10 of Or. 22; for some unexplained reason, the Plaintiff has not taken steps to have the decree drawn up yet, though the order was made on the 4th December 1919. We are not pressed by the decision in *Script*

Phonography Co. v. Gregg (5), which was cited on behalf of the Respondent. That was a case where a suit would automatically stand dismissed on the failure of the parties to comply with the directions given by the Court. It was ruled that no application could be made as there was no pending suit. Similar observations apply to *King v. Dartmouth* (6) and *Metcalf v. British Tea Association* (7). Here, as we have stated, the suit must be deemed pending as the final decree had not been drawn up and signed.

We have anxiously considered whether, by reason of the delay on the part of the Petitioner, we should decline to interfere with the order made by Mr. Justice Greaves. We have come to the conclusion that in view of the circumstances about to be mentioned that order should be vacated. Sir B. C. Mitter who has appeared on behalf of the Appellant has urged that the only result of the dismissal of the application will be that there will be another suit and probably a protracted litigation. On the other hand, if the Petitioner is allowed to intervene under Or. 22, r. 10 he may be able to prove that the settlement reported to the Court on the 4th December 1919 was not *bonâ fide* and that this will be the basis of his attack on the consent order. We are of opinion that this is a matter which may conveniently be investigated in the present proceeding, so as to avoid multiplicity of litigation.

The result is that this appeal is allowed and the order made by Mr. Justice Greaves set aside. We grant the application under Or. 22, r. 10 of the Code. But in view of the delay on the part of

(1) 1 L. R. 32 Cal. 493 (1904).

(2) 13 C. L. J. 487 (1911).

(3) 1 L. R. 43 Mad. 87 (1919).

(4) 1 L. R. 87 All. 826 (1915).

(5) 59 L. J. Ch. 406 (1890).

(6) 4 Q. B. D. 402 (1879).

(7) 46 L. T. Rep. 81 (1881).

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the Petitioner in making the application under Or. 22, r. 10, we direct that each party do pay his own costs both of this appeal and of the hearing before Mr Justice Greaves.

Mr. R. L. Dutt, Solicitor for the Appellant

Messrs N. C. Bural and Pync, Solicitors for the Respondents

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 685 of 1921

WALMSLEY, J.	} ROSHANALI and anr., Defendants, Appellants, v. CHANDRA MOHAN DAS, Plaintiff, Respondent
B. B. GHOSE, J.	
1923,	
Heard, 27 and	
28, March.	
Judgment,	
28, March.	

Bengal Tenancy Act (VIII of 1885), sec. 22 (2), before amendment by E. B. & A. Act I of 1907—Co-sharer landlord purchasing non-transferable occupancy holding and letting out holding to tenant—Latter, if under-ryyat

Under sec. 22, sub-sec. (2) of the Bengal Tenancy Act (before amendment by Act I, E. B. and A. C., of 1907), a co-sharer landlord purchasing a non-transferable occupancy holding did not acquire title in the holding as a ryyat. A person to whom he let out the holding would be a ryyat and not an under-ryyat under him.

This was an appeal preferred on the 11th March 1921 against the decree of Babu Sarada Kumar Sen Gupta, Subordinate Judge of Zillah Tipperah, dated the 15th December 1920, reversing the decree of Babu Gobinda Chandra Chakravarti, Munsif at Commilla, dated the 27th May 1920.

Plaintiff brought the suit out of which

this appeal arose to eject the Defendants as under-ryyats after serving on them notices to quit under sec. 49 of the Bengal Tenancy Act. The Plaintiff was a co-sharer landlord and had purchased a non-transferable occupancy holding before the Bengal Tenancy (Amendment) Act I (E. B. & A. C.) of 1907. The Defendants successively executed several *abkhatgi* *bargi* *kabulyats* for a term of one year each and the term of the last one dated 2nd Pous 1317 B. S. expired in Pous 1318 B. S. Thereafter the Defendants were holding over and the Plaintiff recovered by suit prices of half share of *burqa* crops for subsequent years. The record-of-rights that was finally published during the pendency of the present suit recorded the Defendants as *abkhatgi* *bargi* *abkhatgi*.

The Court of first instance held that the Defendants were under-ryyats but as the notice under sec. 49 of the Bengal Tenancy Act had not, in its opinion been duly served, it dismissed the suit for want of notice. On appeal by the Defendants, the Subordinate Judge held on a construction of the *kabulyat* that the Defendants were mere labourers and the *kabulyat* did not create any tenancy or interest in the land. He did not go into the question whether the Defendants were ryyats or under-ryyats. As to notice, he held that if notice was necessary it had been duly served, but that the Plaintiff having purchased before the Amendment Act of 1907, the occupancy right continued in him, and that the law of merger contained in sec. 22, sub-sec. (2) of the Act did not apply. It was also found that the Plaintiff's co-sharers had been realising rents from the Plaintiff in respect of their shares. In the result he decreed the Plaintiff's suit, whereupon Defendants preferred the second appeal.

Babu Jatindra Mohan Ghose for the

ROSHANALI v CHANDRA MOHAN DAS.

Appellants submitted (1) that the Court of Appeal below ought not to have decided the case on a point which found no place in the pleadings, viz, that the Defendants were mere labourers

(2) That the said Court was also wrong in holding that the Plaintiff, a co-sharer landlord, could acquire occupancy right by purchase, and it was also contended that by the law of merger the Plaintiff became a proprietor and the Defendants became occupancy raiyats notwithstanding the fact that the other co-sharers landlord had been realising rents for their shares from the Plaintiff

Babu Upendra Kumar Roy for the Respondent submitted on the second point that the Plaintiff could not be in worse position than a stranger purchaser who has obtained recognition from the entire body of landlords. In relation to his co-sharers who are taking rent from him he is unquestionably a raiyat and so far as regards his own share, he is a raiyat under himself unless the facts show that he did not intend to keep the two rights distinct. *Kabuliyat* expressly recognises his raiyati right. Sec 22, sub-sec. (2) of the Bengal Tenancy Act, before amendment, spoke of 'occupancy right ceasing to exist.' If that section be held applicable only to cases of transferable holdings, as held in several cases, it may not in terms apply to the purchaser of a non-transferable holding, but the position of a co-sharer landlord purchasing such a holding cannot certainly be worse. The occupancy right ceases to exist but the holding or the tenancy continues. The principle of the rulings in *Jawadul Huq v Ramdas* (2) and *Ram Mohan v Sheikh Kachu* (3) must apply and the co-sharer

purchaser acquires non-occupancy rights (*vide* observations of Ghose, J, at page 393 of the Full Bench case)

Relies on the unreported judgment in S A No 1488 of 1920 decided by Mookerjee and Chotzner, JJ, on 20th June 1922,* which was a case of a non-transferable occupancy holding. Also *Nabin v Banga* (4), *Humuddin v Amadudin* (5) and *Nayayan v Durgadas* (6)

(4) 15 Ind Cas 705 (1912)

(5) 38 Ind Cas 534 (1917)

(6) 33 C L J 575 (1920)

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No 1488 of 1920 *

MOOKERJEE, J.

CHOIZNER, J.

1921,

20, June.

ABINAS CH BHATTA

CHARJEE, Appellant,

v

AMAR CHANDRA DIF,

Respondent

Bengal Tenancy Act (VIII of 1885), sec 22, before the amendment by E B & A. Act I of 1907—Co-sharer landlord purchasing occupancy holding and settling lands on tenants—Their status respectively of non-occupancy raiyat and under-raiyat.

The legal effect of the purchase on 5-5-1899 of an occupancy raiyati holding by a co-sharer landlord was that the holding ceased to exist as an occupancy holding and the purchaser co-sharer held the land as a non-occupancy raiyat. Therefore a tenant inducted on the land by him was an under-raiyat.

This was an appeal against the decree of S K Ghose, Esq, District Judge of Zillah Tipperah, dated the 14th February 1920, affirming the decree of Babu Chandra Bhusan Banerjee, Subordinate Judge, 2nd Court of that District, dated the 8th April 1918

Babu Upendra Kumar Roy for the Appellant

Babus Brajajal Chakravarty and Hawendra Kumar Das for the Respondent

The JUDGMENT OF THE COURT was as follows —

This is an appeal by the Plaintiffs in an

(2) 1 L R 24 Cal 143 (1896)

(3) 1 L R 32 Cal 286 & 14 S C W N 249 (L. B.) (1905).

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The English Common Law of merger is not applicable to the *motusil* in this country. Sec. 22 is an instance where it has been made applicable by statute. The view taken in the above case avoided the anomaly of the co-sharer purchaser being a *raiyat* and a proprietor at the same time and his lessee being a *raiyat* and under-*raiyat* at the same time. The present section avoids this by specifically legislating that the former will acquire no *raiyati* right notwithstanding his purchase of that right. It is only specific legislation that can produce such a result. Before the amendment it was distinctly understood that such a purchaser would be a *raiyat* but without occupancy rights, a *raiyati* right which by the very operation of sec. 22 itself could never ripen into occupancy rights. I submit Plaintiff

action in ejectment. The Plaintiffs and the Defendant were co-sharers in a *taluq* which comprised the disputed land as an occupancy holding of the Dhars. On the 5th May 1899 the first Plaintiff purchased the occupancy holding in execution of a mortgage decree. The legal effect of this purchase was that the holding ceased to exist as an occupancy holding in the hands of Plaintiff as co-sharer landlord and the Plaintiff held the land as non-occupancy *raiyat*. On the 17th April 1900, he sold a portion of the land of the holding to one Raj Chandra Dhar. On 5th November 1908 the Plaintiff in execution of a money decree re-purchased the transferred land. We are of opinion that the effect of the sale to Dhars was not to break up the tenancy but to constitute the Plaintiff and the transferee joint tenants of a non-occupancy holding. The effect of the re-purchase by the Plaintiff was to make him, as before, the sole tenant of the non-occupancy holding. This was the position in the year 1913. On the 19th March of that year the Defendant executed a *kabuliyat* in his favour in respect of the lands comprised in the first schedule of the plaint. It has been found that this *kabuliyat* did not represent any real transaction but was

tiff is a *raiyat* and the Defendant an under-*raiyat*.

On the question of the position of the Defendant under the instrument, the document is before the Court. It does not require further investigation into facts and is a pure question of law. In the absence of surprise and prejudice the fact that Plaintiff did not specifically plead that Defendant was a labourer is of no consequence. A *burgadar* is not necessarily a tenant. *Sheikh Pukhan v Rajani Kamal Chuckerbatty* (7).

The JUDGMENT OF THE COURT was as follows.

B. B. GHOSH, J. This appeal arises out of a suit for recovery of *khas* possession on declaration of the *raiyati* right. (7) 23 C W N 614 (1919)

brought about to meet the exigencies of the situation created by a criminal case. In dependently of the document the Defendant was a tenant under the Plaintiff and the Plaintiff now seeks to eject the Defendant. Their relative position can be easily determined. The Plaintiff was a non-occupancy *raiyat* and the Defendant was therefore an under-*raiyat* who held under a verbal lease. Consequently, the Defendant could only be ejected after service of a notice to quit in accordance with sec. 19 of the Bengal Tenancy Act.

No such notice was served. Consequently the relation, between the Plaintiff and the Defendant, as that of a non-occupancy *raiyat* on the one hand and under-*raiyat* on the other, has not been terminated in accordance with law and therefore the Plaintiff was not entitled to eject the Defendant from this holding. There is thus no escape from the conclusion that the suit must stand dismissed with costs in all Courts.

We have not taken into consideration the consequence of the decree in the partition suit between the Plaintiff, Defendant and their co-sharers as it is not necessary to take that decree into account for the purposes of the present appeal.

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of the Plaintiff after evicting the Defendants who are under-riayats under the Plaintiff and who hold under a *kabuliyat* the term of which has expired. This is how the Plaintiff frames his suit. It was dismissed by the Munsif who held that the Defendants were under-riayats but that no notice had been served under sec 49 of the Bengal Tenancy Act on them and, therefore, the Plaintiff was not entitled to a decree for ejectment. On appeal by the Plaintiff, the learned Subordinate Judge holds that the Defendants are not in possession of the land as tenants but as labourers. This view I think was not open to the Subordinate Judge to take because the Plaintiff comes to Court on the allegation that the Defendants are under-riayats. The facts shortly stated, are these:—The Plaintiff was a co-sharer landlord with regard to a certain occupancy holding which has been found to be non-transferable. He purchased the occupancy holding and then let it out to the Defendants under a *kabuliyat* dated 2nd Pous 1317 B. S. for a term of one year only which expired in Pous 1318 B. S. With regard to the meaning of this *kabuliyat*, there is some dispute which I shall state later on. The Defendants continued in possession after the expiry of the term of that *kabuliyat* and the present suit was brought in May 1919 which corresponds with sometime in Aar 1326 B. S. The question is what is the status of the Defendants. The learned Subordinate Judge, as I have said, holds that, under the *kabuliyat*, the Defendants are mere labourers. Whatever may be the true construction of the document, the Defendants did not hold the land at the time of the suit under the terms of the *kabuliyat*. The Plaintiff mentions in his plaint that the Defendants have been “holding over” and that they are *korfa*

riayats under the Plaintiff. There cannot be any question, therefore, that the Defendants hold the land as tenants under the Plaintiff whatever their status may be. The learned Subordinate Judge next says that the occupancy right of a riayat prior to the purchase of the Plaintiff not being transferable, sec 22, sub-sec (2) of the Bengal Tenancy Act has no application and he seems to have held that the right of occupancy subsisted in the Plaintiff and there could not be any merger. This evidently is a misconstruction of the effect of sec 22, sub-sec (2) of the Bengal Tenancy Act. The question of transferability or non-transferability of occupancy right is only relevant with regard to the position of the co-sharer landlords when one of them purchases the occupancy right, that is, whether the other co-sharers would be entitled to joint possession with the purchaser or would be entitled only to receive rent from the purchaser according to their shares in the property. In this case, that question does not arise, because the other co-sharers did not ask for joint possession and they have accepted the position that the Plaintiff is entitled to possession by payment of their share of the rent to them. The question then is—what is the position of the Plaintiff with regard to this land? The learned Vakil for the Respondent does not contend that the occupancy right purchased by the Plaintiff subsists as has been observed by the Subordinate Judge, but he contends that the Plaintiff would be a non-occupancy riayat with regard to the land. That position cannot be supported and it would lead to anomalies. Why should the Plaintiff be considered to be only a non-occupancy riayat? If the Plaintiff is a settled riayat of the village and if the contention of the Plaintiff be accepted, then by the pur-

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chase he acquired a right of occupancy and he would be an occupancy raiyat under himself as well as under his co-sharers. Therefore, although sec. 22, sub-sec (2) of the Bengal Tenancy Act (before the Amendment in 1907, as that applies to this case) lays down that the occupancy right will cease to exist by such purchase, a new occupancy right would accrue to the Plaintiff. Then supposing that he would be a non-occupancy raiyat, would he be an occupancy raiyat, by twelve years' possession of the land? It seems to me that it cannot be so. This question was discussed in one of the many cases which have clustered round sec. 22 of the Bengal Tenancy Act. In the case of *Bamlal Sukul v Bhela Gazi* (1), it was observed that a purchaser in the position of the Plaintiff could not acquire a new occupancy right under himself and his co-sharers. Mr. Justice Woodroffe, in delivering the judgment of the Court, says—"To hold this," that is, that the purchaser acquires a new occupancy right, "would, I think, defeat the policy of the section and further the owner of the holding could not acquire a right adversely to himself in his other character as co-proprietor." It seems to me, therefore, that the Plaintiff was not a raiyat with regard to the land after his purchase of the occupancy right, but was holding in his right as a co-proprietor. The next question is—what the position of the person to whom he lets out the land would be? He would, in my judgment, be a raiyat or a tenure-holder as has now been made clear by the provisions of sec. 22, sub-sec (2) of the Bengal Tenancy Act, after the amendment in 1907, which says "if such transferee sub-lets the land to a third person, such third person shall be deemed to be a

tenure-holder or a raiyat, as the case may be, in respect of the land." The Defendants, therefore, would be raiyats and not under-raiyats as is contended for by the learned Vakil for the Respondents. If that is so, they are not liable to be ejected by service of notice under sec. 49 of the Bengal Tenancy Act. The appeal is, therefore, allowed and the suit dismissed with costs in all the Courts.

WALMSLEY, J.—I agree.

N. G. .

Appeal decreed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2061 OF 1920

THE KUSTEA LOAN
OFFICE LD., Plaintiffs,
Appellants,

v.

WALMSLEY, J.

B. B. GHOSE, J.

1922,

23, November.

ANNADA CHARAN

CHACKRABARTY and
ors., Defendants,
Respondents.

Mortgage suit—Application of compensation money for mortgaged properties compulsorily acquired in payment of unsecured debts according to mortgagee's suggestion—Purchaser of equity of redemption, if can question it.

When before the Defendants, purchasers of the equity of redemption, had acquired any interest in the mortgaged properties, the mortgagees applied, according to the suggestion of the mortgagors, a part of the compensation money received on account of some of the mortgaged properties under the Land Acquisition Act in satisfaction of certain unsecured debts due from the mortgagors to the mortgagees and applied the balance in reduction of the mortgage-debt.

Held—That the purchasers of the equity of redemption had no right to demand that the mortgagees should give credit for the entire amount of the com-

(1) J. L. R. 37 Cal. 709; a. c. 18 C. W. N. 814 (1910).

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compensation money in reduction of the mortgage-debt, as they did not acquire any interest in the mortgaged properties at the time of the arrangement. The mortgagors themselves after entering into the arrangement could not have claimed that the mortgagees were bound to give credit for the amount in satisfaction of the mortgage-debt which they themselves asked the mortgagees to appropriate in satisfaction of some other debt.

This was an appeal against the decree of Amrita Lal Mukherji, Esq., District Judge of Zillah Nadia, dated the 25th of June 1920, modifying the decree of Babu Ananda Kishore Dutta Roy, Subordinate Judge of that District dated the 30th of September 1918.

The facts of the case will appear from the judgment.

Dr. Dwarka Nath Mitra and Babu Phanindra Lal Moitra (for Babu Manmunda Nath Roy) for the Appellants.

Babus Brajo Lal Chakrabartty and Proo Nath Dutt (for Babu Hemendra Kumar Das) for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

GHOSE, J.—The Plaintiffs are the Appellants in this case. The suit was brought for enforcing a mortgage executed by the Defendants Nos. 1, 2 and 3 in favour of the Plaintiff Company in July 1913. Twenty-four items of property were mortgaged. Out of these, two items were acquired under the Land Acquisition Act in 1915 and the amount of compensation awarded was less than the mortgage-money. The Plaintiffs were entitled as mortgagees to take the whole amount of compensation in satisfaction of their mortgage. But the mortgagors were not willing that the entire amount should be taken by the mortgagees in payment of

that debt. The Plaintiff Company had two unsecured debts due from the mortgagors. What the mortgagors wanted was that the compensation money should be appropriated in full payment of the unsecured debts and two portions of it should be taken away by the mortgagees towards part satisfaction of the mortgage-debt. The mortgagees agreed to that and the unsecured debts were paid off with a portion of the compensation money. In 1916, the contesting Defendants Nos. 1, 5, 6, 7 and 10 with some other Defendants purchased the equity of redemption in some of the mortgaged properties subject to the mortgage and they have been impleaded in this suit as such purchasers. Their objection was that the mortgagees were bound to give credit for the entire amount of the compensation money in reduction of the mortgage-debt. The Court of first instance made a decree in favour of the Plaintiffs for the full amount of the mortgage-money due, but on appeal by the contesting Defendants, the lower Appellate Court has varied that decree and directed that the money due on the mortgage should be reduced by allowing credit for the amount that was paid in satisfaction of the unsecured debts due to the mortgagees. This view, in my opinion, is erroneous. A portion of the property had been acquired under the Land Acquisition Act before the contesting Defendants had acquired any interest in the property. Reliance has been placed by the learned Vakil for the Respondents on the principle that where the mortgagee receives any money by means or virtue of a security, it must be applied in reduction of the mortgage-debt. But that principle has no application here. Before any third person had acquired any interest in any portion of the mortgaged property, the mortgagees were entitled, if they so

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desired, to pay the whole amount of the compensation money to the mortgagors. They would thereby have reduced their own security and the interest of no other person would have been affected in any way. What happened in this case practically amounts to this that the mortgagees made over a part of the compensation money to the mortgagors and the mortgagors paid it back to the mortgagees in satisfaction of their unsecured debts. As this happened before the contesting Defendants had acquired any interest in the mortgaged property, they have no right to complain. The mortgagors themselves could not have, after entering into the arrangement referred to above, claimed that the mortgagees were bound to give credit for the amount in satisfaction of the mortgage-debt which they had themselves asked the mortgagees to appropriate in satisfaction of some other debt. The appeal must therefore be allowed, the judgment and decree of the lower Appellate Court set aside and that of the first Court restored with costs in all Courts. As the period of redemption fixed by the Court of first instance has expired, that period will be extended by three months from this date.

WALMSLEY, J—I agree.

S. C. C

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 2248 TO 2252 AND 2280 OF 1920.

MOOKERJEE, J.	} RAJANI KANTA GHOSE and ors., Plaintiffs, Appellants,
CHOTZNER, J.	
1922,	v.
Heard, 14, July.	SHEIKH RAHAMAN GAZI
Judgment,	and ors., Defendants,
17, July.	Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 158B, sub-sec. (2)—Omission to give notice of sale in execution of rent decree obtained by a co-sharer landlord to the other co-sharer landlord, effect of—Knowledge of the sale and acquiescence therein by the latter—Waiver—Scope and purpose of sec 158B.

The omission to serve upon the co-sharer landlord the notice contemplated by sub-sec (2) of sec 158B of the Bengal Tenancy Act does not nullify the sale or alter its character to that of a sale held in execution of a money decree, if he has knowledge of the sale and acquiesces therein.

AMAMAD BISWAS v BINOY BIJUSAN GUPTA (3) and SARIP HECHAN v BHILATAMA DEBI (2) distinguished.

NANDO LAL CHOWDHURY v KALA CHAND CHOWDHURY (1) and RAGHUNATH DAS v SUNDERDAS KHETRI (4) referred to.

The provision of sub-sec (2) of sec. 158B of the Bengal Tenancy Act has been enacted for the benefit of the co-sharer landlord and it is open to him to waive the benefit of that section.

When the provisions of a statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention, the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity. The safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection, if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity.

HOLMES v. RUSSELL (11) referred to.

- (1) 15 C. W. N. 820 (1910);
- (2) 43 Ind. Cas. 3 (1917)
- (3) 23 C. W. N. 931 (1919).
- (4) L. R. 41 I. A. 251, s. c. I. L. R. 42 Cal. 72, 18 C. W. N. 1058 (1914).
- (11) 9 Dowe 28.

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This was an appeal preferred on the 27th August 1920 from a decision of J. W. Nelson, Esq., Additional District Judge, Howrah, dated the 8th June 1920, affirming that of Babu Rajendra Lal Chakravarty, Munsif, Howrah, dated the 28th November 1919.

The facts of the case will appear from the judgment.

Babus Mahendra Nath Roy and Bhupendra K. Ghose for the Appellants

Babus Surendra Chandra Sen and Gouri Mohan Dutt for the Respondents

Babu Braj Mohan Majumdar for the Minor Respondent in S. A. No. 2249 of 1920

The JUDGMENT OF THE COURT was as follows —

S. A. No. 2218 of 1920

This is an appeal by the Plaintiffs in a suit for recovery of arrears of rent. The Defendants denied the relationship of landlord and tenant during the years in claim. They urged in substance that the title of the Plaintiffs had been extinguished as the result of a sale held in execution of a decree passed in a suit instituted under sec. 148A of the Bengal Tenancy Act.

The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal the decree of the primary Court has been affirmed by the District Judge. On second appeal, it has been argued that the question of title of the Plaintiffs is *res judicata* in view of a decree made on the 29th April 1915 in a previous suit between the parties. This view has been rejected by both the Courts below. It is not necessary to examine in detail the scope of the earlier suit because we have arrived at the conclusion that the question now in controversy was not directly and substantially in issue in

the previous litigation and was not finally decided therein. Consequently we have to consider the effect of the sale held on the 11th September 1913 in execution of a decree for arrears of rent in a suit instituted under sec. 148A of the Bengal Tenancy Act.

It is not disputed that the interest claimed by the Plaintiffs was originally held under two landlords, Dighapatia and Tagore. On the 13th July 1897, one Amarendra Nath Ghose purchased the tenancy at a sale held in execution of a decree obtained by Dighapatia against Panchcouri Ghose who was the recorded tenant. The right, title and interest of Panchcouri Ghose was subsequently purchased by Asutosh Ghose, the *pro formâ* Defendant in the present suit, and Arunodoy Ghose, the predecessor-in-interest of the Plaintiffs, at a sale held in execution of a money decree. The names of Asutosh Ghose and Arunodoy Ghose do not appear, however, to have been recorded in the office of the landlord. The consequence was that Dighapatia brought a suit against one Behary Lal Roy who had purchased the tenancy at a sale in execution of a decree for arrears of rent on the 9th September 1902. This suit was instituted under sec. 148A of the Bengal Tenancy Act. A decree was obtained in due course in the presence of Tagore who was made a party Defendant. No notice, however, was served upon Tagore under sec. 158B of the Bengal Tenancy Act and yet the decree was executed. At the sale which followed, Kishori Mohan Srimany, under whom the contesting Defendants claim, became the purchaser on the 11th September 1913. We are invited to hold that the effect of this purchase by Kishori Mohan Srimany was to extinguish the interest acquired by Asutosh Ghose and Arunodoy Ghose on the 10th March

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1902. The Plaintiffs contended in the Courts below that the decree obtained by Dighapatia in the suit instituted under sec. 148A could not operate as a decree for the entire rent according to the provisions of the Bengal Tenancy Act, inasmuch as the notice contemplated by sec. 158B was not served on Tagore. This contention has been negatived by the Courts below. The point consequently reduces to this—what is the effect of the omission of the co-sharer landlord who has instituted a suit under sec. 148A of the Bengal Tenancy Act to serve the notice contemplated by sub-sec. (2) of sec. 158B. The Appellants contend that the result is to destroy the character of the decree as a decree for arrears of rent and to make it operative only as a decree for money, so that at the sale which follows, the right, title and interest of the person named as the judgment-debtor alone passes. In support of this view reliance has been placed upon the cases of *Nando Lal Chowdhury v. Kala Chand Choudhury* (1), *Sarip Hechan v. Tilattama Debi* (2) and *Ahamad Biswas v. Benoy Bhusan Gupta* (3).

To determine the question raised before us, it is necessary to investigate the scope and object of sub-sec. (2) of sec. 158B. That sub-section is in these terms:—When one or more co-sharer landlords, having obtained a decree in a suit framed under sub-sec. (1) or under sec. 148A applies or apply for the execution of the decree by the sale of the tenure or holding, the Court shall, before proceeding to sell the tenure or holding, give notice of the application for execution to the other co-sharers. It will be observed that the section does not in express terms

state the result of the failure to comply with this direction. The cases of *Sarip Hechan v. Tilattama Debi* (2) and *Ahamad Biswas v. Benoy Bhusan Gupta* (3) laid down that the provision contained in sub-sec. (2) of sec. 158B is mandatory and not directory and the failure of the Court to serve the notice rendered the sale invalid. In support of this view, reliance was placed upon the decision of the Judicial Committee in *Raghunath Das v. Sunderdas Khetri* (4), which turned on the true construction of sec. 218, C. P. C. of 1882, now replaced by Or. 21, r. 22 of the Code of 1908. It must be remembered in this connection that the validity of the sale in the two cases mentioned was challenged by the co-sharer concerned, and it may be conceded that the co-sharer who has not received the notice required to be served under sub-sec. (2) of sec. 158B is entitled to contest the legality of the sale on that ground. In the case before us, the legality of the sale has not been questioned by the co-sharer. On the other hand, as pointed out by the District Judge, that co-sharer has adopted the sale, withdrawn his share of the purchase-money and granted mutation of name to the purchaser. It may consequently be inferred that he knew of the sale, and acquiesced therein. Can it be maintained, then, in such circumstances, that the sale was either a nullity or a sale inoperative as a sale under the Bengal Tenancy Act? The answer depends upon the scope and purpose of sec. 158B.

It was pointed out in the case of *Asutosh Sikdar v. Beharilal Kirtunia* (5) that a sale held contrary to legislative enact-

(2) 43 Ind. Cas. 3 (1917).

(3) 23 C. W. N. 931 (1919).

(4) L. R. 41 I. A. 251, s. c. I. L. R. 42 Cal. 72; 18 C. W. N. 1058 (1914).

(5) I. L. R. 85 Cal. 61; s. c. 11 C. W. N. 1011; 6 C. L. J. 320 (F. B.) (1907).

(1) 15 C. W. N. 820 (1910).

(2) 43 Ind. Cas. 3 (1917).

(3) 23 C. W. N. 931 (1919).

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ment is not necessarily a sale absolutely without jurisdiction. It cannot be maintained on principle that because a sale has been held in contravention of a statutory provision, it must, irrespective of the nature and purpose of the provisions, be deemed to be null and void. Reference may be made to five decisions of the Judicial Committee in illustration of this principle. The cases of *Tasaddak Rasul Khan v Ahmad Hussain* (6) (where a sale was held in violation of the provisions of sec. 290, C. P. C.), *Gobinda Lal Roy v Ram Janam Misser* (7) (where a sale for arrears of revenue was held in contravention of the provisions of secs. 5 and 17 of Act XI of 1859), and *Malkarjan v Narhari* (8) (where a sale was held contrary to the provisions of sec. 248 of the Code) amply show that there may be cases where the violation of the express provision of a statute may not nullify the proceedings. On the other hand, the cases of *Nusserwanjee Pestonjee v Meer Mynodeen* (9) (where an arbitration proceeding was carried on contrary to the provisions of the Bombay Regulation VII of 1827), and *Subramania Ayyar v King-Emperor* (10) (where a trial was held in contravention of the rule of joinder of charges embodied in sec. 234 of the Criminal Procedure Code) are instances where failure to comply with the provisions of a statute completely vitiated the proceedings. The only rule that may be adopted is, that when the provisions of statute have been contravened, if a question

arises as to how far the proceedings are affected by such contravention, the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity. But this much is clear that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. One test is well-established and is often useful, as was observed by Coleridge, J., in *Holmes v Russell* (11), "it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity, if he cannot, it is a nullity."

Now, if the provision has been enacted on grounds of public policy, any individual cannot be permitted to waive it. On the other hand, if the provision has been enacted for the benefit of an individual he is entitled to waive it. Tested from this point of view, what is the obvious purpose of sec. 158B, sub-sec. (2)? The object which the legislature had in view was to protect the co-sharer landlord. The sale in execution of the decree made in the suit framed under sub-sec. (1) of sec. 158B or under sec. 148A has the effect of a sale under the provisions of the Bengal Tenancy Act, in other words, the tenure or holding in the hands of the purchaser can no longer be pursued by the co-sharer landlord for the realisation of

(6) L. R. 20 I. A. 176 s. c. I. L. R. 21 Cal. 66 (1893).

(7) L. R. 20 I. A. 165 s. c. I. L. R. 21 Cal. 70 (1893).

(8) L. R. 27 I. A. 216 s. c. I. L. R. 26 Bom. 337; 5 C. W. N. 10 (1900).

(9) 6 M. I. A. 134 (1855).

(10) L. R. 28 I. A. 257; s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 866 (1901).

(11) 9 Dowe, 28,

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his dues, if any. The co-sharer landlord who has been made a party to the suit is restricted to the sale proceeds for the satisfaction of his dues. It is consequently necessary for his protection that he should have notice of the execution proceedings in time to ensure their legality or regularity. From this point of view, it is open to the co-sharer landlord to waive the benefit of sub-sec. (2) of sec. 158B. This is precisely what has happened in this case. Here the co-sharer landlord was satisfied with the regularity of the execution proceedings. He withdrew the money which was in Court in satisfaction of his dues. In such circumstances, it is impossible for us to hold that the omission to serve upon the co-sharer landlord the notice contemplated by sub-sec. (2) of sec. 158B either nullified the sale or altered its character to that of a sale held in execution of a money decree. The conclusion follows that the Courts below have correctly held that the purchase by Kishori Mohan Srivastav on the 11th September 1913 at the sale held in execution of the decree obtained by Dighapatia was to extinguish the interest of the Plaintiffs, and the relationship of landlord and tenant was not in existence between the parties to this suit during the years in claim.

The result is that this appeal is dismissed.

Nos. 2249-2252 and 2280 of 1920

In the view we take it is not necessary to consider whether these appeals are or are not competent. They are all dismissed.

Costs will be allowed in each of the appeals where the Respondent has entered appearance.

H. C. S. Appeals dismissed with costs

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1353 of 1920.

MOOKERJEE, J.

CHOTZNER, J.

1922,

Heard, 25 and

26, May.

Judgment,

26, May.

KALIPADA DAS and anr.,
Plaintiffs, Appellants,
v.

DURGADAS ROY,
Defendant, Respondent.

Legal Practitioners Act (A VIII of 1879), sec. 28, suit by pleader on adjusted account for money due under agreement for fees for professional services, maintainability of—Indian Contract Act (IX of 1872), sec. 25 such an agreement if can be treated as within the scope of

It was agreed between a pleader and certain clients of his that he should receive certain specified fees for certain specified professional works. On adjustment of accounts a sum was found due to the pleader and the pleader sued on that adjusted account though no agreement had been filed in Court.

Held That it may be conceded that where there is no agreement between the pleader and his client, the pleader is entitled to maintain an action for recovery of reasonable remuneration for services rendered. But where there is a contract between the parties, such contract to be enforceable must be deposited in Court within 15 days from the day on which it is executed. The agreement in the present case not having been so filed was not enforceable under sec. 28 of the Legal Practitioners Act.

KAMINI DEBI v. KHETTER MOHUN (1),
ISHAN CHANDRA KAR v. RAM CHARAN PAL
(2) and several other cases referred to and followed.

(1) 15 C. L. J. 660 s. c. 17 C. W. N. 45
(1911), 15 C. L. J. 680 s. c. 15 C. W.
N. 681 (1910).

(2) 20 C. L. J. 445 (1914).

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The suit on the basis of the adjusted account was in essence a suit to enforce an agreement which did not comply with the requirements of sec 28 and was therefore not maintainable.

KRISHNASAMI v. KESAVA (5), ANANTAYYA v. PADMAYYA (6) and other cases discussed and relied on

Held further—*That the case could not be treated as one within the scope of sec 25 of the Indian Contract Act, as the services rendered by the pleader were not voluntary but were rendered on request, in pursuance of an agreement to pay a certain remuneration.*

This was an appeal preferred on the 21st of May 1920 against the decree of M Yusuf, Esq., District Judge of Zilla Midnapur, dated the 17th February 1920, affirming the decree of Babu Srish Chandra Chowdhuri, Subordinate Judge, 3rd Court of that District, dated the 23rd of December 1918.

The facts of the case are as follows :—

The Plaintiff-Appellant acted as the legal adviser of the Defendant-Respondent's father and paternal grand-mother. It was agreed between the parties that the Plaintiff would receive certain specified fees for certain specified works. The Plaintiff alleged that an account was taken of the sums due to him for his services, and on 11th April 1914 Rs. 5,000 was found due to him. On the 10th April 1917, the Plaintiff instituted the present suit to recover the sum thus found due to him on adjustment of accounts. The defence pleaded that the suit was barred under sec. 28 of the Legal Practitioners Act. This defence prevailed in both the lower Courts and the suit was dismissed. The Plaintiff accord-

ingly preferred this second appeal to the High Court.

Babus Mahendranath Roy and Gopendra Nath Das for the Appellants.

Babus Dwarkanath Chakrabutty and Surendra Nath Guha for the Respondent

The JUDGMENT OF THE COURT was as follows :—

Thus is an appeal by the Plaintiff in a suit for recovery of money due on adjustment of accounts. The Plaintiff who is a pleader acted as the legal adviser of the father of the Defendant as also of his paternal grand-mother. It was agreed between the parties that the Plaintiff would receive his legal fees, if so desired, or that the Plaintiff would get Rs. 32 per diem in contested suits, Rs. 16 per diem in *ex parte* suits, Rs. 6 for filing petitions and for appearing, Rs. 1 for accepting vakalatnamah, and Rs. 16 to Rs. 32 for drafting plaint and written statement as the case might be. The Plaintiff alleges that an account was taken of the sums due to him for his services, and that after deduction of the amounts paid and of the amount relinquished, on amicable settlement it was found on the 11th April 1914 that a sum of Rs. 5,000 was due to him. On the 10th April 1917, the Plaintiff instituted the present suit to recover the sum thus found due to him on adjustment of accounts. The Defendant is a minor under the Court of Wards and the Manager of the Court of Wards on his behalf took the defence that the suit was barred under sec 28 of the Legal Practitioners Act. This defence has prevailed in both the Courts below and the suit has accordingly been dismissed. -

Sec. 28 of the Legal Practitioners Act is in these terms :—"No agreement entered into by any pleader with any per-

(5) I. L. R. 14 Mad. 63 (1890).

(6) I. L. R. 16 Mad. 278 (1892).

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son retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such pleader shall be valid unless it is made in writing signed by such person, and is, within 15 days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done."

The true scope of this section formed the subject of discussion in the cases of *Kamini Dobi v Kheller Mohun* (1), *Ishan Chandra Kar v Ram Charan Pal* (2), *Mohendra Lal v. Ahul Chandra* (3) and *Sib Kisor Ghose v Manick Chandra Nath* (4). These decisions show that the Court is reluctant to restrict the provisions of sec. 28 by placing a narrow and restricted interpretation thereon. It may be conceded that where there is no agreement between the pleader and his client, the pleader is entitled to maintain an action for recovery of reasonable remuneration for services rendered. But where there is a contract between the parties such contract to be enforceable must fulfil the requirements of sec. 28, namely, that the contract must be in writing and the writing must be deposited in Court within the prescribed period. In the case before us, the plaint shows that there was an agreement between the pleader and his client. That agreement was admittedly not deposited in Court and consequently was not enforceable under sec. 28. Subsequently an adjustment

was made and a sum was found due to the Plaintiff. The question is whether a suit on the basis of this adjusted account is in essence a suit to enforce an agreement which does not comply with the requirements of sec. 28. In our opinion the answer must be in the affirmative. A similar point arose before Mr. Justice Muttusami Ayyar in *Krishnasami v. Kesava* (5). There the client delivered to his pleader a promissory note for the amount of his dues. The note was not filed in Court. In a suit to enforce the promissory note, the Court held that the note was invalid, as executed in respect of business done by the Plaintiff as pleader of the Defendant within the meaning of sec. 28. The point arose again in *Anantayya v. Padmayya* (6), where Mr. Justice Muttusami Ayyar followed his previous decision in *Krishnasami v. Kesava* (5). In that case the suit was brought on a note which had been given in substitution for another note for which the consideration was fee payable by the client to the pleader. It was held that the note was invalid and could not be enforced under sec. 28. The matter was fully discussed by Mr. Justice Subramaniya Ayyar and Mr. Justice Bhaskaram Ayyangar in the case of *Subha Pillai v Ramasami Ayyar* (7). In that case the pleader had incurred expenses in connection with law suits conducted by him for his client and a promissory note had been given by the client to recover the sum due. It was ruled that the promissory note was, within the meaning of sec. 28, an agreement respecting the amount of payment for charges incurred or disbursements made by the pleader in respect of the suit in which he had been retained, and was invalid as it had not been

(1) 15 C. L. J. 660; s. c. 17 C. W. N. 45 (1911); 15 C. L. J. 690; s. c. 15 C. W. N. 681 (1910).

(2) 20 C. L. J. 445 (1914).

(3) 20 C. L. J. 424 (1913).

(4) 21 C. L. J. 618 (1915).

(5) I. L. R. 14 Mad. 68 (1890).

(6) I. L. R. 16 Mad. 278 (1892).

(7) I. L. R. 27 Mad. 512 (1903).

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filed in Court as required by the section. These decisions were revised by Mr. Justice Kumarsami Sastri in the case of *Natega Moppa v. Ram Chandra Ayyar* (8). It was held that a promissory note given in such circumstances must be treated as embodying an agreement by a client with his pleader to pay his fees and was consequently not valid unless it fulfilled the requirements of sec. 28. We are of opinion that in the present case the suit is not maintainable on the basis of the adjusted accounts.

It has been finally urged that the case may be brought within the scope of sec. 25 of the Indian Contract Act. The agreement may be treated as a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor. The answer is that the services rendered by the pleader were not voluntary. They were rendered on request, in pursuance of an agreement to pay a certain remuneration. We have examined the plaint with a view to consider whether the suit can be treated not as a suit on the adjusted accounts but as a suit to recover a reasonable remuneration for services rendered. But the allegations in the plaint leave no room for doubt that the suit cannot be so treated. No details are furnished as to the services rendered, and even if the details were available, a question of limitation would arise. The adjustment was made nearly three years before the suit and long after the services had been rendered. A claim founded on the original cause of action would be plainly barred by limitation.

The result is that the decree made by the Court below is affirmed and this appeal dismissed with costs.

J. N. R. *Appeal dismissed*

(8) 27 Mad. L. J. 728.

[CIVIL REVISIONAL JURISDICTION.]

RULE No 516 of 1922.

RANKIN, J.

1923,

Heard,

5, January.

Judgment,

8, January.

CHOWDHURY JAMINI

NATH MALLIK and ors.,

Defendants, Petitioners,

v.

MIDNAPUR ZEMINDARY

Co., Plaintiffs,

Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 10, Court of appeal to stay suit claiming cesses, pending the decision of appeal in which the question of cesses for previous period is in issue.

Two suits involving claims for certain cesses against the Petitioners were decided against them and were pending in appeal, when a rent suit was brought against the Petitioners. They thereupon applied for stay of the suit under sec. 10, C. P. C., inasmuch as it concerned cesses alleged to be due for a subsequent period.

Held That though for this purpose suits include appeals, sec. 10 did not apply to the present case. It was a suit for a different debt altogether and for a debt which was not in existence when the last of the previous suits was brought. Under the new Code the section does not apply unless the previous suit is before a Court which is competent to grant the relief claimed in the subsequent suit. In the suits under appeal, the Court could not possibly give judgment for cesses that fell due long after the institution of those suits.

BEPIN BEHARI MUKHERJEE v. JOGENDRA CHANDRA GHOSE (1) followed

This was a Rule granted on the 14th July 1922 against an order of the Subordinate Judge of Midnapur (Mr. A. L. Mukerjee), dated the 11th July 1922.

The facts will fully appear from the judgment.

(1) 24 C. L. J. 514 (1916)

CHOWDHURY JAMINI NATH MALLIK v. MIDNAPUR ZEMINDARY CO.

Babu Khirode Naran Bhuyan for the Petitioners

Mr. U. N. Sen Gupta (Counsel) and *Babu Probodh Kumar Das* for the Opposite Party

THE JUDGMENT OF THE COURT was as follows —

In this application for revision the decision of the learned Subordinate Judge of Midnapur is complained of on the ground that he has refused under sec. 10, C. P. C., to stay the trial of a rent suit. The case made by the Defendants-Petitioners is that the Plaintiffs, the Midnapur Zemindary Company, are the proprietors of a certain *towp* and are also the *darpatnidars*, that the Defendants are the *putnidars*, that the dispute in question is as to whether in these circumstances the Plaintiffs are entitled to make the Defendants *putnidars* pay certain cesses. It appears that a rent suit (No. 9 of 1916) was brought by the Plaintiffs and was decreed *ex parte*, that to counteract this, the Defendants brought a title suit (No. 262 of 1919), that the Plaintiffs thereafter brought a rent suit (No. 80 of 1918) and that at the present moment the position is that although the Defendants have lost at the trial of these suits, these two suits are pending in appeal. In these circumstances they say that in the present suit which is a suit of 1922 and which concerns the cesses alleged to be due from Aswin 1326 to Falgoun 1329, the Defendants are entitled to claim the benefit of sec. 10, C. P. C. Now, the learned Subordinate Judge has decided the matter upon the ruling that as the prior suits are pending in appeal they are not suits within the meaning of sec. 10 of the Code. As to that, I am of opinion that that decision is erroneous, and I may observe that if it has ever been held under the

old Code that the reference to "Counts whether superior or inferior" was a reason for holding that sec. 10 applied where the previous suit is at the appellate stage, that is an instance of a correct conclusion arrived at for an entirely inadequate reason. The presence or absence of those words—"whether superior or inferior"—does not, in my judgment, affect the question one way or the other. I think that the reference at the end of the section to "His Majesty in Council" shows that for this purpose "suits" include appeals, and in a case which was not referred to in the argument but which I have discovered from Mr. Sen's Book on the Bengal Tenancy Act, a Divisional Bench of this Court has before now dealt with this question and has ruled to that effect. I refer to the case of *Bipin Behary Mukherjee v. Jogendra Chandra Ghose* (1). It remains therefore for me to say whether sec. 10 applies to the case before me. I am of opinion that it does not. The case to which I have just referred is in my judgment an authority completely covering that point also. The position is this. The present suit is for cess which has accrued due after the institution of the last of the pending suits. It is a suit for a different debt altogether, for a debt which was not in existence when the last of the previous suits was brought. When I come to apply sec. 10, it does not appear to me that any of the changes made in the Code of 1908 has any effect so as to make the section applicable where the suits are for distinct and different debts. It is quite true that in a very well-known judgment of that distinguished learned Judge Mr. Justice Mahmud in *Balkishan v. Kishan Lal* (2), he under the former Code dealt

(1) 24 C. L. J. 514 (1916).

(2) 1 L. R. 11 All. 148 (1893).

CHOWDHURI JAMINI NATH MALLIK v. MID NAPUR ZEMINDARY CO.

with this question by saying that the former and the later suits were for different reliefs and it is quite true that certain words about the relief have been omitted from the later version of the Code. The observations made by Mr Justice Mahmud were sufficient to show that under the old Code such a suit as I have now to deal with is not affected by sec 10. But it must be observed that a judgment for the recovery of subsequent cesses does not differ merely as being for a different form of relief. It is the same kind of relief for an entirely separate subject-matter, namely, a debt which was not in existence at all at the time of the previous suit. It does not follow, because the words "the same relief" are no longer in the section, that sec. 10 is applicable to suits for recovery of successive rents. I will draw attention in this connection to one further point. Under the new Code it is clear that the section will not apply unless the previous suit is before a Court which is competent to grant the relief claimed in the present suit. That by itself shows that the section cannot apply to claims for rent due at successive periods altogether. No body can doubt that whatever may be the result of the suits now pending in appeal, the Court cannot possibly give judgment thereunder for cesses that fell due long after the institution of the suits. For these reasons I am of opinion that the learned Subordinate Judge reached the right result when he held that sec 10 had no application. I will only say that if at any subsequent stage an application apart altogether from sec 10 is made to the Court below upon terms which that Court shall think reasonable, then that Court will be in no way prejudiced by anything that I have said, if it is minded to exercise any power in

favour of the Defendant other than the power given by sec 10. The Rule is discharged with costs—one gold mohur.

J N R.

Rule discharged.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

1922, .

KHATUBAI,

Appellant,

v.

Heard, 19, 20, June | MAHOMED HAJI ABU
and 3, 4, 6, July. and ors., Respondents.
Judgment,

9, November.

Halai Memons of Porebunder—Succession governed by Hindu law, as customary law, though opposed to Mahomedan law—Judgments as evidence.

Held—That the High Court has correctly decided that in the matter of succession, the Halai Memons of Porebunder are governed by Hindu law engrafted as a custom on the Mahomedan law, although not in accordance with the rules of the Koran.

Judgments of the Courts of Porebunder, dealing with questions of succession among the Halai Memons of Porebunder, do not settle the question but are good as evidence.

This was an appeal from a decree of the High Court of Bombay, dated the 21st September 1918, reversing the decree of a single Judge of the same Court, dated the 18th December 1917.

The question in this appeal was whether the succession to the estate of a deceased Memon Mahomedan inhabitant of Porebunder in Kathiawar, who died intestate, is governed by Hindu or Mahomedan law.

Haji Abu Haji Habib, the intestate Memon in question, died on the 3rd of

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November 1914, leaving considerable property, valued at more than two lacs of

Haji Abu Haji Habib (the intestate)
died 1st December 1914

Mahomed, 1st Defendant
and Respondent

Khatubai married Abu Haji Soleman,
Plaintiff and Appellant

rupees The intestate left the relations shown in this table.—

married Bibul,
2nd Defendant

Alshabai married Mahomed Haji Sakoor,
died 1st 1914,
intestate
3rd Defendant

Hawabai,
4th Defendant

At some time, probably after the Mahomedan conquest in the 12th century, two large bodies of Hindus in Sindh were converted to Islam, but retained their Hindu law of succession and inheritance. These were the Memons, who had previously been Lohana Hindus and mostly became Sunni Mahommedans, and the Khojas who had been Bhatias and for the most part became Shi'as. Both Lohanas and Bhatias are trading castes of Hindus.

Of each of these communities large bodies migrated southwards, still retaining their Hindu law of succession and inheritance. Of the Memons who so migrated, many settled in Cutch, others settled in and round the Halai Pranth (or Province) of Kathiawar. Hence a distinction of Memons into Cutchi Memons and Halai Memons. A considerable number of these Halai Memons appear to have settled at Porebunder on the west coast of Kathiawar. Porebunder is and always has been an independent Hindu state under its own Rajah. Here the Memons settled, established a Jamat or council, and retained their Hindu law of succession and inheritance.

A small body of Memons appear to have continued the migration and settled in Bombay. Under the charters of the Bombay Courts, Mahommedan law was applicable to all Mahommedans in matters of succession and inheritance and these Bombay Memons seem (like the Memons who migrated to Africa from Cutch in later times) to have allowed the Mahom-

edan law of succession and inheritance to be applied to them without protest.

Later a large body of Memons appear to have migrated to Bombay from Cutch, and in 1845 they and the Khojas, who were also established there in considerable numbers, successfully asserted their custom to follow the Hindu law of succession and inheritance before Sir Eiskine Perry, C. J., of Bombay (1 Perry's Oriental Cases, p. 110).

The intestate Haji Abu Haji Habib was born at Porebunder in Kathiawar, and when he grew up went to Durban in South Africa for five years, and then returned to Porebunder, and carried on business there for a time, and then sold the business and came to Bombay, where after serving in a shop, he, about the year 1882, started a business of his own, which succeeded. He, however, always retained his connection with Porebunder, and in 1899 built a house there. Marriages and confinements in his family always took place at Porebunder, and from 1899 he lived there most of the year, and was a leader of the Memon Jamat or council there. Both Indian Courts held that he retained his Porebunder domicile, and that the right to his estate must be determined by the law or custom applicable to a Porebunder Halai Memon.

On the 15th September 1915, the Appellant claimed a share in her father's estate as his daughter from the Respondent, Mahomed Haji Abu, and on her claim being denied she brought the present suit.

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in the Original Civil Jurisdiction of the High Court, on the footing that the Mahomedan law applied to the intestate as a Halai Memon Mahomedan, and claiming her share as a daughter, and administration of the estate.

Written statements were put in by the Defendants and Respondents, that of the third and fourth Defendants and Respondents supported the Appellant's claim, while those of the first and the second Defendants and Respondents maintained that the intestate retained his domicile at Porebunder, and that the Halai Memons domiciled in Kathiawar had retained their Hindu law of succession and inheritance.

The learned trial Judge ruled that it lay on the first Respondent to establish that the intestate had retained his Porebunder domicile and that Hindu law applied to Halai Memons domiciled in Kathiawar. He then considered the evidence on this issue, and held that the said Respondent had proved that the intestate had a Porebunder domicile when he died, and that the laws of Halai Memons at Porebunder applied to him. He next examined the evidence adduced by the parties as to the law applying to Halai Memons of Porebunder and considered that the documentary evidence produced by the first Defendant (Respondent) of decisions in the Porebunder and other Courts which all (with one exception) held that Halai Memons in Porebunder were governed by Hindu law in matters of succession and inheritance--was unreliable on the ground that these decisions were mostly based, as he thought, on a misinterpretation of the judgments of the British Courts. With regard to the oral evidence of the 50 instances of Hindu succession among Halai Memons at Porebunder to which this Respondent's witnesses had deposed, the

learned Judge held that 16 instances had been established, but, in his opinion, these were not of sufficient weight to establish the custom, and on the other hand he held that the Appellant had proved three cases of the application of Mahomedan law, and he accordingly decided that the Respondent had failed to establish a valid custom of Halai Memons at Porebunder to retain the Hindu law and decreed the suit in favour of the Plaintiff.

From this decree, the first Defendant appealed, and his appeal was heard by a Division Bench of the Bombay High Court, consisting of Scott, C. J., and Macleod, J., who delivered separate judgments reversing the decree of the lower Court and allowing the appeal.

Both the Judges concurred in the finding of the trial Judge that the intestate was a Porebunder man governed by Porebunder law. In their opinion, the decisions of the Porebunder and other Courts were material to the consideration of the custom followed in that state and Macleod, J., considered them conclusive of the contention put forward by the Defendant.

In the early part of his judgment, the Chief Justice stated as follows—

"Speaking generally, the evidence which will later be referred to with more particularity, establishes that the Memons of Kathiawar of whatever group or set, follow the Hindu law of succession, and this conclusion is supported as to Porebunder Memons particularly by a large number of instances in which widow and daughters have been excluded from succession, sons have divided the property with their father in his life-time or equally with each other after his death, and the right of predeceased brothers' sons to share with their uncles has been repeatedly recognised. All these results are

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incidental to the Hindu and not to the Mahomedan system

"The husband of the Plaintiff, who is a Porebunder man, and had the fullest opportunity of countering the evidence adduced in Court by the first Defendant, has not been able to produce any Porebunder evidence to support the contention that the Mahomedan law applies

"The Plaintiff relies upon the evidence of Bombay Memons, which does not necessarily help us to decide what is the customary law of Porebunder. in only very few of these cases does it appear that there was any continuous connection with Kathiawar, and in none does there clearly appear to have been, as in the case of Haji Abu, an intention of returning permanently to Kathiawar

"A priori, there is nothing astonishing in the result of the Porebunder evidence

"That the Memons of Kathiawar are converts to Islam from Hinduism is undoubted

"It would be surprising if in Kathiawar they had divested themselves of the social system of their fore-fathers.* Such a result has not followed in the case of other Hindu converts to Islam in Western India, for example the Khojas, the Cutchi Memons, the Suni Borahs of North Gujarat [see *Bai Baiji v. Bai Santok* (8)] and the Molesalam Ghastias of Ahmad [see *Maharana Shri Fatchsangji v. Kuvar Harisangji* (9)] and the Nassaporia Memons of Sind [*Ibdurahim Haji Ismail Mithu v. Halimabai* (1)]. It may indeed be said that the habit of the Bombay Memons (other than the Cutchis) to follow the Mahomedan law of succession is rather the anomaly. It may perhaps be ex-

plained by the fact that, as testified in 1847 before Sir Erskine Perry, they had been settled for a long time in the City. There they would be open to the influence of professional lawyers at a time when the exclusion of the law of the religion by the customary law anterior to the conversion was not established as a legal possibility or it may be that the influence of some religious teacher in the city operated to enforce the adherence of the Bombay Memons to the rule of the Koran. Whatever the cause, the result has been that the Bombay lawyers sweep into the category of pure Mahomedans, not merely the Memons settled in Bombay with no Kathiawar connections, but also occasionally Memons who have not given up their Kathiawar connections

"The general Bombay assumption that every Memon who is not a Cutchi is governed by the Mahomedan law of succession is well illustrated by the notice of the Bombay Government of the year 1897 described as a 'public notice to the Memon Community by the Government of Bombay at the desire of the Government of India' in which it is stated 'the Memon Community in India is divided into two sets, the Halar Memons and the Cutchi Memons. The former without exception follow the Mahomedan law in all respects.' This notice appeared in the Porebunder Gazette with a view to elicit the wishes of the Memon Community there. The result must have been a surprise to the Bombay Government, for the leaders of the Porebunder Memons (not Cutchis) went to the Administrator and informed him that the Jamat had approved of the Hindu law of inheritance by which they were governed

"I will now consider the evidence in detail

(1) L. R. 43 I. A. 35 : s. c. 20 C. W. N. 362 (1915).

(8) I. L. R. 20 Bom. 52 (1894).

(9) I. L. R. 20 Bom. 181 (1894).

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First, as to the general evidence regarding Kathiawar Memons

"Many of the witnesses examined on commission at Porebunder on behalf of the first Defendant depose that in matters of succession and inheritance Memons follow the Hindu customs, that all Kathiawar Memons are Halals, and all Cutchi Memons are Cutchis, that Memons residing in other Kathiawar towns such as Dhoraji, Upleta, Kutiana, Bantwa, Gondal, Rajkote, Vantali and Vasawad, some of them being under Mahomedan jurisdiction, follow similar customs. That all Memons were originally Lohanas in Sind before their conversion."

Later on after dealing with the evidence in detail he stated —

"In this state of the evidence we are, I think, justified in holding that the conditions of a valid custom have been established. The custom is certain in its operation, excluding daughters in favour of sons. It is invariable inasmuch as no case of variation in Porebunder has been proved. It is ancient because it is the custom which must certainly have prevailed in the community before the conversion to Islam, for Mahomedans do not discard when once adopted, though they do not always on conversion adopt the rule of the Koran relating to succession."

"The suit as filed relates to property in Bombay alone, and the deceased Haji Abu died in Bombay intestate, but he was a Porebunder man. Neither circumstance implies severance from Porebunder. The evidence is strong that the deceased had retired to Porebunder, where he had a house, with the intention of ending his days there, and he only came to Bombay to consult a doctor during his last illness. Since then there was no sever-

ance from Porebunder, the customary law of Porebunder Memons must govern the distribution of the estate."

"We do not think it is open to us in our view of the evidence to follow the course taken by the lower Court and hold that the Defendant has not made out the custom alleged. Nor can we hold that custom has established a *lex loci* peculiar to Bombay property, namely, the Mahomedan law, and another *lex loci* peculiar to Porebunder property, namely, the Hindu law. There is no principle recognised by the law administered in this country upon which a Hindu's or Mahomedan's possession may be distributed partly by one law and partly by another according to the locality of the possessions. They must all fall under one law, either the law of the religion or the customary law of the community. There is no *lex loci* for the purpose of distribution. If it were possible on the evidence to infer an election by the deceased, a severance of his connection with the Hindu-Kathiawar environment and a permanent settling in Bombay where non-Cutchi Memons have long adopted the Mahomedan law for distribution, the analogy of the law of domicile could be applied as in *Ibrahim Haji Ismail Mithu v. Halimabai* (1). It would not be the law of domicile, for permanent residence in Bombay does not necessarily import the Mahomedan law of succession for one whose ancestors were converted, from Hinduism. Severance from the domicile of origin and permanent residence in Bombay would, in the case of persons falling within the purview of the Succession Act, effect change of domicile and with it a change of law, e.g., from French to Anglo-Indian or Portuguese to

(1) L. R. 43 I. A. 35. s. c. 20 C. W. N. 362 (1915).

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Anglo-Indian, but it would not change the law of succession for Hindus or Mahommedans.

"Therefore since we are of opinion that the deceased died as he was born, a Porebunder Memon, we must hold that according to the custom established by the evidence his son succeeds to all his property, his daughters are not entitled to share in his estate and his widow is entitled only to maintenance. We set aside the decree of the lower Court and dismiss the suit. The Plaintiff must pay the costs of the 1st Defendant throughout."

MacLeod, J., stated —

"Those instances which have been brought forward on both sides have been considered in detail by the learned Chief Justice and I entirely agree with the conclusions at which he has arrived. No instance has been proved in which the estate of a Porebunder Halai Memon has been distributed in Porebunder according to Mahommedan law, while considering the numbers of the community a large number of instances have been proved in which the distribution has been according to Hindu law . . ."

From the decree of the High Court the Appellant appealed to His Majesty in Council.

Mr. L. DeGruyther, K. C. (with him *Mr. C. L. Farwell*) for the Appellant — The intestate being a Mahommedan, the succession to his estate is governed by Mahommedan law unless an ancient and invariable custom to the contrary is established by clear and unambiguous evidence.

As to the requisites of proof, see *Abdul Hussein Khan v. Sana Dero* (2).

No such custom has been established.

It was decided in Bombay in 1847

(2) *L. R. 45 I. A. 10* at pp. 15, 17. *s. c. I. L. R. 45 Cal 450; 22 C. W. N. 353 (1917).*

(Perry's Oriental Cases, p. 110) that Cutchi Memons had adopted the Hindu law of inheritance, yet there are a series of decisions in Bombay right up to 1916 that the distribution of property among Halai Memons is according to Mahommedan law. If the alleged custom of succession by Hindu law prevailed among Halai Memons they would have brought it to Bombay with them.

Sm. Rani Parbati Kumari Debi v. Jagadis Ch. Phabal (3) and *Balwant Rao v. Baij Rao* (4).

[**LORD DUNEDIN** — Supposing all Halai Memons in Porebunder allow their property to go by Hindu law and in Bombay *vice versa*, what is the legal result?]

Mr. DeGruyther, K. C. — If there is a Hindu rule of succession among Halai Memons they would take it to Bombay. The fact that in Bombay they observe the Mahommedan law of succession shows that that was their original law.

[**LORD DUNEDIN** — A man can abandon his law and adopt another. *Balwant Rao v. Baij Rao* (4).]

Mr. DeGruyther, K. C. — Although so far as Hindu law goes a different variety may be observed as to Mahommedan law there is only one law. *Balwant Rao v. Baij Rao* (4) is only in reference to different varieties of Hindu law.

Further, on the evidence there is no proof that Halai Memons in Porebunder adopt the Hindu law of succession.

The Porebunder decisions are based on a misinterpretation of certain decisions of the Bombay Courts.

[**LORD DUNEDIN** — The Porebunder Court proceeds in the same way as the

(3) *L. R. 29 I. A. 82; s. c. I. L. R. 29 Cal. 343; 6 C. W. N. 480 (1902).*

(4) *L. R. 47 I. A. 213; s. c. I. L. R. 48 Cal. 50; 25 C. W. N. 243 (1920).*

KHATUBAI v MAHOMED HAJI ABU.

Indian Courts, not on domicile but on the personal law of the intestate.]

[LORD PHILLIMORE.—The real inquiry is what is the law which the state of Porebunder applies to Halai Memons. The "*ratio decidendi*" may be of interest, but what we have got to look at is the "*res decisa*"]

Mr DeGruyther, K. C.—Undoubtedly in Bombay the Mahomedan law of succession is observed. If the Hindu custom of succession was general among Halai Memons in Kathiawar they must have taken it with them to Bombay and there is nothing to show why or when they abandoned it. The question of domicile is really irrelevant (37 Geo III, c 142, secs 12 and 13)

(Indian Succession Act 1865, secs 5 and 321.)

Reference was also made to *Hemchand Devchand v Izam Saharlal Chhotamlal* (5), *Abdurahim Haji Ismail Mithu v Halimabai* (1), *Jan Mahomed v Datu Jaffer* (6) and *Advocate-General of Bombay v Jambabai* (7)

Messrs Upjohn, K. C., E. B. Rakes and Palat for the 1st Respondent.—The Respondent has always contended that the intestate was not a Bombay man but a Porebunder man. The only law which applied to him was Porebunder law as interpreted by the Courts of Porebunder. That law is foreign law to be proved as a fact.

There is not one universal law applicable to Halai Memons, their law is personal and depends on where they are settled.

The enquiry here is to ascertain the per-

(1) L. R. 43 I. A. 35. s. c. 20 C. W. N. 362 (1915).

(5) L. R. 39 I. A. 1; s. c. I. L. R. 33 Cal 219; 10 C. W. N. 361 (1905).

(6) I. L. R. 38 Bom 449 (1913).

(7) I. L. R. 41 Bom 181 (1916)

sonal law of the intestate who was a Halai Memon of Porebunder, and who retained his personal law until his death.

The Porebunder decisions show that Halai Memons there adopt the Hindu law of succession.

Mr DeGruyther, K. C., replied

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The present appeal relates to the succession of one Haji Abu Haji Habib, who died intestate at Bombay on the 30th November 1914. The contest is between a daughter, the Plaintiff and Appellant, on the one hand, and a son and other members of the family, the Defendants and Respondents, on the other, and depends entirely upon what is the law of succession to be applied to the property of the deceased.

Now, the deceased was a Mahomedan. Accordingly the Indian Succession Act does not apply, and if nothing more were known it would be obvious that the ordinary Mahomedan law of succession would fall to be applied, which would mean that the Appellant would succeed. But the deceased was not what may be termed an ordinary Mahomedan. There are among the Mahomedans certain groups whose ancestors were Hindus and professed the Hindu religion, and were then converted to Islam. Among these groups may be reckoned, as is shown by decided cases, Khojas, Suni Borahs, Molesalam Girasias, Cutchi Memons, Nassapooria Memons, and, lastly, Halai Memons, to which group the deceased belonged. Now, with regard to the groups other than Halai Memons, it has been held by a succession of cases beginning with a case decided by Sir Erskine Perry in 1847, that the converts had retained their Hindu law relating to the exclusion of females from suc-

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cession, and that that law had been engrafted as a custom on the Mahomedan law, although not in accordance with the rules of the Koran. In the present case, as is said by the learned Chief Justice, an entirely novel question is raised, viz., what is the customary law governing succession to a non-Cutchi Memon of Porebunder? Both the learned Judge of first instance and the learned Judges of the Appeal Court held that the deceased was, so to speak, a Porebunder and not a Bombay Memon. These being concurrent findings of fact, their Lordships, while entirely agreeing with them, need not examine the evidence on which they are founded. It follows that the personal law of the deceased, so far as the question for decision in the present appeal is concerned, was the law of a Halai Memon of Porebunder.

It may be here well to say a word as to what is meant by a Halai Memon. A Memon, as the word denotes, is a convert. The name Memon, however, has not been applied to all branches of Hindu converts, *e.g.*, as in the case of the Khojas. There was a body which came from Sind and settled in Cutch, and these have been denominated as Cutchi Memons. Another body from the same place settled in the Halai Prant of Kathiawar, and these have been designated Halai Memons. Some of the Halai Memons pushed on to Bombay, where they have formed a community known as the Bombay Halai Memons. There was also an immigration to Bombay from Cutch, and the Cutchi Memons formed by themselves a separate community in Bombay from the Halai Memons. Now, it is admitted that so far as the Bombay Halai Memons are concerned they have been content for many years to have their property distributed on succession according to the tenets of the

Mahomedan law, so that if the deceased had been, in the proper sense of the word, a Bombay Halai Memon, the question of the succession would have been solved. But, as already stated, both Courts have found that he was not a Bombay Halai Memon, but a Porebunder Halai Memon. The question, therefore, is—Does a Halai Memon domiciled in Porebunder follow the Hindu or Mahomedan law with regard to the succession of females?

Voluminous evidence was taken, which consisted of (1) the reports of a set of judgments of the Porebunder Courts—Porebunder being a Native State, from whose Courts there is no appeal either to any Appeal Court in India or to the King in Council, (2) oral testimony from pleaders and from persons belonging to the community in Porebunder as to what the custom of succession was. The learned Judge of first instance, after a careful and elaborate judgment, came to the conclusion that the custom of succession according to Hindu law was not sufficiently proved so as to cast the general application of the Mahomedan law.

On appeal that judgment was reversed, and an equally careful and elaborate judgment pronounced by the learned Judges of the Court of Appeal.

Then Lordships, after careful consideration, are in accordance with the views of the Appeal Court. The learned trial Judge has, in their view, drawn a wrong inference from the fact that the Bombay Halai Memons follow the Mahomedan law, and they cannot help thinking that this inference has coloured his views on the whole case. Finding that these Bombay Halai Memons practise in the matter of succession the Mahomedan law, he has drawn the inference that when they came to Bombay from Kathiawar they brought that law with them, and that conse-

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quently the community which they left also followed the Mahomedan law. Their Lordships agree with Macleod, J., that this is not a necessary inference. If it is otherwise shown that the Kathnawar Halai Memons practised the Hindu law excluding females from succession, it is equally easy to infer that the Bombay Memons, finding themselves among other Mahomedans who followed the Mahomedan law in its purity, renounced the custom of the Hindu law of succession in favour of the orthodox tenets of their own religion. An example of this may be found in the case of *Abdurahim Haji Ismail Withu v Halmabai* (1) (the Mombasa case). Of course, this is not an inference which itself need necessarily be drawn, but it counter-balances the other, and matters are, therefore, left as they were, *viz.*, to depend on an enquiry as to what has been *de facto* the practice of the Halai Memons in Porebunder.

The decisions of the Porebunder Courts were minutely examined by Macleod, J. The most that can be said for the Appellant was reduced in the cross-examination of her chief witness to this:—

“In Porebunder there is a conflict of decision, but the latest is that Hindu law governs Halai Memons. That is the decision of the final Court of Appeal there—the Puzari Court.”

It has been objected to this last and most authoritative decision—for it was the decision of the highest tribunal in Porebunder—that it is based on a misreading of the Mombasa case. It probably does go too far in thinking that their Lordships in that case laid it down as a general proposition that all Memons necessarily follow Hindu law of succession. But that was not the only ground of judgment, and

the judgment remains as the last of the Porebunder Courts.

Their Lordships, however, are not inclined to take the view that that settles the matter, for the enquiry is not as to what is the Porebunder law, but as to what is the Porebunder custom. But the judgments of the Courts are good as evidence, and they are borne out by the other evidence in the case. Here their Lordships are content to follow the result arrived at by Scott, C. J., who after a most careful examination of the evidence sums it up thus:—

“On a consideration of all the cases above mentioned, the evidence seems to me to be all one way. Twenty-five cases are proved which indicate that Hindu law was applied and not Mahomedan law, and there is no clear case of the application of Mahomedan law among Memons settled at Porebunder.”

The learned Counsel for the Appellant directed criticism to the character of certain of the witnesses, but such criticism is of small avail in contrast with the overwhelming effect of the negative result alluded to by the Chief Justice, that there is no clear case of succession according to the Mahomedan law.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Solicitors Messrs Hallons & Co for the Appellant.

Solicitors Messrs T. L. Wilson & Co for the 1st Respondent.

G. D. M.

(1) L. R. 43 I. A. 25; S. C. 20 C. W. N. 362 (1915).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 56 OF 1923.

MOOKERJEE, J. J. C. GALSTAUN,
 RANKIN, J. Defendant, Appellant,
 1923, v.
 Heard, 14 May. E. D. SASSOON & Co.,
 Judgment, LID., Plaintiffs,
 16, May. Respondents.

Civil Procedure Code (Act V of 1908), Or XII, r. 6—Judgment on admission, if the Plaintiff can have judgment when the Defendant pleads that the action is premature—Object of Or XII, r. 6—Judgment if can be claimed as of right

A suit was instituted by the Plaintiff Company against Salep & Co as principal and against Galstaun as surety. The Defendant Galstaun in his written statement took the plea that the conduct of the Plaintiff had been such as to absolve him from liability under the guarantee and that the suit was premature. Subsequently Galstaun, in course of his deposition before the Registrar in Insolvency in a certain proceeding, in answer to the question "Up to now you have had nothing to pay as guarantor?", said, "But I shall have to pay." Thereupon an application was made for judgment on admission. Mr Justice Greaves allowed the application.

On appeal it was held that the statement in the deposition of Galstaun could not be construed to imply that he had abandoned his defences in their entirety and that judgment on admission should not have been pronounced.

In order to entitle the Plaintiff to have judgment on admission there must be a clear admission that the money is due and recoverable in the action in which the admission is made.

KORAMALL v MONGILAL (1) approved.

(1) 23 C. W. N. 1017 (1919).

LANDERGAN v FEAST (2) referred to
The admission also must be clear and unequivocal

HUGHES v LONDON, EDINBURGH AND GLASGOW ASSURANCE CO LTD (3) referred to

Object of the rule as explained in ELLIS v ALLEN (4) approved

A judgment on admission cannot be claimed as a matter of right

PREMSUK DAS v UDARAM (5), MELLOR v SIDEBOTTOM (6), IN RE WRIGHT, KIRKE v NORTH (7) and GILBERT v SMITH (8) referred to

This was an appeal from an order of Mr. Justice Greaves passed on the 20th March 1923 in the exercise of Ordinary Original Civil Jurisdiction.

Facts were these. The Plaintiff Company filed a suit against the Defendant firm Ebrahaim Solomon Salep & Co and the Defendant John Caspiet Galstaun for the recovery of a sum of Rs. 5,00,000 together with interest thereon and for other reliefs. The said sum of Rs. 5,00,000 was lent and advanced by the Plaintiff Company to the Defendant firm as part of 10 lakhs agreed to be lent and advanced by the Plaintiff Company to the Defendant Salep. The claim against the Defendant Galstaun was based on a letter of guarantee written by him to the Plaintiff Company on the 6th January 1921.

(The letter is set out in the judgment.)

The Defendant Galstaun in his written statement took the plea (1) that the conduct of the Plaintiff Company had been such as to absolve him from liability under

(2) 34 W. R. (Eng.) 691; 55 L. T. 42.

(3) [1891] 8 T. L. R. 81.

(4) [1914] 1 Ch. D. 904.

(5) I. L. R. 45 Cal. 138; s. c. 22 C. W. N. 204 (1917).

(6) L. R. 5 Ch. D. 342 (1877).

(7) [1895] 2 Ch. D. 747.

(8) L. R. 2 Ch. D. 689 (1876).

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the guarantee, (u) that the suit was premature.

On the 28th February 1923 an application was made on behalf of the Plaintiff for judgment on admission against the Defendant Galstaun for the sum of Rs 5,00,000 under Or 12, r. 6 of the Code of Civil Procedure. In the petition it was stated that the Defendant Galstaun admitted his liability in respect of the said sum of Rs 5,00,000 on three occasions, viz, (a) by a letter dated the 26th February 1922, (b) by a letter dated the 15th August 1922, (c) on or about the 15th May 1922 in his evidence before the Registrar in Insolvency in No 184 of 1921.

The letter dated the 26th February 1922 was as follows ---

Messrs E D Sassoon & Co., Ltd

Dear Sirs,

With reference to our interview with your commander Davey re loan on Park Street and Russell property with an area of over 10 biggahs freehold land on which I am now building I would feel obliged if you can advance me rupees twenty-five lacs on the first charge on these premises. I would have to pay the Tata Bank 10 lacs to release the property and would allow you to deduct five lacs account Salep. I would also require five lacs to complete the buildings later when more progress is made. I hope to complete the whole about March next year and will then get a rental of 45 to 50 thousand per month. The building will be a six storied one with shops on the ground floor and flats about the ground floor area will be over 50,000 sq. feet.

I have contracted to purchase the leasehold of 12, Russell Street about 60 years still to run and have filed a suit for specific performance. Should I succeed this too will be given to you as further security.

The loan to be for 3 years certain and one year's option at 8 per cent per annum.

Yours faithfully,

(Sd) J C GALSTAUN

The letter dated the 15th August 1922 was as follows ---

Messrs E D Sassoon & Co., Ltd.

Dear Sirs,

I shall thank you to give me an advance on my property in Calcutta now in course of construction at the corner of Russell Street and Park Street, area about 3½ acres ground floor space over fifty thousand square feet for shops.

A six storied building is being erected containing 50 first class flats which can at any time be converted into a hotel of the highest order. I understand from Mr. A M John, the broker, that he has shown you the photographs.

I require at present 30 lacs payable here or in India at 7½ interest per annum. I have every hope of floating a Company.

From this sum you can deduct 5 lacs advanced by you to Salep the interest and costs payable hereafter and also to pay Mr A M John his commission of 1 per cent on the sum advanced.

Yours faithfully,

(Sd) J C GALSTAUN.

(The portions of the evidence material for the purpose of this report will appear from the judgment.)

Mr Justice Greaves held that there was no such admission in either of the two letters as would justify a judgment under Or 12, r. 6 of the Code of Civil Procedure. He came to the conclusion that the deposition of the Defendant Galstaun contained an admission contemplated by Or 12, r. 6 of the Code of Civil Procedure and accordingly made a decree in favour of the Plaintiff Company for the amount.

The Defendant Galstaun appealed.

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Messrs. N. Strcar and S M Bose for the Appellant.

Messrs Langford James and Amcer Ali for the Respondent Company.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from a judgment on admission pronounced by Mr Justice Greaves under Or 12, r 6 of the Code of Civil Procedure, 1908.

The suit was instituted on the 7th May 1921 by E D Sassoon & Co against Ebrahim Soleman Saleji & Co and J C Galstaun for recovery of money. The claim, so far as Galstaun was concerned, was based on the following letter of guarantee written by him to the Plaintiffs on the 6th January 1921 :—

"In consideration of your advancing to Ebrahim Soleman Saleji & Co of No 1, Annatolla Lane in Calcutta at my request the sum of Rs 5,00,000 as a loan bearing interest at nine per cent per annum I, the undersigned John Carapet Galstaun, hereby agree with you as follows :—

1 To make good any default on the part of the said Ebrahim Soleman Saleji & Co or their successors in interest in the payment of the said loan and all interest due thereon.

2 You are to be at liberty without discharging me from liability hereunder to grant time or other indulgence to the said Ebrahim Soleman Saleji & Co and to treat them in all respects as though I was jointly liable with them as a debtor to you instead of being a surety for them and in order to give full effect to the provisions of this guarantee I hereby waive all suretyship and other rights inconsistent with such provisions which I otherwise might be entitled to claim and enforce.

3. This guarantee shall not be revoc-

able by notice or by reason of my death but it shall remain in full force until the said sum of Rs 5,00,000 with interest is repaid to you or until such time as the proposed mortgage for Rs 10,00,000 secured on certain properties of the said Ebrahim Soleman Saleji & Co shall be completed.

1 This guarantee shall be enforceable against me notwithstanding the fact that any other securities may be held by you against this loan at the time of any proceedings being taken against me on this guarantee."

There was an arrangement whereby the Plaintiffs were to advance to the first Defendant a loan of Rs 10,00,000 secured on certain properties. The execution of the mortgage, after investigation of title, would of course occupy a certain amount of time, but apparently the first Defendant was very anxious to obtain some money as soon as possible, and accordingly before the mortgage was executed or the title investigated, the Plaintiff advanced to the first Defendant the sum of Rs 5,00,000 in consideration of this being guaranteed by the second Defendant as in fact it was by the letter of the 6th January 1921. The mortgage was never executed and accordingly this suit was commenced.

The written statement of the first Defendant was filed on the 23rd August 1921. This was followed by the written statement of the second Defendant on the 21st December 1921. The present application for judgment under Or 12, r. 6 was made on the 23rd February 1923. The Plaintiffs rely upon admissions contained in three documents. The first is a letter written on the 26th February 1922 by Galstaun to the Plaintiffs; the second is another letter addressed by Galstaun to the Plaintiffs on the 15th August 1922,

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the third is a deposition intermediate in date, namely, a statement made by Galstaun in the course of an examination under sec. 36 of the Presidency Towns Insolvency Act on the 19th May 1922 in the matter of the insolvency of the first Defendant Mr. Justice Greaves has come to the conclusion that there is no such admission in either of the two letters as would justify a judgment under Or. 12, r. 6. He has held, however, that the deposition of Galstaun contained an admission which afforded foundation for such a judgment.

As regards the letters, we agree with Mr. Justice Greaves that they do not contain such admission as would justify a judgment under Or. 12, r. 6. In the first letter, Galstaun applied to the Plaintiffs for a loan and stated that if the loan were sanctioned, he would allow the Plaintiffs to deduct Rs. 5,00,000 on account of Saleji. In the second letter, Galstaun applied to the Plaintiffs for another loan and stated that if the loan were arranged, the Plaintiffs could deduct Rs. 5,00,000 advanced by them to Saleji. Mr. Justice Greaves has held that neither of these constitutes an unqualified admission of the type contemplated by the rule. We hold with him that they merely amount to this, that if the Plaintiffs agreed to make the requisite advance, he was prepared to allow Rs. 5,00,000 to be deducted from the loan, on Saleji's account.

We have next to consider the third admission made on the 19th May, 1922. In the course of his examination Galstaun was asked with regard to the title deeds which had been handed over to him.

Q.—How came these to be in your possession?

A.—All these documents were with

Morgan & Co. Mr. Thornton Jones of Morgan & Co. had them.

Q.—How did they get them?

A.—Kassuni Ebrahim Saleji deposited the letters of administration with me and promised to make over the title deeds of the property to Morgan & Co.

Q.—Who told you that?

A.—Kassim and Hashim. They wanted a loan of five lacs urgently and they deposited the title deeds of these properties.

* * * * *

They took the five lacs from E. D. Sassoon & Co. on my guarantee, Kassim deposited the letters of administration and undertook to deposit with Messrs. Morgan & Co. the title deeds of his properties as security.

* * * * *

The loan of ten lacs was never put through, out of five lacs, four and a half lacs was paid to him and the insolvent got Rs. 50,000.

Q.—Did you advance any money?

A.—No, Sassoons advanced the money.

Q.—You were not lending the money?

A.—No, but I was guaranteeing the money.

Q.—Up to now you have had nothing to pay as guarantor?

A.—But I shall have to pay."

This last statement, it was urged before Mr. Justice Greaves, constituted an unqualified admission that he was liable to pay five lacs to the Plaintiffs. After a careful consideration of the deposition taken as a whole, we have come to the conclusion that it does not contain an admission of the requisite description.

The written statement of Galstaun makes it abundantly clear that he had in substance taken a two-fold defence, namely, first, that the conduct of the Plaintiffs had been such as to absolve him

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from liability under the guarantee, and secondly, that the suit was premature. We are not prepared to construe his statement in the deposition to imply that he had abandoned these defences in their entirety.

This case is in some respects similar to that of *Koramall v Mongilal* (1), where reference was made to the observation of Lopes, L. J., in *Landerigan v Feast* (2). "There must be a clear admission that the money is due and recoverable in the action in which the admission is made. There is no such admission here. The Defendant's statement that the action is premature may be untrue, but we cannot go into that." Lindley, L. J. said -- "The first thing necessary is an admission that the sum is due and recoverable in the action, and I can find no such admission here. The affidavit gives the Defendant's view that the action was brought too soon." To the same effect are the observations of Fry, L. J., in *Hughes v. London, Edinburgh and Glasgow Assurance Co., Ltd.* (3), that he held a strong view that final judgment ought not to be signed upon admissions in a pleading or an affidavit, unless the admissions were clear and unequivocal. The observations of Sargant, J., in *Ellis v Allen* (4) may also be usefully recalled:—"The object of the rule was to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. This applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed." We must further remember that the power of the Court is discretionary

and that its exercise cannot be claimed as a matter of right, *Premshuk Das v. Udairam* (5), *Mellor v. Sidebottom* (6), *In re Wright*, *Kuke v. North* (7) and *Gilbert v. Smath* (8). We are of opinion that the present case is not one in which judgment on admission should have been pronounced.

The result is that this appeal is allowed and the order of Mr. Justice Greaves discharged. The Appellant is entitled to his costs both here and in the Court below.

Messrs. Morgan & Co., Solicitors for the Appellant.

Messrs. Orr Dignam & Co. Solicitors for the Respondent Company.

D. N. S. Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 168 of 1922.

THE CORPORATION OF
CALCUTTA, Defendant,
Appellant,

v.

BEJOY KUMAR ADDY
and ors., Plaintiffs,
Respondents.

MOOKERJEE, J.

RANKIN, J.

1923,

10, April

Calcutta Municipal Act (III of 1899, B. C.), sec. 622 (3), owner of land, who has not complied with a Municipal requisition, if discharged from liability, merely because occupier of a portion of the land rendered compliance impracticable only in part—Sec. 408, decision of the Corporation to take action under sec. 409, if operates as a waiver of the notice under—Specific Relief Act (I of 1877), sec. 56 (e), jurisdiction of Court to restrain criminal proceedings for breach of a Municipal requisition.

The Calcutta Municipal Corporation called upon the Plaintiffs to carry out certain improvements in their bustees and,

(1) 23 C. W. N. 1017 (1912).

(2) 34 W. R. (Eng.) 691; 55 L. T. 42.

(3) [1891] 8 T. L. R. 21.

(4) [1914] 1 Ch. D. 904.

(5) I. L. R. 45 Cal. 188; s. c. 22 C. W. N. 204 (1917).

(6) L. R. 5 Ch. D. 342 (1877).

(7) [1895] 2 Ch. D. 747.

(8) L. R. 2 Ch. D. 689 (1876).

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upon their failure to comply with the requisition, instituted successive criminal prosecutions to compel execution of the works. The Corporation also undertook under sec 409 of the Calcutta Municipal Act to carry out the improvements at the cost of the owner, as some of the tenants of the land having obstructed improvements in their portions, the owner failed to carry out fully the required improvements. It appeared that Plaintiffs had taken proceedings against the tenants under sec 623 of the Act.

Held—That though some of the tenants refused to afford facilities to the Plaintiff, and thus rendered it impracticable for them to carry out completely all the improvements required by the Corporation, the Plaintiffs could have carried out some at least of the improvements. It would be unreasonable to construe sec 622 (c) in the sense that an owner, who has not complied with the requisition at all is discharged from liability, merely because the occupier of a portion of the land has rendered compliance impracticable only in part. The owner is discharged from liability only to the extent that compliance is rendered impossible by the conduct of the occupier.

It cannot be said that if the General Committee of the Corporation decides to take recourse to sec. 409, the owner is forthwith absolved from the liability he has already incurred by reason of his failure to comply with the requisition under sec. 408. If the requisite improvements are carried out by the General Committee under sec. 409, the default on the part of the owner vanishes, but till the work has been completed, the default remains, entire or partial, and the liability of the owner to be prosecuted still continues in operation.

EMPEROR v. NADER SHAH (2) distinguished.

The tendency of modern decisions is that even if the Court has jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by a statute for breach of its enactments, it will not interfere as a general rule. The principle deducible from the decisions is that though the extreme position cannot be maintained that there is absolutely no jurisdiction in the Court to restrain proceedings before a Magistrate, the Court will not interfere unless in very special circumstances by way of injunction or declaration of right where the legislature has pointed out a mode of procedure before a Magistrate. A Court of Equity may in a proper case interfere by injunction to restrain an act or proceeding, criminal or quasi-criminal in form, which tends to the impairment of property rights, and proceedings for the enforcement of Municipal ordinances, such as the present one, have been treated as quasi-criminal. There is, however, the well-settled rule that it is not the practice of the Court to interfere with corporate bodies, unless they are manifestly abusing their powers.

MAYOR OF YORK v. PILKINGTON (3), HOLDERSTAFFE v. SAUNDERS (4), SAUL v. BROWNE (6), EMPEROR OF AUSTRIA v. DAY (14), DUKE OF BEDFORD v. DAWSON (15) and several other cases referred to.

Quære —How the law in regard to this matter has been affected by sec. 56 (e) of the Specific Relief Act.

This was an appeal against the decree

(2) 1 L. R. 29 Bom. 35 (1904),

(3) [1742] 2 Atk. 302,

(4) 6 Modern 12.

(6) L. R. 10 Ch. 64; 44 L. J. Ch. 1.

(14) 3 DeG. F. & J. 217 (253); 180 R. R. 101 (121), (1861).

(15) L. R. 20 Eq. 558 (1875).

THE CORPORATION OF CALCUTTA v. BEJOY KUMAR ADDY.

of Babu Nalini Kanta Bose, Subordinate Judge, 1st Court of 24-Parganas, dated the 20th of December 1921, preferred on the 18th of February 1922 in the Court of the District Judge of 24-Parganas and transferred to this Court by an order of the Chief Justice and Mr Justice Panton, made on the 25th of May 1922

The facts will fully appear from the judgment.

Sir Asutosh Chaudhuri and Babus Matha Nath Mukherjee and Satindra Nath Mukherjee for the Appellant

Babu Gour Mohon Dutta for the Respondents.

The JUDGMENT OF THE COURT was as follows.—

The Plaintiffs-Respondents are the owners of premises No 12-1, Puddopukur Lane and Nos 34-1 and 37-3, Watgunge Street, which are *bustee* lands in occupation of their tenants. The lands are situated within the jurisdiction of the Municipal Corporation of Calcutta and are subject to the operation of Chap XXVI of the Calcutta Municipal Act, 1899 (Act III of 1899, B C). The Defendant Corporation called upon the Plaintiffs to carry out improvements in the *bustees* and upon their failure to comply with the requisition, instituted successive criminal prosecutions to compel execution of the works. The result has been that the Plaintiffs have been convicted on no less than eight occasions and sentenced to pay fines of various amounts under sec. 575 read with sec. 408 of the Calcutta Municipal Act.

The Plaintiffs have thereupon instituted the present suit for an injunction against the Corporation. The Plaintiffs pray that the Corporation be restrained by an injunction (a) from taking any action

or proceeding for non-compliance with the requisition for carrying out improvements in their premises, and (b) from instituting or continuing any proceeding or putting the law in motion for enforcing the requisition. The claim for an injunction was based on the assertion that the Corporation had not only initiated proceedings without strict compliance with the provisions of the law in that behalf and without proper service of notice upon the parties interested, but had instituted prosecutions against them in perverse exercise of alleged powers not authorised by law. The Corporation repudiated these allegations and maintained that they had acted in strict compliance with statutory provisions. The Subordinate Judge came to the conclusion that the Corporation had not acted without jurisdiction, but granted an injunction, first because the Plaintiffs were not in a position to carry out all the improvements by reason of the obstructive attitude of some of their tenants on the premises, and secondly, because the Corporation had taken action under sec 409 with a view to carry out the improvements themselves. The present appeal has been brought by the Corporation to test the propriety of this order.

Sec 406 of the Calcutta Municipal Act authorises the General Committee to arrange for inspection, report and preparation of standard plan by a medical officer and an engineer, in cases where the improvement of a *bustee* is a matter of emergency. Sec 407 requires the General Committee to approve such standard plan after hearing objections of the owner and after making such modification as they may deem proper. Sec. 408 next provides that the General Committee may cause a written notice to be served upon the owners of the land, requiring them to carry out all or any of the improvements

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or any portion thereof. Sec. 409 empowers the General Committee to carry out such improvements in default of the owners and to realise the expenses from them. Sec 574 makes non-compliance with requisitions under sec. 408 punishable with a fine, and sec 575 makes the continuing offence punishable with a daily fine after a first conviction.

In the present case, it was contended that the notices contemplated by secs 407 and 408 had not been duly served and that the proceedings were consequently without jurisdiction, as indicated in *Kanai Lal v Corporation of Calcutta* (1). The Subordinate Judge has held on the evidence that the requirements of secs. 406, 407 and 408 were fulfilled and the requisite notices were served in the manner prescribed by sec 593. He has further pointed out that the receipt of the notices under secs 407 and 408 is admitted by one of the Plaintiffs. The conclusions of the Subordinate Judge are amply supported by the evidence on the record. In these circumstances, the view cannot be maintained that the General Committee acted illegally and without jurisdiction, when they called upon the Plaintiffs to make the improvements under sec 408.

The Plaintiffs have contended, however, that they should not be held responsible for failure to comply with the requisition made by the Corporation, inasmuch as the improvements could not be carried out while the land was still occupied by tenants who could not be removed. Sec 622 authorises the owner of any land, who is prevented by occupier thereof from complying with any requisition made in respect of the land, to apply to the Chief Judge of the Court of Small Causes of Calcutta. The Chief Judge, on receipt

(1) 11 C. W. N. 508 (1906).

of such application, may make a written order requiring the occupier to afford all reasonable facilities to the owner for complying with the requisition. The occupier shall, after eight days, afford all such reasonable facilities as may be prescribed in the order, and, in the event of his continued refusal so to do, the owner shall be discharged during the continuance of such refusal from any liability which he would otherwise incur by reason of his failure to comply with the requisition. In the case before us, the Plaintiffs invoked the aid of sec 622 and yet three tenants, Salemah Bibi, Jabanulla Serang and Solaman Molla refused to comply with the order. The Subordinate Judge has, however found that although these three tenants refused to afford facilities to the Plaintiffs and thus rendered it impracticable for them to carry out completely all the improvements required by the General Committee, the Plaintiffs could have carried out some at least of the improvements. But the Plaintiffs have not done anything at all to comply with the requisition. In such circumstances, sec 622, sub-sec (3) is of no assistance to the Plaintiffs. It would be unreasonable to construe that provision in the sense that an owner, who has not complied with the requisition at all, is discharged from liability, merely because the occupier of a portion of the land has rendered compliance impracticable only in part. Upon a fair interpretation of sec 622 we must hold that the owner is discharged from liability only to the extent that compliance is rendered impossible by the conduct of the occupier.

The Plaintiffs have next urged that the notice under sec. 408 was waived by the Corporation, when it was decided to take action under sec. 409 and to have the improvements carried out by the General

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Committee at the cost of the owner. We are of opinion that there is no solid foundation for this contention. Non-compliance with a requisition under sec. 408 imposes a liability on the owner. If the requisite improvements are carried out by the General Committee under sec. 409, the default on the part of the owner vanishes; but till the work has been completed, the default remains, entire or partial, and the liability of the owner to be prosecuted still continues in operation. This view is not opposed to the decision in *Emperor v. Nader Shah* (2). There it was ruled that if after service of notice, negotiations ensue, which are tantamount to a request by the defaulter and a consent by the Commissioner to reconsider the matter, such negotiations operate as a waiver of the notice. This does not justify the inference that if the General Committee decides to take recourse to sec. 409 the owner is forthwith absolved from the liability he has already incurred by reason of his failure to comply with the requisition under sec. 408. In the case before us, a drain was constructed departmentally as a temporary measure during the period of continued default on the part of the Plaintiffs. No doubt half of the costs of construction was realised from them, but this did not extinguish their liability on account of failure to carry out such of the improvements as could have been effected notwithstanding the obstructive attitude of three of their tenants. We are of opinion that sec. 409 is of as little avail to the Plaintiffs as sec. 622.

There has been much discussion at the Bar as to whether a Court of Equity has jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by a statute for breach of its enactments.

(2) I. L. R. 29 Bom. 35 (1904).

An authority for an affirmative answer has been traced to the decision of Lord Hardwicke in *Mayor of York v. Pillme*.

(3), though a contrary view had been indicated by Holt, C. J., in *Holderstaffe v. Saunders* (1), see also the decision of Lord Hardwicke in *Montague v. Dudman* (5). But the tendency of modern decisions is that even if the Court has such jurisdiction, it will not interfere as a general rule [*Saull v. Browne* (6), *Kerr v. Preston Corporation* (7), *Hedley v. Bates* (8), *Stannard v. Vestry of Saint Giles* (9), *In re Briton Medical, etc. Association* (10), *Grand Junction Waterworks Co. v. Hampton Urban Council* (11), *Deconport Corporation v. Tozer* (12) and *Merrick v. Liverpool Corporation* (13)]. The principle deducible from the decisions is that though the extreme position cannot be maintained that there is absolutely jurisdiction in the Court to restrain proceedings before a Magistrate, the Court will not interfere unless in very special circumstances by way of injunction or declaration of right where the Legislature has pointed out a mode of procedure before a Magistrate, see also *Emperor of Austria v. Day* (14). A similar view had been adopted in the Courts of United States, and relief has been frequently denied on the ground that the proceedings were for the enforcement of a criminal or quasi-criminal nature and that equity declines

(3), [1742] 2 Atk. 302

(4) 6 Modern 12

(5) [1751] 2 Bos. (son) 396

(6) L. R. 10 Ch. 81, 44 L. J. Ch. 1.

(7) 6 Ch. Div. 463 (1876)

(8) 13 Ch. Div. 498 (1880).

(9) 20 Ch. Div. 190 (1882)

(10) 32 Ch. Div. 503 (1886).

(11) [1898] 2 Ch. 341.

(12) [1902] 2 Ch. 195

(13) [1910] 2 Ch. 449.

(14) 3 DeG. F. & J. 217 (253), 130 E. R. 101

(121) (1861).

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to interfere with the administration of the criminal laws. It has been maintained, however, that a Court of Equity may in a proper case interfere by injunction to restrain an act or proceeding, criminal or quasi-criminal in form, which tends to the impairment of property rights, and proceedings for the enforcement of Municipal ordinances, such as the one before us, have been treated as quasi-criminal (*Pomeroy on Equity Jurisprudence*, sec 1777). We need not pursue this point further, but it should not be overlooked that the judicial decisions on the subject in other jurisdictions were largely rendered necessary by the system of classification of Courts prevalent there. Apart from this we have the well-settled rule that it is not the practice of the Court to interfere with corporate bodies, unless they are manifestly abusing the powers, *Duke of Bedford v. Dawson* (15) and *Ahmedabad Municipality v. Manilal Udenath* (16). It is consequently unnecessary to consider the terms of sec. 56 (c) of the Specific Relief Act, which provides that an injunction cannot be granted to stay proceedings in any criminal matter, and, which, it has been suggested, should be construed to imply that there is no bar to enjoining contemptuous prosecutions where proceedings are only threatened and are not yet pending. Nor need we adopt the extreme view that an injunction should not be granted to prevent the institution of criminal proceedings for non-compliance with requisitions of Municipal authorities, merely because the person concerned, when prosecuted for an alleged default, may be acquitted on proof that the action of the Corporation was *ultra vires*. On the facts established in the

case before us, we are clearly of opinion that an injunction should not be granted.

The result is that this appeal must be allowed and the suit dismissed with costs in both Courts. The hearing-fee in this Court is assessed at five gold mohurs.

J. N. R.

Appeal allowed

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL ORDER

No. 9 of 1921

WITH

RULES NOS. 49 AND 140 OF 1921.

AND

No. 598M OF 1922.

HEMANGINI DASI and

ors., Appellants,

v.

BHAGWATI SUNDARI

DASI and ors.,

Respondents

C. C. GHOSE, J.

PANTON, J.

1923,

8, February.

Compromise, not consented to by guardian ad litem, if may be approved by Court—Mere expressions of opinion, no bar to Judge passing a different order finally.

Although the Court can and must approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of their next friend or guardian ad litem.

RE BIRCHALL. WILSON v BIRCHALL (1) followed.

Until a final order is definitely passed in any matter, the Judge is free to change an opinion previously expressed by him.

This was an appeal against the order of Babu R. K. Mitra, Officiating Subordinate Judge of Zillah Rajshahye, dated the 15th of December 1920.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chuckerbutty and Jatindra M. Chuckerbutty for the Appellants, Petitioners.

(1) 16 Ch. D. 41 (1880).

(15) L. R. 20 Eq. 358 (1875).

(16) I. L. R. 19 Bom. 212; A. C. I. L. B. 20 Bom. 126 (1894).

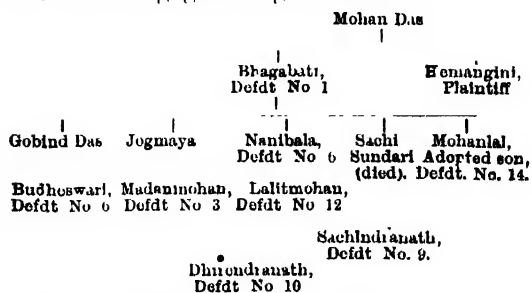
HEMANGINI DAS *v* BHAGWATI SUNDARI DAS.

Babus Mahendranath Roy and Phanindra Lal Moitra for the Respondents, Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The facts which have given rise to this appeal and to the connected rules, shortly stated, are as follows.—One Monmohan Das, who was possessed of considerable properties, both moveable and immoveable, died on the 2nd March 1908 leaving him surviving his two widows Hemangini Das and Bhagwati Sundari Das and a son, alleged to be of unsound mind, named Gobind Chand Das by the said Srimati Bhagwati Sundari Das, a deceased daughter's son and two unmarried daughters named Nanibala and Khudibala by the said Bhagwati Sundari and Hemangini respectively. The said Khudibala died unmarried some time in 1320 B. S. Gobind Chand Das died on the 10th April 1908 without any issue leaving him surviving his widow Srimati Budheswari Das. Monmohan Das left a Will by which he appointed six executors and the Will directed that in the event of there being difference of opinion between the executors in respect of any matter relating to the estate of the testator, the opinion of the majority should prevail. Application having been made by the said six executors for probate of the said Will, the said two widows intervened and applied to be appointed as executrices on the ground that they had been appointed impliedly so under the said Will. On the 18th January 1909, probate of the said Will was granted by the District Judge of Rajshahi to the said six executors and to the said two widows. Some time in 1912-13 two out of the said six executors died and thereafter the estate was administered by the surviving executors and

by the two widows. In 1319 Nanibala was married to one Lalitmohan Poddar and a dispute subsequently arose between the two widows regarding the adoption of a boy named Shyamapada Das as a son to the testator. This dispute was composed some time in Asar 1325 when it was settled between the parties that the accumulations of the income of the estate amounting to Rs. 77,000 should be divided between the two widows, Nanibala and the grandson (Sachindria) of the testator in certain proportions and that Hemangini Das should execute an *ekrar* in favour of her co-widow acknowledging the validity of the adoption by her of the said Shyamapada Das. In Kartick 1325 the adopted son Shyamapada Das died. In 1919 Hemangini Das who had not been paid her portion of the said accumulations instituted a suit, being suit No. 361 of 1919, for construction of the said Will and for administration of the estate of the said testator. The Defendants in that suit were no less than 14 in number, i.e., the four surviving original executors and certain other parties, the relationship between whom appears from the following genealogical table :—



On the 16th September 1920, the Plaintiff Hemangini filed a petition praying that the suit may be disposed of in accordance with certain terms of compromise arrived at between her of the one part and three of the executors, namely, Defendants Nos. 2, 4 and 5 of the other part.

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One of the terms of the said compromise was that a sum of Rs. 24,500 should be paid out of the estate of the said testator to Hemangini in accordance with terms of settlement of Asar 1325. Along with this petition of compromise, an affidavit by one Rakhal Chandra Das was filed in which it was pointed out that although the proposed compromise was beneficial to the infant Defendant No. 14, the Defendant No. 1 as the guardian *ad litem* of the said infant had refused to give her consent to the said settlement and that in the circumstances it was necessary that Defendant No. 1 should be removed and another person, namely, one Girish Chunder Das, the natural father of the infant, should be appointed guardian *ad litem* in place of the Defendant No. 1. Sreemati Bhagwati Das. The Defendant No. 11, it may be noted here, was adopted as a son by Sreemati Bhagwati after the death of Shyamapada Das who has been referred to above. On the 18th September 1920, the said Girish Chunder Das filed a petition praying that he may be appointed guardian *ad litem* of the minor Defendant No. 14 in place of Sreemati Bhagwati. By the terms of the proposed compromise the junior widow, i.e., the Plaintiff relinquished all claims to the estate of the said testator and admitted the validity of the second adoption recognising the minor adopted son of the senior widow, namely, the Defendant No. 14, as the sole heir to the said estate; but these admissions and the withdrawal were made conditional on the payment to the Plaintiff of the said sum of Rs. 24,500. The applications referred to above were vigorously contested by the other widow Sreemati Bhagwati and the dissenting executor Madanmohan Das before the Sub-Judge before whom the administration suit was pending; but meanwhile a sepa-

rate application had been brought on by the Plaintiff before the District Judge for permission to compromise the said suit in terms of the draft petition of the compromise filed before the Sub-Judge and for sanction to the payment of Rs. 24,500 out of the said estate to the Plaintiff. The District Judge called for a report from the Sub-Judge. The latter reported on the 7th October 1920 that the petition of compromise should be approved of by the Court, but in disposing of the application filed by the Plaintiff he recorded the following order on the 7th October 1920 in the order-sheet of the said suit No. 361 of 1919:—"An application has been made before the District Judge for permission to compromise this suit according to the draft *solenama* filed before me and for sanction for the payment of Rs. 24,500 to the Plaintiff. The District Judge has called for my report which will be submitted to-morrow. It is not desirable and proper that final orders should be passed by this Court in the matter until the application pending before the District Judge is disposed of. It is necessary that the matter should be reconsidered in the light of the order passed by the District Judge. Plaintiff is directed to file a certified copy of the District Judge's order. Put up on the 29th November 1920 for further hearing."

It appears that the learned District Judge after perusing the report of the learned Sub-Judge expressed himself in the following manner on the 8th October 1920 against the acceptance of the compromise:—"Circumspection is very necessary owing to the charges of mal-administration urged by the junior widow herself as Plaintiff. I also do not feel safe in expressing approval of the terms, the payment of Rs. 24,500 for which a somewhat dictatorial demand is made is such that

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it looks as if this were the *raison d'être* of the *solenama*. The questionably advisable payment of Rs. 24,500 will not save the estate from litigation and the safest course is to seek for a surer basis in the determination of the administration suit in regular course." Thereafter a fresh application to compromise the suit on the terms which had already been mentioned to the Court was filed before the learned Sub-Judge on the 4th December 1920, on behalf of the Plaintiff and Defendants Nos. 2, 4 and 5 containing, among others, the following prayer "That an order may be passed that the Defendant No. 1 may be removed from the guardianship of the minor Defendant No. 14 in connection with this suit for the reason of his offering opposition to the amicable settlement against the interest of the said minor Defendant No. 14 and that the aforementioned Girish Chunder Das, the natural father of the minor Defendant No. 14 may be appointed his guardian *ad litem*."

On the 15th December 1920, the Sub-Judge by his order of that date held that there were not sufficient grounds for the removal of Defendant No. 1 and for the appointment of Girish Chunder Das as guardian *ad litem* of Defendant No. 14 in place of Defendant No. 1. He further held that inasmuch as a second suit for administration of the said estate had already been commenced by the Defendant No. 1 on behalf of herself and as next friend of her adopted son and by the dissenting executor, the proposed compromise, even if given effect to, would not end the litigation relating to the estate and he accordingly dismissed the Plaintiff's application. Against this last mentioned order, the present appeal from original order has been preferred by the Plaintiff and the Defendants Nos. 2, 4 and 5. The

Civil Rule No. 49 of 1921 is directed against the order of the District Judge, dated the 9th October 1920, refusing permission to make over War Bonds of the value of Rs. 15,000 to the Plaintiff in part satisfaction of her claim for Rs. 24,000. The Civil Rule No. 140 of 1921 which was obtained by the Defendant No. 10, who is the husband of the said Nanibala, is directed against Order No. 178 in the order-sheet, dated the 15th December 1920 by which the names of the Defendants Nos. 10 and 12 were expunged from the record of suit No. 361 of 1919. Lastly, the Civil Rule No. 593M of 1922 was obtained by the Defendant No. 1 Sreemati Bhagwati Dasi calling upon the Plaintiff and the said Defendants Nos. 2, 4 and 5 to show cause why a Receiver should not be appointed of the estate of the said testator pending the hearing of the said appeal from Original Order No. 9 of 1921.

On behalf of the Plaintiff and the Defendants Nos. 2, 4 and 5 who are the Appellants before us, it has been contended in the first place that the findings of the Court below are inconsistent with its own findings contained in the report submitted to the District Judge on the 7th October 1920, and in the second place the Court below ought to have held on the facts on the record that the Defendant No. 1 was acting fraudulently in opposing the said compromise and accordingly the Court below should have removed the Defendant No. 1 from the guardianship of the infant Defendant and should have appointed Girish Chunder Das or some other person as guardian *ad litem* of the infant Defendant in place of the Defendant No. 1.

As regards the first contention we do not think that the learned Sub-Judge was precluded from reconsidering the matter by reason of what he had said in his re-

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port to the learned District Judge on the 7th October 1920. There may perhaps be room for criticism as regards the terms of the order made by the District Judge on the 8th October 1920; but it must be remembered that that order was invited by the applicants themselves on their application made to the District Judge. There may also perhaps be room for criticism of the terms in which the order of the 7th October 1920 was expressed by the learned Sub-Judge; but after all said and done, what was there on the record which tied down the learned Sub-Judge to the opinion which he had expressed in his report to the learned District Judge? It was no doubt irritating to the Appellants when they found that in his final order, dated the 15th December 1920, the learned Sub-Judge had expressed an opinion contrary to that contained in his report to the learned District Judge, but, in law and on the facts of this case, the learned Sub-Judge was free to change his opinion as often as he liked until he had definitely made a final order, which, as will be seen from the above, was not made till the 15th December 1920. There is therefore no substance in the Appellants' first contention and it accordingly fails.

As regards the second contention, it is settled law that although the Court can and must approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of their next friend or guardian *ad litem* in the action. In the case of *Re: Birchall: Wilson v. Birchall* (1) (where Jessel, M. R., stated the practice adopted by himself and his predecessor Lord Romilly, M. R.) it was definitely ruled that no compromise can be enforced upon infants against the opinion of their guardian or next friend. No doubt if the Court

(1) 16 Ch. D. 41 (1880).

found that a guardian or next friend was acting improperly and against the infant's interests in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person. These being the principles to be borne in mind, can it be said in this case that the action of the learned Sub-Judge in refusing to remove the Defendant No. 1 and in refusing to appoint Girish Chunder Das in place of the Defendant No. 1 is unsustainable? We have anxiously considered the whole of the record and we have come to the conclusion that it is impossible for us to say at this stage of the litigation that the terms of the proposed compromise are so entirely for the benefit of the minor that no further enquiry should be made into the validity of the Plaintiff's claim for Rs. 24,500 and that she should straightway get a decree for Rs. 24,500 to be paid out of the estate of the testator. Further, as has been pointed out by the lower Court, this compromise, even if given effect to, will not end the litigation relating to the estate of the said testator, for important questions of construction of the Will of the said testator have been raised and whether in this suit or in the suit started by the Defendant No. 1 they will have to be determined by the Court. It is said, however, that the second suit for administration at the instance of the Defendant No. 1 is a *malâ fide* suit and has been instituted only with a view to prevent the compromise referred to above being sanctioned by the Court. It is sufficient for us to observe that allegation is not proof and that on the materials on the record at this stage it is difficult to express an opinion on the merits of this accusation. We have not seen the Will of the testator nor have we heard any argument before us as regards

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the rights of the various parties in this case in and to the estate of the said testator: the matters alleged by the Plaintiff in paras. 9 to 13 of her plaint clearly call for investigation: we have no materials before us which enable us to say that an enquiry into these matters should be burked and the disputes adjusted in the manner proposed by the Plaintiff. For these reasons in our opinion the second contention is equally untenable. The Appeal from Original Order No. 9 must therefore be dismissed. With it must also fail Civil Rule No. 49 of 1921. As regards Civil Rule No. 593M of 1922, no orders are now necessary. As regards Civil Rule No. 140 of 1921 the order complained of was one under Or. 1, r. 10, C. P. C. and in our opinion it does not come within the purview of sec. 115, C. P. C. The result therefore is that Appeal from Original Order is dismissed with costs which we assess at 5 gold mohurs. There will be no order for costs as regards Civil Rule No. 49 of 1921 and Civil Rule No. 593M of 1922. The Civil Rule No. 140 of 1921 is discharged with costs which we assess at 2 gold mohurs.

S. C. C.

PRIVY COUNCIL.

[APPEAL FROM BENGAL]

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

LORD SALVESEN.

1922,

Heard, 10 and

13, November.

Judgment, 8, December.

BAIKUNTHA NATH

CHATTORAJ,

Appellant,

v.

PRASANNAMOYI

DEBYA and anr.,

Respondents.

Will—Proof—Evidence Act (I of 1872), sec. 154—Witness, cross-examined though not considered by Judge and declared hostile—Credibility of witnesses, matter for trial Court—Proper judgment when rejecting a probate petition.

Where the Judge allowed a witness to be virtually cross-examined by the party who called him, though he did not in fact think he had turned hostile

Held—That there were no grounds for adverse comments on the Judge's conduct of the trial, passed by the High Court, to the effect that the cross-examination of the witness was improperly disallowed.

Sec. 154 of the Evidence Act says nothing as to declaring a witness hostile but provides that the Court may in its discretion permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party

The decision of the High Court reversing on facts the finding of the Subordinate Judge that the Will propounded was not genuine and a forgery was overruled, this being held to be eminently a case where the value of the proof depended upon an appreciation by the trial Judge of the credibility of witnesses

Held, however—That the Subordinate Judge had gone beyond what the law requires in holding that the Will was a forgery. The burden of proving a Will is on the person who sets it up and it was enough for the purpose of the case to find that the alleged Will was not proved.

These are two consolidated appeals against a judgment and two decrees, dated the 14th April 1921, of the High Court of Bengal, reversing a judgment and two decrees, dated the 20th February 1920, of the Court of the District Judge of Bankura.

The question for determination is the validity or otherwise of a Will propounded by the 1st Respondent Prasannamoyi Debya.

The Appellant who contended that the Will was a forgery applied for letters of

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administration to the estate of one Mandakini, his brother's widow. The Respondent Prasanna who was sister and sister-in-law of Mandakini applied for probate of Mandakini's Will.

The two applications were tried together by the District Judge who held that the Will was a forgery and directed a grant of letters of administration to be issued to the present Appellant. On appeal the High Court (Sir A. Mookerjee and Buckland, JJ.) reversed this decision and granted probate of the Will.

From the decrees of the High Court the Appellant appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant.

Sir George Lowndes, K. C. and Mr. J. M. Parikh for the Respondents.

The arguments were wholly directed to the evidence.

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS—These are consolidated appeals from two decrees of the High Court of Judicature in Bengal, dated the 14th April 1921, reversing two decrees of the Court of the District Judge of Bankura, dated the 20th February 1920.

Madhusudan Chatteraj, a Hindu governed by the Dayabhaga School of Hindu law, died leaving four sons, Radha Ballav, Brahmananda, Raj Ballav, and the present Appellant Baikuntha Nath.

Brahmananda died in 1913 leaving all his property by Will to his widow, Mandakini Debi.

Mandakini died on the 16th September 1918, and her sister Prasannamoyi Debya, the widow of Raj Ballav, and the Respondent in these appeals, propounded in this litigation a paper writing dated the 14th

September 1918, as the last Will of Mandakini.

She is opposed by Baikuntha Nath, her husband's younger brother, and by Ashutosh Chatteraj, Radha Ballav's son. The interest of the objectors is not in dispute.

The District Judge pronounced against the Will and granted letters of administration to Baikuntha Nath. The High Court, reversing this decision, ordered and decreed that probate of the Will should issue to Prasannamoyi, and that the application for letters of administration made by Baikuntha Nath be dismissed.

The outline of the story as to the preparation and execution of the alleged Will as presented on behalf of the proponent is briefly as follows:—On the 13th of September Natabar Mukerji, it is said, chanced to call on Mandakini, whom he describes as his Dharam mother, and found her suffering from fever. He was told by the night of that day that she intended to execute a Will, and that he should stay there to manage its execution. On the 14th at 2 P.M., he was asked to arrange for the execution of the Will, and on his protesting that he had no experience in Will drafting, he was given a draft that had been prepared for Mandakini by a pleader named Upendra Nath. A pleader named Babu Bhut Nath Mandal was then called in; he examined the draft, and dictated the document now propounded to Natabar, who wrote it out.

At 4 or 4-30 in the same afternoon it was read over and explained to Mandakini, but as she was illiterate Natabar signed her name for her. The paper writing was signed by seven attesting witnesses, Bhut Nath Mandal, Kandarpa Behari Ghose, Raj Narayan Biswas, Trailokhya Nath Karak, Nagendra Nath Ghose, Surendra Nath Mandal, and Gosta

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Behari Mandal. It was then taken to Prasannamoyi, who was in an adjoining hut, but as she too was suffering from fever, it was taken back to Mandakini, who, helped by Natabar, took the Will to another hut and placed it in an iron safe together with the draft. Natabar stayed at the *bari* that night and then left. Mandakini died on the 16th of September.

This is the proponent's version of what happened. The objectors contest its truth.

In proof of the execution the proponent has called Natabar, the writer, and four of the seven attesting witnesses. On Surendra Nath Mandal no reliance has been placed by either Court, and his evidence need not be considered.

Nagendra Nath Ghose does not support the proponent's case for in his examination-in-chief he declared that he did not know whether Mandakini executed any Will, and that it was to a blank paper that he put his signature at the request of Ram Lal Gossain.

An application was therefore made to the District Judge to declare the witness hostile and to allow the proponent to cross-examine him.

This is a position for which provision is made by sec. 151 of the Evidence Act, which says nothing as to declaring a witness hostile but provides that the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

One of the Appeal Court's adverse comments on the trial Judge's conduct of the case is that the cross-examination of this witness was improperly disallowed. No such objection was made in the grounds of appeal to the High Court, and it would seem as though this comment must have

been made without the Court's attention being drawn to that portion of the order-sheet in which the District Judge remarks, as the record of the deposition indicates, that the witness was virtually cross-examined, though the Judge in fact did not think he had turned hostile.

On this part of the case therefore it only remains to consider the evidence of the writer, Natabar Mukerji, and the two attesting witnesses Bhut Nath Mandal and Trailokhya Karak.

In a sense Natabar is the most important figure. The part he is said to have taken has already been indicated.

Though his home was in the neighbourhood of Kundu Pushkarni where Mandakini's *bari* was, he was actually employed at the date of the alleged execution at the Nakarka colliery 300 or 400 miles distant. His story is that in September 1918, hearing of his wife's illness, he returned to his home, which is 6 miles from Mandakini's *bari*, having taken seven days' leave for that purpose. He went on the 13th of September to see Mandakini reaching her *bari* about noon. On the 14th there was the preparation and execution of the Will, which has already been sufficiently described for the present purpose. If this be accepted, as it was by the High Court, as a true story, there would be no difficulty in holding the Will proved. But the District Judge before whom the witness was examined, did not believe Natabar's testimony. In arriving at this conclusion he was to a considerable extent influenced by the letter and post-card, Exs. A and A1. Though it possibly is not a matter of any great importance, it would seem probable, from such post-marks as are available, that the post-card, contrary to what has been supposed, was later than the letter.

The District Judge regarded the letter

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as showing in the light of the facts to which he refers that Natabar was not in Kundu Pushkarni on the date the alleged Will is said to have been executed. The High Court did not share this view, and evidently was greatly influenced by the idea that Natabar was never called upon to explain the contents of the communication. The same contention has been urged on this appeal, but it is founded on a misapprehension.

The letter was not sprung on the proponent as a surprise at the trial. In the previous arbitration proceedings the letter and post-card were produced evidently as relevant to the issue whether the Will set up by Prasannamoyi was a genuine and valid document, and for the purpose of raising a suspicion in the minds of the arbitrators, as indeed would seem to have been its effect (see the deposition of Harish Chandra Sarkar).

When then the letter and post-card were shown to Natabar the purpose must have been well understood, and from the record of his deposition it is manifest that after being shown the letter he was directly asked whether it was not a fact that he was not at Mandakini's *bari* on the alleged date of execution.

On re-examination no attempt was made to elicit any explanation, and the learned Judge delivered his judgment in eight days, when the incident and the impression it created must still have been fresh in his mind. In their Lordships' opinion the materials on the record when carefully examined do not support the High Court's criticism.

But it is not by these exhibits alone that the District Judge was influenced. Natabar, though alleged to have been in constant attendance at Mandakini's *bari* from noon of the 13th to the night of the 14th, was not seen by the doctor, Sham

Charan Barat, who was the lady's medical attendant throughout her illness and saw his patient every day. And not only did he not see Natabar, but he deposes that he did not hear of any Will by Mandakini during the time he treated her. There are other witnesses to the same effect to whom allusion will be made later.

Bhut Nath Mandal is not only an attesting witness, but is said to have dictated the Will using for that purpose the draft Ex. 2. Though he is a pleader of the Burdwan Court, his persistent attempt to evade his obligation to give evidence does not inspire confidence in him as a witness. The District Judge was unable to believe him—he certainly was in the best position to judge of his credibility, and no sufficient reason has been shown for disturbing his appreciation of this witness's testimony.

Trailokhya Karak is a junior servant of Prasannamoyi on the small pay of Rs. 48 a year.

He deposes to the due execution of the paper writing, but the Trial Judge did not think him a witness on whose testimony its genuineness could be supported. And it is significant that while Trailokhya is called, his senior and superior in service, Raj Narayan Biswas, the chief gomasta, though an attesting witness, was not cited.

Prasanna was examined on commission. She does not depose to the actual execution of the paper writing, and her evidence does not materially strengthen her case.

This will be an appropriate place at which to allude to the evidence of Upendra Nath Das. He is not a witness to the execution of the Will, but he deposes, and no doubt truly, to having prepared the draft Ex. 2. The Courts in India have in their Lordships' view attached

BAIKUNTHA NATH CHATTORAJ v. PRASANNA MOYI DEBIA.

more importance and significance to this document than it deserves. There can be no doubt that the alleged Will was based on it, and with such modifications as were necessary for the purpose in hand was in effect a reproduction of it. It might have been of distinct value if the issue had been whether Mandakini had understood an instrument admitted or proved to have been executed by her, or if her mental capacity had been questioned. But that is not the issue here; the only matter in contest is the fact of execution by or on behalf of Mandakini. Upendra's statement that he cannot give the month or year of the draft, and that he cannot be positive if the draft was before or after the 16th September, which is the date of Mandakini's death, may in view of his intimate connection with the litigation invite a certain amount of comment, but their Lordships find nothing on the record that would justify any imputation that this pleader of 20 years' standing was party to any conspiracy or knowingly prepared the draft to further any sinister purpose. But at the same time their Lordships consider that his evidence has little or no bearing on the question whether or not the alleged Will was in fact executed.

From this survey of the evidence it is apparent that this is eminently a case where the value of the proof depends upon an appreciation by the trial Judge of the credibility of the witnesses.

In their Lordships' opinion there is no sufficient reason shown for disturbing that appreciation, and in so saying they do not overlook what has been urged as to the propriety of the dispositions in view of the close relationship and intimacy between Mandakini and Prasanna-moyi.

But the proponent's difficulties do not

end with the infirmity of her direct evidence as to execution. There are other factors in the case which call for especial caution in approaching the proponent's story. The document was not actually signed by Mandakini, and so there is not the assurance of genuineness that would have been afforded by the presence on it of her recognised signature. Then again the absence of Mandakini's relations and connections invites comment, as does Prasanna-moyi's conduct and her delay in putting forward the Will after Mandakini's death.

In contradiction of the story of execution, several witnesses have been called who declare that, notwithstanding the opportunities of observation they possessed, Natabar was not seen by them at Mandakini's *bari* and no Will was mentioned. Another witness, Kalipada Roy, described as a doctor, deposed that he was asked by Kandarpa Ghose and Ram Lal Gossain to become a witness to a Will alleged to have been executed by Mandakini and further to say that he "had attended Mandakini during her last illness and that she executed a Will in presence of such and such persons." This, he says, was after the death of Mandakini. The District Judge did not disbelieve him.

The High Court regarded this witness as "obviously unreliable," apparently under the impression that his evidence was that he had been asked to be an *attesting* witness to a Will then in the safe. But that is not the sense in which their Lordships read his evidence, for the expression used by him points to a request to be a witness to the Will at the trial, and this involves no such impossibility as the learned Judges ascribe to his words.

Ananta Lal Ghose's evidence may merit the doubt thrown on it by the High Court. No great reliance was placed on it by

BAIKUNTHA NATH CHATTERJEE & PRASANNA MOYI DEBYA.

the District Judge nor will their Lordships treat it as of any value. It, however, calls for this remark that it does not in their Lordships' opinion justify the charge founded on it in the argument before this Board that there was a conspiracy on the part of the objectors to procure false evidence in order to defeat the Will. No such suggestion was made in the grounds of appeal to the High Court, or even in the Appellate judgment or the case for the Appellant on these appeals. It was first advanced in the argument before the Board, and in their Lordships' opinion has no adequate foundation.

It may be that when the proponent's case was closed the precise character of the adverse evidence in disparagement of the alleged Will was not anticipated, but the strength of the opposition must have been sufficiently apparent to show the urgent necessity for calling all available evidence. And yet Raj Narayan Biswas and Kandarpa Behari Ghose, two of the attesting witnesses, were not called, nor was Ram Lal Gossain, to whom Nagendra Nath Ghose refers, though he seems to have been assisting in the conduct of Prasannamoyi's litigation.

The conclusion at which the District Judge arrived after a careful consideration of the evidence and all the circumstances of the case was that the Will was not a genuine document, but a forgery. In so finding he went beyond what the law requires. The burden of proving a Will is on the person who sets it up, and it would have been enough for the purpose of this case to find, as their Lordships hold to be the case, that the alleged Will was not proved. Their Lordships will therefore, humbly advise His Majesty that these appeals be allowed, the decrees of the High Court set aside, and those of the District Judge restored with costs

throughout. The Respondent Prasannamoyi must pay the Appellant's costs of these appeals.

Solicitors Messrs. Watkins & Hunter for the Appellant.

Solicitor Mr. Edward Dalgado for the Respondents

G D M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

LORD BUCKMASTER

LORD PHILLIMORE.

SIR JOHN EDGE.

LORD SALVESBURY.

1922,

Heard, 3, November.

Judgment,

28, November.

KISHAN NARAIN,
Appellant,

v.

PALA MAL and
ors., Respondents.

Civil Procedure Code (Act V of 1908), Or. 2, r. 2.—Mortgage, stipulation in mortgage that on failure to pay interest, mortgagee may sue for both principal and interest.—Suit to realise interest only by sale of property, decreed personally. Suit for principal, if lies.—Cause of action, splitting up.

Where a mortgage provides for an independent obligation to pay the principal and the interest, a suit to obtain a personal judgment in respect of the interest alone will not, under Or. 2, r. 2 of the Civil Procedure Code, bar a subsequent suit for the payment of the principal, as in such a case the cause of action would be distinct.

But where under the terms of the mortgage, non-payment of the interest causes the principal money also to become due, the same cause of action, namely, non-payment of the interest, gives rise to two forms of relief, viz., for principal and interest, which cannot be split up under the Code.

* Where therefore, according to a stipulation in the mortgage, both prin-

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principal and interest became payable upon default by the mortgagor to pay interest, and the mortgagee sued to realise the interest alone by sale of the mortgaged property:

Held—That though in that suit only a personal decree was passed in the mortgagee's favour, a second suit to realise the principal money by sale of the mortgaged property was barred by Or. 2, r. 2, Civil Procedure Code.

MUHAMMAD HAFIZ v. MUHAMMAD ZAKARIYA (1) referred to

This was an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 16th March 1918, affirming a judgment and decree of the District Judge of Delhi, dated the 20th February 1915

In January 1909 the Appellant obtained a decree against the Respondents for Rs. 2,390 being the amount of interest due to the Appellant under a mortgage deed, dated the 19th January 1904.

The Appellant's plaint contained the statement that Rs. 9,997 was due by way of principal under the said mortgage but "at present the Plaintiff sues only for the remaining interest according to the conditions of the mortgage deed. A suit for recovery of the principal and future interest will be brought later on"

The Appellant then obtained an order for the sale of the equity of redemption but this order was reversed on appeal, and on the 19th November 1914, he filed the suit out of which this appeal arose and claimed to recover the whole of the mortgage debt.

The District Judge dismissed the suit holding that it was barred by Or. 2, r. 2 of the Civil Procedure Code and that decision was upheld by the Chief Court.

(1) L. R. 49 I. A. 9: s. c. 26 C. W. N. 292 (1921).

Messrs. L. DeGruyther, K. C. and B. Dubé for the Appellant—In the execution proceedings the Respondents contended that Or. 34, r. 14 was applicable. The Appellant's suit was for sale of the mortgaged property and the above order states that such suit may be instituted in spite of the provisions of Or. 2, r. 2.

It is immaterial that the Transfer of Property Act has not been extended to the Punjab but the principle involved in Or. 34, r. 14 has been applied there.

There are separate causes of action in respect of (1) principal and (2) interest.

Muhammad Hafiz v. Muhammad Zakariya (1) is distinguishable. There, proceedings were taken to bring the whole property to sale in order to realise only the interest, i.e., there was an attempt to bring the property to sale once for the interest, and a second time for the principal. Here the Appellant got only a simple money decree. He had no right to bring the property to sale merely for non-payment of interest.

Reference was also made to.—*Payana Recna Sammathan Chetty v. Pana Lana Palamappa Chetty* (2).

Mr. W. Wallach for the Respondents.—The Civil Procedure Code deals with not what you get but what the prayer in the plaint asks for. At the time the suit was instituted both principal and interest were due and the Appellant prayed for the amount due "recoverable from the mortgaged property," which was tantamount to asking for a decree for the amount that could be realised on the sale of the property.

Mr. L. DeGruyther, K. C., replied.

(1) L. R. 49 I. A. 9: s. c. 26 C. W. N. 292 (1921).

(2) L. R. [1914] A. C. 618: s. c. 18 C. W. N. 617 (1913).

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Then LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—The difficulty in this case is due to the provisions of r. 2 of Or. 2 of the Code of Civil Procedure, 1908. This rule provides that every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action. But the Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. The illustration given shows that a personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as one and the same cause of action. This provision is in marked distinction to the law of this country, where a mortgagee is at liberty to appoint a Receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time. It is important, therefore, in considering the effect of the Code to bear in mind that its obvious intention is to establish a rule of law different from that accepted here.

The Appellant was a mortgagee under a mortgage executed on the 19th January 1904 by the three Respondents. It was a mortgage to secure Rs. 11,748 with interest at Rs. 8 per month, and provided that the money was to be paid in two years. The conditions of the mortgage enabled the mortgagors to redeem within the two years if they thought fit. It also contained an express promise on the part of the mortgagee to pay interest for the first year, and provided that if the interest were not paid for the first year it should be competent to the mortgagee to cancel the fixed term and to realise. Cl. 5 dealt with the conditions that would arise if the interest were paid for the first year and there was difficulty thereafter.

It is one of the critical clauses in the present dispute, and it is in the following terms :—

"5 If we pay the interest on the expiry of the first year, we shall pay the interest on the mortgage money after every three months after the expiry of the first year. If by chance we are unable to pay the interest after every three months, we shall pay it after six months, without any objection. If we do not pay the remaining interest after six months, the mortgagee will be at liberty to cancel the term of two years and to realise with costs all the principal mortgage money with interest by means of a suit from the mortgaged property and our other moveable and immoveable property and our person. If the mortgagee of his own accord wishes to maintain the term of mortgage, he will have a right to realise only the remaining interest by means of a suit from the said property and our person. We and our representatives shall have no objection and refusal."

The interest was paid up to the 4th July 1905, but no further payment being made in respect of interest, on the 17th November 1908, the mortgagee sued the mortgagors, and the first question that arises is what was the effect of that suit?

The plaint set out the mortgage, set out payment of the interest up to the 4th July 1905, and certain further payments on account of principal. It then stated that the Plaintiff only sued for the remaining interest, and that a suit for the recovery of the principal and of the future interest would be brought later on, and it asked for a decree in the following terms :—

"A decree for Rs. 2,390 8-0 interest at the above rate from Asarh Sudi 2, Sambat 1902, to Mangsar Badi 8, Sambat 1905, corresponding to the 16th November, 1903, with costs in favour of the Plaintiff against the Defendants, recoverable from the mortgaged property and the other property and persons of the Defendants."

KISHAN NARAIN v. PALA MAL.

The only question that appears to have been tried was what was the correct amount of interest; and a decree passed by the Subordinate Judge on the 27th January 1909, was a decree for Rs. 2,226-13-0, which it was stated should be charged on the mortgaged property. The mortgagee then attempted to get the equity of redemption sold, and in this he succeeded before the Subordinate Judge, but failed on appeal. He thereupon, on the 19th November 1914, instituted the proceedings out of which this appeal has arisen, asking the full mortgagee's relief in respect of the mortgaged property. The District Judge held that r. 2 of Or. 2 barred the case and dismissed the suit; this decree was supported in the Chief Court of the Punjab, and from this judgment the present appeal has been brought.

That r. 2 of Or. 2 of the Code of Civil Procedure is the relative section of the Code applicable to the dispute is not in contest. The whole question is, what does it mean? It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit brought to obtain a personal judgment in respect of the interest alone the rule would have prevented a subsequent claim for payment of the principal. In such a case the cause of action would have been distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action—the non-payment of the interest—gives rise to two forms of relief which the Code provides shall not be split. This is illustrated by the present suit. The interest was paid during the first year, and the interest in arrear was that under cl. 5. If, therefore, the plaintiff ori-

ginally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the Appellant's case would be on surer ground; but although their Lordships are anxious that claims for a just debt should not be defeated by the intricacies of legal procedure, yet they are unable to hold that the plaintiff that was originally issued by the Appellant can properly bear that interpretation. The claim is for a decree for the interest "recoverable from the mortgaged property," and the other property and persons of the Defendants. The words are not dissimilar from the words of cl. 5 of the mortgage deed, which clearly points to the interest being payable (that is by sale) out of the mortgaged property. Their Lordships are unable to give any other interpretation of the phrase "recoverable from the mortgaged property . . ." in the Appellant's plaint than a claim for realisation, and the fact that the decree he obtained was not a decree for sale but in the nature of a personal judgment, does not alter its effect, for r. 2 of Or. 2 provides that every suit shall include the whole of the claim. The suit so brought by the Plaintiff did not include it, and this consequently barred the institution of a further suit in respect thereof. Indeed, when once it be accepted that the original plaint did seek, by its prayer, for realisation, this case becomes indistinguishable from the case of *Muhammad Hafiz v. Muhammad Zakariya* (1), where a similar question arose and was determined by this Board.

There were, no doubt, good grounds of policy that caused the introduction into the Code of Civil Procedure of the provisions which, in the result of this case, will involve the Appellant in some pecu-

(1) L. R. 40 I. A. 9: s. c. 26 O. W. N 297 (1921).

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niary loss, and it is the duty of the Courts to interpret and carry into effect those rules uninfluenced by the consideration of the individual loss that may be occasioned by disobedience of the provisions.

Their Lordships think that this case was rightly decided, that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors. *Messrs. Barrow, Rogers & Nevill* for the Appellant

Solicitors. *Messrs. T. L. Wilson & Co* for the Respondents

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

No. 1764 of 1921.

VALLY MD. HAJI

PAGE, J.

GUNNY

1921,

v.

27, April.

[NEDERLAND S. NAVIGATION Co and anr.

Libration Act (IX of 1908), Sch. I, Art. 31 and Art. 115—Suit by a consignor against a common carrier for non-delivery of goods, whether governed by Art. 31 or 115.

A suit against a common carrier by the consignor for damages for non-delivery of goods sent through such carrier is governed by Art. 31 of the Indian Limitation Act, 1908, Sch. I, and not by Art. 115, the words of Art. 31 being wide enough to include suits by the consignor as well as by the consignee.

THE INDIA GENERAL NAVIGATION Co., LTD. r. NANDA LAL BANIK (5), HAJI AHAM GOOLAM HOSSEIN r. BOMBAY AND PERSIA STEAM NAVIGATION Co. (4) and MUR-SADDI LAL v. THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY Co. (2) followed.

RADHASHAM BASAK v. THE SECRETARY

(2) I. L. R. 42 All 890 (1920).

(4) I. L. R. 26 Bom. 562 (1902).

5. 13 C. W. N. 851 (1909).

OF STATE FOR INDIA IN COUNCIL (1) distinguished

The facts of the case will appear from the judgment

Messrs. N. C. Sen and P. K. Chakrabarti, Counsel for the Plaintiff

Messrs. A. A. Aveloom and B. C. Ghosh, Counsel for the Defendants

THE JUDGMENT OF THE COURT was as follows:—

PAGE, J.—This is a suit which is brought by the Plaintiff against the Defendants for damages for failure to deliver 879 baskets of hard molasses which the Defendants as common carriers had accepted for carriage, and had agreed to carry for the Plaintiff from Samrabaya in Java to be delivered to the Plaintiff at Calcutta. The goods were shipped under a bill of lading on the S. S. "Manada," and the steamship arrived in Calcutta on the 25th January 1920. Notice was given by letter by the Defendants to the Plaintiff on the 26th January 1920 that the goods were ready to be discharged. On the 26th the ship discharged certain goods on one of the quays at Calcutta. On the 27th she put out into the river, and her cargo was discharged there into lighters. The exact time which it took her to discharge the whole of her cargo is uncertain, but it was admittedly completed some considerable time before the 20th February 1920 when she left Calcutta.

The Plaintiff issued his plaint on the 7th June 1921, which is more than a year after the time by which the goods ought to have been delivered which was about the 27th to 30th January 1920. The Plaintiff framed his claim exclusively on contract being for damages for failure to deliver the goods. I refer to one or two paragraphs in the plaint:—

(1) 20 C. W. N. 790 (1918)

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"Para. 2.—In or about the month of January 1920 the Plaintiff shipped 6936 crates and 2747 baskets of hard molasses on board the Defendant Company's steamship "Manada" at Saurabaya in Java.

"Para. 3—The master of the said steamship received the said goods to be carried to Calcutta and there to be delivered to the Plaintiff. Freight for the said goods was paid by the Plaintiff.

"Para. 4—On arrival of the said steamship at Calcutta aforesaid the Defendant Company delivered to the Plaintiff 6936 crates and 1868 baskets of molasses, but did not deliver to him 879 baskets of molasses.

"Para. 5—The Plaintiff has demanded delivery of the said 879 baskets but the Defendant Company have failed and neglected to deliver the same.

"Para. 6—By reason of the Defendant Company's wrongful failure to deliver the said 879 baskets as aforesaid, the Plaintiff claims as damages from the Defendant Company a sum of Rs. 8,264-12-0 being the price of the said 879 baskets as also another sum of Rs. 1,239-9-7 as interest thereon calculated at the rate of 12 per cent per annum from the 20th February 1920 to 20th May 1921.

"Para. 8.—The Plaintiff's cause of action arose not earlier than the 31st day of January 1920 in Calcutta.

"The Plaintiff, therefore, prays for, (a) such leave as aforesaid, (b) a decree for the said sum of Rs. 9,503-9-6 with interest, and (c) for costs."

Counsel for the Plaintiff, in the course of the hearing, admitted that under the circumstances of this case the only issue which could be determined was whether or not the cause of action was barred by limitation on the ground that if that issue

was decided against him (and which should be first considered), all other issues which might be raised would become immaterial, and the time spent upon considering them would be wasted. Accordingly, a representative of the Defendants was called, and he stated in evidence the facts as to the arrival of the vessel at Calcutta, and the time during which she was discharging, and the date of her subsequent departure from Calcutta, which I have already referred to. Thereupon, the only question which it became incumbent upon me to determine was whether or not the cause of action for damages for non-delivery of the 879 baskets was barred by reason of the provisions of the Limitation Act.

The determination of that question, in my view, depends upon whether or not the cause of action comes within Art. 31 of the first schedule to the Limitation Act. The schedule reads as follows.—

"31—Against a carrier for compensation for non-delivery of or delay in delivering goods, one year from the time when the goods ought to have been delivered."

The goods ought to have been delivered sometime between the 27th January and the 20th February, and probably sometime between the 27th January and the 30th January 1920. As the plaint was filed on the 7th June 1921, more than a year later, if Art. 31 applies, the cause of action is barred by limitation. Counsel, who have strenuously argued on behalf of the Plaintiff, contended that Art. 31 did not apply for this reason that Art. 31 only applies to a claim against a carrier which is made by the consignee of the goods for non-delivery of the goods to him. In support of his contention he cited the case of *Radhasham Basak v. The Secretary of State for India in Coun-*

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cil (1) In that case Mr. Justice Chatterjee at page 795 stated it to be his opinion that "Art. 31 applies to suits against a carrier for compensation for non-delivery of, or delay in, delivering goods, and the time for suit is one year from the time when the goods ought to have been delivered. I think this article has no application. In the first place, this article seems to contemplate a suit by a party who is entitled to the delivery, namely, the consignee. In the second place, it would be for the Company to show when the goods ought to have been delivered, that fact being presumably within their knowledge, but there is no evidence on that point." Mr. Justice Beachcroft in giving judgment in the same case made this observation: "As regards the question of limitation, it is sufficient to say that I agree that Art. 30 does not apply, and if Art. 31 does there is no evidence when the goods ought to have been delivered." It might be contended that the decision in this case is to be supported on the ground that there was no evidence adduced as to the time when the goods ought to have been delivered. That would have been sufficient for the decision in the case. Mr. Justice Beachcroft did not affect to decide whether Art. 31 applied or not, and therefore one is left with the opinion expressed by Mr. Justice Chatterjee that Art. 31 seems to contemplate a suit by the party who is entitled to the delivery, namely, the consignee. Counsel for the Plaintiff urged that the meaning of that observation is that it applies to a suit by the consignee only. If that is the meaning which is to be attached to the words of the learned Judge, a meaning which I think is not clear, then I am bound to say with all due deference that I am unable to follow the

reasoning upon which it is based. The words of Art. 31 are wide enough to include suits brought by the consignor as well as by the consignee, and it may very well happen that the same person is both consignor and consignee. I am unable to see why any distinction should be drawn between a cause of action for compensation for non-delivery by a consignor and one by a consignee, and the view which I hold is also found in the judgment of Mr. Justice Banerjee in the case of *Mutsaddi Lal v The Bombay, Baroda and Central India Railway Co.* (2). At page 393 the learned Judge makes these observations:—

"That Art. 31 applies to a case of this kind appears from the ruling of this Court in the case of *Great Indian Peninsula Railway Co v Ganpat Rai* (3). The same view was taken by the Bombay High Court in the case of *Haji Ajam Goolam Hossein v Bombay and Persia Steam Navigation Co* (4). It has been urged that Art. 31 applies to a suit by the consignee and not, as in this case, by the consignor. This contention is, in my opinion, untenable. The article is wide enough to include a suit brought by the consignor also. It provides for a suit for compensation for non-delivery, that is, a suit by a person who by reason of non-delivery has sustained loss. There may be cases in which it is not the consignee who sustains loss but the consignor. In such cases it would be a suit by the consignor for compensation for non-delivery."

It is open to doubt whether the ruling of Mr. Justice Chatterjee was necessary for the decision in the case in which it was given, but I am at liberty to form

2. I. L. R. 42 All. 390 (1920).

3. I. L. R. 33 All. 544 (1911).

4. I. L. R. 26 Bom. 562 (1902).

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my own view of the matter having regard to the decision of the Calcutta High Court in *The India General Navigation Co., Ltd. v. Nanda Lal Banik* (5). Mr. Justice Chitty and Mr. Justice Vincent in giving judgment in this case, which was a case on all fours with the present case, expressly decided that a cause of action such as the cause of action in the present case comes within Art. 31 of the first schedule of the Limitation Act. At page 852 the learned Judges in their judgment lay down these propositions:—

“The question is whether Art. 31 or Art. 115 of second schedule of the Limitation Act applies to this case. There were decisions regarding Arts. 30 and 31 which held that these articles applied only to questions of tort and Art. 31 as originally worded applied only to a suit for compensation for delay in delivering goods. Subsequently, however, by sec 3 of Act X of 1899, Art. 31 was amended and took its present form. It has been argued for the Opposite Party that the former decisions must still be held to apply but we cannot accede to such a contention. It has frequently been said that statutes must be interpreted according to the ordinary meaning of their language and the present wording of Art. 31 clearly covers such a claim as is put forward in the Plaintiff's present suit. It is a suit for damages for failure to deliver, or non-delivery of goods. If it be so read, it is plain that Art. 31 must govern the present case and not Art. 115, which deals with the case of suits for compensation for the breach of contracts not specially provided for. It is not contended that the Defendants in this case are not carriers, or that the suit does not fall within the description in Art. 31. This view of the

(5) 18 C. W. N. 861 (1909).

article has been taken by the Bombay High Court in the case of *Haji Ajam Goolam Hossein v Bombay and Persia Steam Navigation Co.* (4). It was on a reference from the Court of Small Causes in Bombay, and with that opinion, we entirely agree. Under the circumstances, we must hold that the suit having been brought more than one year after the date when the goods should have been delivered is barred by limitation.”

I respectfully agree with that decision which is on all fours in its facts with the present case, and, in my opinion, the claim of the Plaintiff in this suit as framed comes within Art. 31, and is barred by limitation. No question has been raised in this case as to whether there was an acknowledgment of liability, and no other fact has been relied upon which could prevent the statute of limitation applying. Therefore, as the suit is framed, it discloses a cause of action which is barred by limitation, and must be dismissed.

Messrs N C Bural and Pyne, Solicitors for the Plaintiff

Messrs Leslie & Hinds, Solicitors for the Defendant

P K C

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 1480 of 1922.

SM. SHOSHI MUKHI

GREAVES, J.

DEBYA and ors.

1922,

v.

5, December.

KESHAB LALL MUKHERJEE (& the other cause).

Land Acquisition Act (I of 1894), sec. 18—Circumstances under which reference to the Improvement Tribunal not to be stayed by High Court.

The Land Acquisition Collector having directed the whole of the compensation money in respect of a certain property

(4) I. L. R. 28 Bom 562 (1902).

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to be paid to K., S. applied for a reference under sec. 18 of the Land Acquisition Act and subsequently brought a suit along with two other Plaintiffs against K on the Original Side of the High Court for the recovery of possession of the said property and other reliefs S, having applied for a stay of the reference in the Court of the Calcutta Improvement Tribunal and failed, applied on the Original Side of the High Court for revision of the Tribunal's order refusing stay or in the alternative, for an injunction restraining K from proceeding with the reference or in the alternative, for a transfer of the reference to the High Court for determination along with the suit

Held—That S, having made a reference under sec. 18 of the Land Acquisition Act, had chosen her forum and her application to the Tribunal for stay having failed, she must abide by its decision

SAIBESH CHANDRA SARKAR *c.* SIR LEJOY CHAND MAHAPATRA BHADUR (1) and BHANDI SINGH *c.* RAMADHIN ROY (2) referred to

The facts of the case will appear from the judgment.

Mr. N. Sarkar for the Plaintiffs

Sir B. C. Mitter and Mr. M. N. Basu for the Defendant

THE JUDGMENT OF THE COURT WAS AS FOLLOWS.—

GREAVES, J.—This is an application by Srimati Shoshi Mukhi Debya to restrain Keshab Lall Mukerjee from proceeding with Case No. 138 of 1922 now pending before the Calcutta Improvement Tribunal until the final determination of this suit, or in the alternative for the transfer of the case to this Court for determination with this suit or in the alternative for

revision of the order of the Tribunal of the 14th August 1922.

The facts are shortly as follows:—One Panchanon Bannerjee died on the 19th July 1878 leaving him surviving his widow, the Plaintiff Srimati Shoshi Mukhi, and three daughters. One daughter is dead and the surviving daughters are co-Plaintiffs with her in the suit. Panchanon left a Will, dated the 23rd June 1878, whereby he appointed one Kenaram Bannerjee and one Tripura Sundari Debi executor and executrix. Probate was granted to Kenaram alone on the 11th December 1901 out of the Hughli Court. By cl. 8 of the Will it was provided that any of the executors should in case of death be able to appoint by Will another executor to carry out the directions of the Will. Kenaram died on the 7th September 1921 having by his Will dated the 30th September 1905 appointed the Defendant executor of his Will and also executor and trustee of Panchanon's estate. The Defendant proved Kenaram's Will in this Court on the 21st February 1912, he has not, I understand, applied for administration *de bonis non* of Panchanon's estate. Whether this was necessary or not it is not necessary for me to decide for the purposes of this application.

Srimati Shoshi Mukhi states that in February of this year she came to learn that a scheme had been framed (I suppose by the Improvement Trust) for the acquisition of 11, Socterkin's Lane, one of the properties of the estate. On the 8th March 1922, she filed a petition before the 2nd Land Acquisition Collector stating that the Defendant had no title to the property and that upon the true construction of Panchanon's Will she was entitled to the premises and to the rents, issues and profits thereof for her life and asking

(1) 26 C. W. N. 506 (1921)

(2) 10 C. W. N. 991 (1905).

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that her name should be recorded as a person interested and that upon an award being made the matter should be referred to the Court of the Calcutta Improvement Tribunal for the determination of her rights

On the 18th April of this year the Collector made his award awarding Rs 57,500 and directing the money to be paid to the Defendant as executor and *shebait*. I should state that by cl. 5 of Panchanon's Will on the happening of certain events the property was made *debutter*.

On the 21st April Sumati Shoshi Mukhi was served with a notice, dated the 20th April 1922, from the Land Acquisition Collector stating that she had been treated as a person interested in the premises, that an award had been made and asking her to file her objections before him on or before the 25th April. She accordingly on the 25th April filed a petition asking (*inter alia*) that the matter should be referred to the Tribunal for the determination of her rights and the Collector made the following entry in the order-sheet —

"Petition filed on behalf of Sm. Shoshi Mukhi. Debya refer to the Tribunal if in order and in time."

The compensation money was deposited with the Tribunal on the 28th April and this suit was instituted on the 1st May. On the 3rd May the President of the Tribunal notes receipt of the cheque and adds "Await reference." On the 26th June a reference (No. 370) was made by the Collector.

On the 11th July the Plaintiff was given notice by the Tribunal to file her written statement on the reference. On the 3rd August the Plaintiff petitioned the Tribunal to stay the reference. On the 14th August the Tribunal refused to stay the reference as it was made prior to the suit

and the 11th September was fixed for settlement of issues.

I am asked to stay the proceedings before the Tribunal on the ground that the daughters are parties to the suit and not to the reference and that they will not be bound thereby and that accordingly there might be conflicting decisions of the Tribunal and of this Court. It is further said that the Tribunal was wrong in holding that the reference was prior to the suit and it is urged that the suit is more comprehensive and that the Tribunal's proceedings will be useless as they will not operate between the parties as *res judicata*.

As against this it is said on behalf of the Defendant

(1) That the Tribunal has exclusive jurisdiction and can alone determine the matter.

(2) That the Plaintiff by her application under sec. 18 of the Land Acquisition Act has chosen the forum and cannot now go back on this.

(3) That she has taken her chance before the Tribunal by applying for a stay and has failed and that she is bound by this decision.

(4) That she is in effect asking for a stay order on the Tribunal.

(5) That this Court has no jurisdiction to review the Tribunal's decision.

It is further said that in any case there is an appeal from the Tribunal to the High Court and ultimately to the Judicial Committee.

And reliance was placed on a recent decision of this Court in its Appellate jurisdiction, *Saibesh Chandra Sarkar v. Sri Bejoy Chand Mahatap Bahadur* (1). In that case after the compensation moneys had been apportioned by the Collector, and neither party served with notice under sec. 9 of the Land Acquisition Act had applied for a reference under

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sec. 18 of the Act, a civil suit was instituted by one of the parties served with notice to recover part of the compensation moneys awarded by the Collector, and it was held that the suit was not maintainable as the Land Acquisition Act created a special jurisdiction and provided a special remedy and that sec. 31 of the Act applied only to cases where a person was under a disability or was not served with notice before the Collector. As against this I was referred to *Bhandi Singh v. Ramadhin Roy* (2). In that case a reference under sec. 18 had been struck off for non-appearance and it was held that those who were parties to the reference could not litigate the matter anew in a Civil Court but Mookerjee, J. states at p. 998 that having regard to the 3rd proviso to sec. 31 read with sec. 18 where the dispute is as to the persons amongst whom the compensation moneys are apportionable or as to the extent of their interest, the matter could be litigated either on a reference under sec. 18 or in a Civil Court.

For the purposes of the present application it is not necessary for me to express my own opinion on the divergence of Judicial opinion which appears in the two cases cited above, for in the application before me the Plaintiff has chosen her forum by applying for a reference under sec. 18 and I think she must abide by it, and on that ground I dismiss the Plaintiff's application with costs.

Learned Counsel for the Plaintiff stated towards the conclusion of the argument that although the application was in form by the Plaintiff alone, this was an error and he asked me to treat it as if the co-Plaintiffs (the daughters) had also joined in the application. I regret that I cannot do so as I have not the facts before me

(3) 10 C. W. N. 901 (1905).

with regard to the daughters. I do not know whether or not they were served with notice under sec. 9; presumably they were not, but the Defendant has had no opportunity of dealing with this. If they were not served, presumably under sec. 31 their rights are preserved but I am not deciding this question. All that I decide is that the Plaintiff having made her election under sec. 18 and applied to the Tribunal for a stay which has been refused, cannot, even assuming that a civil suit was open to her, succeed on this application. The result may be unfortunate, as if the suit continues so far as the daughters are concerned two Tribunals may be dealing with the same question and different decisions may result, but I regret that in the view I hold on the present application I cannot help this.

Mr. I. D. Banerjee, Solicitor for the Plaintiff

Mr. J. C. Dutt, Solicitor for the Defendant

S. C. C.

ORDINARY ORIGINAL CIVIL JURISDICTION.]

GREAVES, J.

1923,

20, February.

In the goods of
GEORGE THOMAS WIL-
LIAMS, deceased.

Bengal Court Fees Amendment Act (IV of 1922), whether ultra vires—Fee at the enhanced rate for grant of letters of administration whether to be levied on portion situate in Bengal or in respect of assets outside Bengal as well

Under the provisions of sec. 80A (1) of the Government of India Act, the Local Legislature has power to make laws, and under sec. 80A (2), the Local Legislature may, subject to the limitations mentioned in cl. (3), repeal or alter as to that Province any law made before or after the commencement of the Act. The limitations imposed by cl. (3) relate inter alia to the imposition of new taxes other than

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those set out in Sch. I of the Scheduled Taxes Rules [sub-cl. (a)] and Acts set out in the schedule to the Previous Sanction Rules [sub-cl. (h)], the previous sanction of the Governor-General being required in either case.

Stamp duties, the amounts of which have been fixed by Indian Legislation, and which under Sch. I (8) of the Scheduled Taxes Rules cannot be altered by the Local Legislatures without the previous sanction of the Governor-General, mean some such duties as are imposed by the Indian Stamp Act and do not comprise court-fees imposed by the Court Fees Act, which Act being also not contained in the Schedule to the Previous Sanction Rules, Bengal (Court Fees Act Amendment) Act IV of 1922, was not ultra vires by reason of its having been enacted without the previous sanction of the Governor-General

The sum charged upon a grant of probate or of letters of administration is not a tax or duty levied upon the property upon which the probate or administration operates, but it is merely a fee levied by the Court issuing the probate or letters of administration for the work done in this connection wherever the property may be situate. And this is not any less the case because the fee is levied upon the value of the property.

Therefore court-fee on probate or letters of administration is rightly levied at the enhanced rate on the value of all the assets whether in the Province or outside.

This was a Reference under sec 5 of the Court Fees Act, 1870, for determining the amount of the fee to be paid in respect of the grant of letters of administration in the estate of George Thomas Williams, situate in the Province of Bengal as well as outside it.

The facts of the case will appear from the judgment.

The Advocate-General (Mr. S. R. Das) appeared for the Government

Mr. Richard Westmacott appeared for the Administrator-General of Bengal.

The JUDGMENT OF THE COURT was as follows —

GRAVES, J. — This is a Reference under sec. 5 of the Court Fees Act, 1870, for the purpose of determining the amount of the fee to be paid in respect of the grant of letters of administration in the above estate. Two questions are raised. The first is whether the Bengal Court Fees Amendment Act of 1922 (Act IV of 1922) is *ultra vires*. The second question is whether assuming the Act is not *ultra vires*, the fee is to be levied at the enhanced rate prescribed by the Bengal Court Fees Amendment Act of 1922 (Act IV of 1922) on the whole estate, or whether the enhanced fee is payable only on that portion thereof which is situate in Bengal, the fee in respect of the assets outside Bengal being leviable at the lower rate prescribed by the Court Fees Act of 1870 as amended by subsequent Acts of the Imperial Legislative Council.

On behalf of the Administrator-General of Bengal to whom a grant has been issued, and who has paid under protest the fee at the enhanced rate prescribed by Bengal Act IV of 1922 in respect of all the assets, it is contended — First — That the Bengal Court Fees Act of 1922 is *ultra vires*. Second — That if it is not *ultra vires* it was not competent to the Bengal Legislature to enhance the fees on assets outside Bengal.

I will deal first with the first point. Sec. 80 (A) of the Government of India Act provides by sub-sec. 1 (2) that the Local Legislature of any Province may, subject

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to the provisions of the sub-section next following, repeal or alter as to that province any law made either before or after the commencement of this Act by any authority in British India other than that Local Legislature. And sub-sec (3) provides that the Local Legislature of any Province may not without the previous sanction of the Governor-General make or take into consideration any law (a) imposing or authorising the imposition of any new tax unless the tax is a tax scheduled as exempted from this provision by rules made under this Act, or (b) altering or repealing the provisions of any law which, having been made before the commencement of the Government of India Act, 1919, by any authority in British India other than that Local Legislature, is declared by rules under this Act to be a law which cannot be repealed or altered by the Local Legislature without previous sanction.

By the rules framed in respect of sec 80A (3) (a) of the Act it is provided that the Legislative Council of a Province may, without the previous sanction of the Governor-General, make and take into consideration any law imposing, for the purposes of the Local Government, any tax included in Sch. I to these rules. Sch. I (2) includes a tax on succession and Sch. I (8) includes a stamp duty other than duties of which the amount is fixed by Indian Legislation. By the rules framed in respect of sec. 80A (3) (b), it is provided that a Local Legislature may not repeal or alter without the previous sanction of the Governor-General (1) any law made by any authority in British India before the commencement of the Indian Councils Act, 1861, (2) any law specified in the schedule to those rules or any law made by the Governor-General or Council amending a law so specified.

Now the Court Fees Act, 1870 (Act VII of 1870) under which the fee payable on a grant of letters of administration is levied, which is an Act of the Governor-General of India in Council, is not one of the Acts specified in the schedule to the rules framed in respect of sec. 80A (3) (b).

It will be convenient at this stage to consider the material provisions of that Act. Sec. 3 provides (*inter alia*) that the fees chargeable in the different High Courts under No. 11 of the 1st Schedule (which prescribes the fee payable in respect of letters of administration) are to be levied in manner hereinafter appearing, that is to say, by stamps under sec. 25.

Now, as I understand the argument for the Administrator-General on this 1st point, it is this that the fee is a stamp duty, because it is collected by stamps under the provisions of sec. 25 of the Court Fees Act, 1870, and inasmuch as that Act is an Act of the Governor-General in Council it is a duty of which the amount is fixed by Indian Legislation and that it cannot therefore be altered without the previous sanction of the Governor-General, which admittedly has not been obtained in this case.

The Advocate-General contends that the provisions of sec. 80A (3) relate only to new taxes and not to the enhancement of existing taxes and that the taxes referred to in Sch. I of the Scheduled Taxes Rules, which can be imposed without leave, all relate to new taxes and that sanction is only required for the imposition of a new tax which does not fall within the provisions of Sch. I, and not to the enhancement of an existing tax. And he contends that under the provisions of sec. 80A (3) (b), the Local Legislature can amend any Act of the Imperial Legis-

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lature except those mentioned in the Previous Sanction Rules.

I think that these contentions are correct. Under the provisions of sec. 80A (1) the Local Legislature has power to make laws for the peace and good government of the territories of the Province, and under sec. 80A (2) the Local Legislature may, subject as therein mentioned, that is to say, subject to the limitations mentioned in (3), repeal or alter as to that Province any law made before or after the commencement of the Act by any authority in British India.

The limitations imposed by (3) relate (a) to the imposition of new taxes other than those set out in Sch. I of the Scheduled Taxes Rules. Now it is quite true that duties which are collected by means of stamps are in a sense stamp duties, for instance in England, estate duty, probate duty and succession duty are stamp duties because they are so collected; but I feel very great doubt whether a court-fee becomes a stamp duty within the meaning of the Scheduled Taxes Rules, Sch. I, because it is collected by means of stamps. I think that the stamp duties referred to in Sch. I mean some such duties as are imposed by the Indian Stamp Act, see sec. 3 of that Act, and do not comprise court-fees comprised in the Court Fees Act, even although in a sense they are stamp duties as being paid by stamps. As to 3 (h) the limitations extend only to those Acts set out in the schedule to the Previous Sanction Rules, which does not as already stated contain the Court Fees Act. For these reasons in my opinion the 1st point fails and Bengal Act IV of 1922 is not *ultra vires* of the Local Legislature as no previous sanction was necessary.

I now come to the second point. On

behalf of the Administrator-General it is contended that the Bengal Court Fees (Amendment) Act, 1922 extends only to Bengal and that the Bengal Legislature cannot impose a tax on property in another Province. The real question is whether the enhancement of the court-fee payable on a grant of administration is a tax or merely a court-fee. It is said that it is a tax or duty because this has to be paid before the Court exercises any jurisdiction in the matter and because, under the provisions of sec. 1911 (2) of the Court Fees Act, notice of the application has to be given by the High Court to the revenue authority of the province and because of the provisions for valuation in secs. 19A, E and F and the provision for deducting debts in 19 (B). The Advocate-General, however, contends that it is merely a court-fee and that if a man chooses to take out probate or administration in Bengal, he must submit to the laws of the Local Legislature and that if the imposition is viewed as a court-fee and not as a duty or tax, it is quite immaterial where the property is situate. I think that the contention is correct, the sum charged upon a grant of probate or of letters of administration is not a tax or duty levied upon the property upon which the probate of administration operates, and it is not charged thereon as is estate duty in England, but it is merely a fee levied by the Court issuing the probate or letters of administration for the work done in this connection. And I do not think that this is any less the case because the fee is levied upon the value of the property.

In my opinion, therefore, the court-fee was rightly levied at the enhanced rate on the value of all the assets, whether in the Province or outside.

Mr. W. J. Simmons, Solicitor for the Administrator-General.

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Mr. G. C. Gooding (Government Solicitor) for the Secretary of State.
J. N. R.

(CIVIL APPELLATE JURISDICTION.)

**APPEALS FROM ORDERS
Nos. 305 AND 306 OF 1920.**

<p>WALMSLEY, J. B. B. GHOSE, J. 1923, 13, March.</p>	<p>JADU NATH HALDAR and ors., Appellants, v. MANINDRA NATH CHANDRA and ors., Respondents.</p>
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Provincial Insolvency Act (III of 1907), sec 3;—“Creditors,” if includes secured creditors.

A secured creditor is not a “creditor” within the contemplation of the term as used in sec. 37 of Act III of 1907, so that a purchase by a secured creditor within three months of the petition for insolvency presented by the insolvent cannot be avoided in a proceeding under sec 37 on the ground that it was effected with a view to giving the purchaser a preference over the other creditors

These were appeals from orders, dated the 12th June 1920, passed by the District Judge of Bankura (Babu Gmish Ch Sen)

The facts of the case will appear from the judgment.

Babu Narendra Coomar Bose for the Appellants

Babus Amarendra Nath Bose and Hira Lal Chakrabarty for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—These two appeals are from orders made by the District Judge in insolvency proceedings arising out of applications made for adjudication as insolvents by two persons who are brothers. The Appellants were the creditors of the two insolvents by two separate mortgage bonds. The mortgage bonds are dated

1893 and 1907 respectively. The mortgagors were the two insolvents and also two other brothers of those insolvents. It appears that one of the mortgage bonds was sued on and a decree was obtained for Rs 600. The amount alleged to have been due on the other bond from the mortgagors was Rs 1,300 odd. Taken together, about Rs. 2,000 was due for those debts in May 1917. Then all the four brothers executed a deed of conveyance with regard to some of the mortgaged properties which included a house in Sonamukhi and some *jote* lands. The deed of sale is dated the 23rd May 1917 and the properties were sold for Rs. 2,000 to the Appellants' father. Thereafter, two of the mortgagors presented petitions to the District Judge for being adjudged insolvents in July 1917 and an adjudication order was made and a Receiver was appointed of the properties of the insolvents. Then, the Receiver applied to the District Judge for avoiding the sale to the extent of the shares of the two insolvents in the properties included in the deed of sale dated the 23rd May 1917, and an order was made setting aside the sale with regard to those shares. That order, however, was set aside by this Court on appeal by the purchasers in December 1919 and both the cases were sent back for retrial. The cases were heard again and, on the 12th June 1920, the District Judge has made an order in each case avoiding the sale of the interests of the two insolvents. These appeals are preferred by the purchasers against those orders.

In these cases, the only evidence adduced was adduced by the purchasers. The sale was sought to be avoided under sec. 37 of Act III of 1907, which governs these cases, as having been in favour of creditors. The question in these cases is whether the sale was to a “creditor with

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a view of giving that creditor a preference over the other creditors." It is contended on behalf of the Appellants that there is no evidence that this was so. The answer to the question depends upon whether sec. 37 applies to these cases. The purchasers were secured creditors and they were entitled to be paid to the full extent of their debts so secured in preference over other creditors. There is a distinction in the Act between a creditor and a secured creditor and the purchasers in this case do not come within the expression "creditor" as contemplated in sec. 37. In my judgment sec. 37 does not apply to these purchasers. The learned Judge has, however, found that the properties were worth Rs. 1,000 and it was not necessary to sell them for Rs. 2,000 and he observes: "Such being the case, I declare that the sale set up was not a *bonâ fide* but a fraudulent one intended to defeat or delay creditors." He, therefore, annulled the sales to the extent of the insolvents' share. There is no direct evidence as to the value of the properties, and it should be borne in mind that these two properties along with others were subject to the mortgages which were satisfied by the sale, and the other properties were released. The brothers of the insolvents, who had no object in making a fraudulent conveyance, joined in the sale by which they also lost their title to the properties. Then, the evidence shows that the purchasers were not aware at the time of the sale that the insolvents were heavily indebted, and there was nothing to show they were not acting *bonâ fide*. The sale, therefore, cannot be said to be fraudulent. The learned Judge further holds that the *buri* was not sold and was not intended to be sold. As a matter of fact, the *buri* was included in the deed of sale for which there was consideration, and the title of all the ven-

dors passed to the purchasers in both the properties by the transaction. Whether the purchasers allowed any of the vendors to live in the house after the sale seems to me immaterial. No question has been raised as to the genuineness of the mortgage transactions. It is difficult to see how this sale can be impeached on the ground that it was either colourable or without consideration because this *buri* itself was the subject of the mortgages in satisfaction of which it was sold. I am, therefore, of opinion that the sale cannot be impeached as a mere colourable transaction. On these grounds, the judgment and orders of the learned Judge avoiding the sale to the extent of the interests of the two insolvents in the properties should be set aside. The Appellants are entitled to recover their costs in these appeals from the estate of the insolvents. In Appeal No. 305, the hearing fee is assessed at four gold mohurs and, in Appeal No. 306, no hearing fee is allowed but the Appellants will be entitled to recover the other costs incurred.

WALMSLEY, J. - I agree.

H. D. C.

Appeal allowed.

N. G.

CIVIL REVISIONAL JURISDICTION.]

RULE No. 187 OF 1922.

JOTINDRA MOHAN PAL,

Decree-holder,

Petitioner,

v.

RICHARDSON, J.

B. B. GHOSE, J.

1922,

25, August.

BHOLA NATH BRAKAT

and ors, Judgment-debtors, Opposite Party.

Bengal Tenancy Act (VIII of 1885), sec. 170—Decree in form a rent-decree—Attachment of holding—Claim under Civil Procedure Code (Act V of 1908), Or. 21, r. 58, if entertainable—Question, whether decree rent-decree or money-decree, if may be gone into

Where leasehold property is

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in execution of a decree which in form was a rent-decree, the Court has jurisdiction at the instance of a claimant under Or. 21, r. 58 of the Civil Procedure Code to enquire whether the decree was in fact a rent-decree, so as to attract the operation of sec. 170 of the Bengal Tenancy Act

If, in view of the character of the leasehold property, the Court finds that the decree was not a rent-decree, it may properly entertain the claim.

This was a Rule granted against an order of the Munsif, 2nd Court, Howrah, dated the 15th March 1922, allowing the claim by the Opposite Party under Or. 21, r. 58, C. P. C.

The Petitioner, having obtained a decree for rent against one Abdul Latif attached certain properties which he alleged to be the holding in arrears. The Opposite Party put in a claim under Or. 21, r. 58 of the Civil Procedure Code alleging that the judgment-debtor had no title or possession in the property, that it had been purchased by the predecessor-in-title of the Opposite Party many years ago and that they had been possessing it ever since, sometimes in *khas* and sometimes by letting it out to tenants, that it was neither agricultural nor horticultural land and that therefore the Bengal Tenancy Act did not apply to it. The Munsif took evidence and held that the holding was not governed by the Bengal Tenancy Act; that the decree was not a rent-decree and that the Opposite Party were in possession adversely to the judgment-debtors, and he allowed the claim.

The Petitioner thereupon moved the High Court and obtained this Rule.

Dr. Sarat Chandra Basak (with Babu Hemendra Nath Chatterjee) for the Petitioner submitted that the decree being

in terms a decree for rent, sec. 170 of the Bengal Tenancy Act applied and excluded the operation of Or. 21, r. 58 of the Civil Procedure Code. The decree being on the face of it a rent-decree, an enquiry whether it is a rent-decree or not is barred by the provisions of sec. 170 of the Bengal Tenancy Act. Relied on *Amrita Lal Bose v. Nema Chand Mukhopadhyaya* (1). The order was without jurisdiction.

Babu Nagendra Nath Ghose for the Opposite Party relied on *Sarba Sundari Das v. Harendra Lal Roy Chowdhury* (2) and *Bipra Das Dey v. Raja Ram Bandopadhyaya* (3). The passage in the judgment of Maclean, C. J., in *Amrita Lal Bose v. Nema Chand Mukhopadhyaya* (1) has to be read with the question referred to the Full Bench. There, there was no question that the decree was a rent-decree and the claimant raised the question whether what was attached was part of the holding or not. Sec. 170 presupposes a decree for rent in fact and not in form only. The question whether the decree is a rent-decree or a money-decree has to be decided one time or another. Calling or labelling a decree a rent-decree does not make it one.

Dr. Sarat Chandra Basak in reply—The two cases relied on by my opponent were decided without reference to the Full Bench decision.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS:—

B. B. GHOSE, J.—This Rule was obtained by the decree-holder against the order of the Munsif of Howrah, dated the 15th March 1922, allowing the claim made

(1) I. L. R. 28 Cal. 882 at p. 885; s. c. 5 C. W. N. 474 (F. B.) (1901).

(2) 12 C. L. J. 549 (1910).

(3) 13 C. W. N. 650 (1909).

JOTINDRA MOHAN PAL v. BHOLA NATH BHAKAT.

by the Opposite Party under Or. 21, r. 58. C. P. C., to the property attached by the decree-holder in execution of a decree for rent which he had obtained against one Abdul Latif for the property in question.

The ground upon which the judgment of the learned Munsif is attacked is that it was beyond his jurisdiction to entertain the claim having regard to sec. 170 of the Bengal Tenancy Act, as the decree he had obtained was for rent under the Bengal Tenancy Act. The claimant alleged that this property was not a tenure or holding and that the Bengal Tenancy Act was not applicable with reference to a suit for rent brought for the land. The learned Munsif went into evidence for the purpose of ascertaining whether the land was of such a character as to make the provisions of the Bengal Tenancy Act applicable. His finding is to the effect that the provisions of the Bengal Tenancy Act do not apply to the land in question.

It is urged on behalf of the Petitioner that the decree being on the face of it a decree for rent, as it is so described, the provisions of the Bengal Tenancy Act would be applicable; and it is not open to the Court executing the decree to make any enquiry as to the nature of the land and to decide whether the Bengal Tenancy Act would apply with regard to the decree or not. Reliance is placed upon the Full Bench case of *Amrita Lal Bose v. Nemai Chand Mukhopadhyaya* (1) in support of the contention of the Petitioner. In that case, however, the question referred to the Full Bench was whether sec. 170 of the Bengal Tenancy Act bars the claim to a tenure or holding attached in execution of a decree for arrears due thereon in all cases, or whe-

ther the operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached. The majority of the Court held that the section bars a claim in all cases where the tenure or holding is attached in execution of a decree. It was not decided, nor could it be decided, having regard to the reference, whether any claim can be entertained where the property attached is not a tenure or holding although the decree is in form a decree for rent under the Bengal Tenancy Act. On the other hand, it has been held in the case of *Sarba Sundari Das v. Harendra Lal Roy (Chowdhury)* (2) that when the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is open to the Court to ascertain the true nature of the property. Reference may also be made to the case of *Bipra Das Dey v. Raja Ram Bandopadhyaya* (3) for the purpose of showing that the Court executing the decree can go into the question whether the decree was a decree under the provisions of the Bengal Tenancy Act so as to bring into play the operation of sec. 170 of the Act and prevent a claim being preferred to the property attached. In that case also the decree was in form a decree for rent which was obtained for two holdings and it was held that a claim might be entertained with regard to the property attached in execution of the decree. It therefore appears to us that the learned Munsif did not act without jurisdiction in entertaining the claim.

The Rule is therefore discharged with costs, hearing-fee, five gold mohurs.

RICHARDSON, J.—I agree.

N. G.

(1) 1 L. R. 28 Cal. 382; s. c. 5 C. W. N. 474 (F. B.) (1901).

(2) 12 C. L. J. 549 (1910).

(3) 18 C. W. N. 650 (1909).

[CRIMINAL APPELLATE JURISDICTION.]**AP.P. No. 575 OF 1922.****NEWBOULD, J.
SUHRAWARDY, J.****NAGENDRA CHANDRA
DHAR, Appellant,
v.****1923,
22, February. THE KING-EMPEROR,
Respondent.**

Sessions trial—Non-examination in Sessions Court of witnesses examined in Committing Magistrate's Court, effect of—Alternative and inconsistent defence, if to be disallowed.

In a sessions trial seven out of ten witnesses examined in the Committing Magistrate's Court were not examined, nor were they tendered for cross-examination. Further, the Sessions Judge did not allow the pleader of the accused to argue an alternative defence which was inconsistent with the first defence set up by him:

Held—That it not having been suggested that the witnesses withheld were discarded by the Public Prosecutor on the ground that if examined they would not tell the truth, the accused was entitled to have them put in the box for cross-examination. Further, the Judge erred in holding that the accused could not set up an alternative defence which was inconsistent with the first defence set up by him. Although by setting up an inconsistent defence, the defence case becomes considerably weaker, there is nothing illegal in setting up an alternative and inconsistent defence, and the accused's pleader should have been allowed to argue the alternative defence before the jury. These illegal orders were sufficient to vitiate the trial since they were likely to prejudice the accused.

This was an appeal preferred on the 15th November 1922 against an order of the Sessions Judge of Chittagong (Mr. J. W. Nelson), dated the 7th November 1922.

The facts will fully appear from the judgment.

Babus Dasarathi Sanyal and Chandra Sekhar Sen for the Appellant.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows.—

The Appellant in this case has been convicted of kidnapping a girl from the lawful guardian and her mother and has been sentenced under sec. 363, I. P. C. to three months' rigorous imprisonment. Sarasibala Dhar, the mother of the girl, is the young widow of one Bangsi Mohon Dhar. She was living in her husband's house with her daughter Mukta, a girl of 6 or 7 years, and the accused Nagendra Chandra Dhar, the adopted son of Bangsi Dhar's cousin, also lived in the same *bari*.

The case for the prosecution was that on the 29th April last Nagendra asked Sarasibala to make over to him her ornaments and moveable property and also to transfer her husband's immoveable property to him. Sarasibala refused and on this Nagendra assaulted her and drove her away from the house and at the same time forcibly detained her daughter Mukta and did not allow the girl to go with her mother. The accused set up the defence that Sarasibala had been guilty of misconduct with one Ramk who had been discovered in her room on the 17th April. Nagendra was then absent from home and that when Nagendra returned on the 2nd May he found that Sarasibala had gone away leaving her daughter behind her. The accused's pleader also wished to argue the alternative defence that Sarasibala by her misconduct had forfeited her right to the guardianship of her daughter and that he as *karta* of a Hindu family was the legal guardian, or at any rate he acted in good

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faith in keeping the girl away from her mother. The case was tried before the Sessions Judge of Chittagong and a jury who unanimously found the accused guilty.

We find that this appeal must succeed on two grounds. The first is that ten witnesses were examined before the Committing Magistrate on behalf of the prosecution. Of these seven were not examined in the Sessions Court, nor were they tendered for cross-examination although an application was made on behalf of the accused that this should be allowed. It is not suggested that these witnesses were discarded by the Public Prosecutor on the ground that if examined they would not tell the truth and the accused was entitled to have them put in the box for cross-examination. Further, the learned Sessions Judge has erred in holding that the accused could not set up an alternative defence which was inconsistent with the first defence set up by him. By setting up an inconsistent defence there can be no doubt that the case for the accused becomes considerably weaker than if he settled in his best line of defence and set up that defence only. But there is nothing illegal in setting up an alternative and inconsistent defence and the accused's pleader should have been allowed to argue the alternative defence before the jury.

We hold that these illegal orders passed by the learned Sessions Judge were sufficient to vitiate the trial since they were likely to have prejudiced the accused and we must therefore set aside the conviction and sentence passed on the Appellant. On examination of the evidence we do not think it necessary that the accused should be retried. It appears to us that the offence, if any, committed by the accused was of a technical nature for which

the period of imprisonment he has already undergone is a sufficient punishment. The main dispute between the parties is one that can be better settled in the Civil Court than by a criminal prosecution for kidnapping. We accordingly set aside the conviction and sentence passed on the accused and acquit him of the charge of kidnapping. We direct that he be discharged from his bail bond.

J. N. R.

Appeal allowed.

[CRIMINAL APPELLATE JURISDICTION.]

APPS. NOS. 646 AND 619 OF 1922

AND

GOVT. APP. NO. 1 OF 1923.

SANDERSON, C. J. P. E. BILLINGHURST and
RICHARDSON, J. ors., Appellants,

1923,

31, May

v.
H. P. BLACKBURN,
Respondent.

Indian Penal Code (Act XLV of 1860), secs. 120B, 420 and 511—Conspiracy, charge of—Different overt acts from which one general conspiracy could be inferred—Charge not clearly expressed but understood, not bad, where no prejudice—Cheating, charge of—Person induced to part with property, to be specified—Omission, effect of—Prejudice—Successive presentation of fraudulent bills and payment of same by one cheque—Offence, if one or several—Evidence insufficient to prove cheating, but sufficient to prove attempt to cheat and sufficient to support general charge of conspiracy—Criminal Procedure Code (Act V of 1898), sec. 237—Presentation of bills to be checked, if amounts to fraudulent representation, when bills contain false statements—Delay in trial not caused by accused—Matter for consideration, in passing sentence

The accused were charged with having conspired to cheat the Government of India of large sums of money in respect of the supply of linseed oil, turpentine, and water-soluble oil, etc., . . . "and thereby committed an offence punishable under secs. 120B and 420 of the Indian Penal Code," and it was urged in defence that the charge contained

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allegations amounting to charges of three different conspiracies and was consequently bad.

Held—That the charge, though not clearly worded, was capable of the meaning placed upon it by the prosecution, viz., as alleging one general conspiracy to commit an offence or offences under sec. 420 of the Penal Code, the three transactions mentioned constituting overt acts, from which the conspiracy might be inferred, and as it appeared that the accused also understood the charge in the same sense, the objection was not fatal.

That the fact that the three transactions were independent and occurred on different dates and that between those dates intervened many other transactions between the accused and the Government of India which were not proved to be fraudulent or dishonest was not inconsistent with the existence of one general conspiracy.

A second charge against the accused was that they had between the 26th August 1918 and 10th December 1918 cheated the Government of India by dishonestly inducing them to deliver a cheque for Rs. 59,265, the property of the Government of India, in payment of five fraudulent bills for linseed oil and thereby committed an offence punishable under sec. 420 of the Penal Code.

Held—That the charge should have contained an allegation of the person or persons deceived and induced to issue the cheque, but the omission was not a fatal defect in the charge when it did not mislead the accused and there was no failure of justice by reason of it.

That the fact that the five bills were presented at different dates did not make them matters for five separate offences, in-

asmuch as an offence under sec. 420 of the Penal Code in relation to any of them would not be complete until the cheque was issued, and one cheque having been obtained through the inducement of the said five fraudulent bills there was one offence only and not five offences of cheating.

Held further—That though the prosecution had failed to prove inter alia that any official of the Government of India was deceived by reason of the fraudulent representations contained in the bills, and therefore an offence under sec. 420 of the Penal Code was not established, the evidence produced in support of the charge was sufficient to support a charge of an attempt or attempts on the part of the accused to commit the said offence.

The offence of attempt to cheat was complete as soon as each of the bills was presented, and, under sec. 237 of the Criminal Procedure Code, the accused could be convicted of the attempt though not charged therewith.

Held further—That the evidence in respect of the charge was, in any event, material on the question of conspiracy alleged in the first charge.

The presentation of the said fraudulent bills was not the less dishonest because the accused expected them to be checked by the Government before being passed and the fact that they were checked and passed would not make the representation innocent.

The interruption in the trial due to the Magistrate having been deputed during the course of the hearing to other work and delays for which the accused were not wholly responsible, commented upon. The strain, anxiety and mental suffering to which the accused must in consequence have been subjected during an unusually

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protracted trial were matters to be legitimately taken into consideration in passing sentence.

This was an appeal preferred against the order passed by D. Swinhoe, Esq., Chief Presidency Magistrate, Calcutta, dated the 28th of November 1922.

The facts of the case and the arguments will appear sufficiently from the judgment.

Mr. B. C. Chatterji and Babu Satindra Nath Mukherjee for the Appellant in Appeal No. 646 of 1922.

Babus Manmatha Nath Mukherjee and Bir Bhusan Dutt for the Appellant in Appeal No. 649 of 1922.

The Advocate-General, Mr. J. Camell, Mr. N. C. Sen and Babu Romoni Mohan Bannerjee for the Crown in Government Appeal No. 1 of 1923.

The Advocate-General, Mr. J. Camell, Mr. N. C. Sen and Babu Romoni Mohan Bannerjee for the Crown in Appeals Nos. 646 and 649 of 1922.

Mr. Arabinda Ray, Babus Satindra Nath Mukherjee and Santosh Kumar Pal for the Respondent in Government Appeal No. 1 of 1923.

The JUDGMENT OF THE COURT was as follows :—

Nos. 646 and 649 of 1922 are appeals by Billinghamurst and Michael against conviction by the Chief Presidency Magistrate who found them guilty on each of the two charges and sentenced them to one year's imprisonment. Blackburn and Stoddart were charged with the same offences but were acquitted by the Magistrate.

The first charge is as follows :—“ That you, J. Stoddart, H. P. Blackburn, P. E. Billinghamurst, and P. H. Michael, during the period from June 1918 to July 1919, in Calcutta conspired with each other and with C. S. Waite and other persons

unknown to commit an offence punishable under sec. 420, Indian Penal Code, to wit, to cheat the Government of India of large sums of money in respect of the supply of linseed oil, turpentine, and water-soluble oil by Messrs. Spalding & Co., to the Munitions Board, Calcutta, and you thereby committed an offence punishable under secs. 120B and 420, Indian Penal Code, and within the cognizance of my Court.”

Objection was taken by learned Counsel on behalf of Billinghamurst to the first charge on the ground that it contained allegations amounting to charges of three different conspiracies and that consequently it was a bad charge.

The learned Advocate-General admitted that the first charge might have been framed in a better and clearer manner, but he contended that it was intended to allege one general conspiracy to commit an offence or offences under sec. 420 of the Indian Penal Code by cheating the Government of India of large sums of money and that the transactions in linseed oil, turpentine, and water-soluble oil were overt acts from which the conspiracy might be inferred.

It is clear from the judgment of the learned Magistrate that this was explained to the Counsel, who appeared for the accused at different periods of the trial. The petition of Billinghamurst, dated the 31st August 1921, para. 38, stated as follows :—“ That the charge against your Petitioner is one of conspiracy to cheat and three overt acts are alleged in proof of that conspiracy—(1) in case of an order for linseed oil your Petitioner supplied short measure; (2) in case of turpentine the price charged was excessive, and that your Petitioner had not the quantity of turpentine required in stock while representing that they had; (3) in case of an

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order for water-soluble oil the price was excessive and the quality was not up to sample. No money was paid in respect of this and is put forward as a case of an attempt to cheat "

The petition of all the accused, dated the 8th December 1921, para. 20, was as follows:—"That in so far as the first count of the charges is concerned your Petitioners have been advised and beg to submit that regard being had to the nature of the charge, which is one of a general conspiracy entered into by the said Mr C. S. Waite and your Petitioners to cheat the Government of India during the period of one year from June 1918 to July 1919, of large sums of money, and to the importance and magnitude of the same in which the Crown has engaged the services of the learned Advocate-General of Bengal from its very inception, it is desirable that the case should be tried by a Jury "

It is clear, therefore, that the accused fully understood the nature of the charge. In our judgment the first charge is capable of the meaning which was placed upon it by the prosecution and which every one connected with the trial thoroughly understood and consequently the objection raised by the learned Counsel cannot be sustained.

The next objection to the first charge was taken both by the learned Counsel appearing for Billinghamurst and the learned Vakil appearing for Michael.

It was urged that, assuming the first charge to be a charge of one general conspiracy, the prosecution had not proved it, but that if they had proved any conspiracy at all, they had proved three conspiracies, and consequently the first charge must fail.

This objection must depend upon the evidence and the inference to be drawn

from the proved facts, and we will state our conclusion on this point after dealing with the facts of the case.

Another objection was taken by the learned Vakil that the charge alleged a conspiracy to commit an offence punishable under sec. 420 of the Indian Penal Code, to wit, to cheat the Government of India of large sums of money in respect of the linseed oil, turpentine, and water-soluble oil.

It was urged that in order to substantiate this charge it must be proved that there was an agreement to commit the offence of cheating under sec. 420, Indian Penal Code, in respect of each of the three transactions, that the facts proved in respect of the turpentine and water-soluble oil cases did not constitute cheating within the meaning of that section. In other words, that it was not proved that what the alleged conspirators intended was cheating within the meaning of the above-mentioned sec. 420, Indian Penal Code.

On behalf of the prosecution it was argued that it had been proved that such of the transactions, alleged as overt acts, if completed, would have constituted an offence under sec. 420 of the Indian Penal Code.

But it was further argued by the learned Advocate-General that in order to sustain the first charge, it was not necessary to prove that each, or indeed any of the above-mentioned transactions, if completed, would have constituted an offence under section 420, but that it would be sufficient if the facts which had been proved and materials which had been placed before the Court showed that there was a criminal conspiracy between Waite and the two Appellants to commit an offence or offences under sec. 420, Indian

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Penal Code, by cheating the Government of India of large sums of money.

There is no doubt that as regards the first charge the gist of the alleged offence, viz., a criminal conspiracy to commit an offence or offences under sec. 420, Indian Penal Code, lies in the agreement or common intention of Waite and the two Appellants, and in our judgment, the question whether such an agreement or common intention existed, is a matter of inference to be deduced from the facts of the case and the acts of the parties which have been proved in evidence, and which are alleged to have been done by them in pursuance of such agreement or common intention.

It is necessary, therefore, to examine the facts of the case which are relied upon by the prosecution, and the explanations and defences put forward by the two Appellants respectively.

We do not think it necessary to deal in detail with the numerous documents which have been referred to in this case. This has been done at great length by the learned Magistrate who tried the case, and our attention has been drawn to them many times during the hearing of the appeal by the learned Counsel and the learned Vakil, who appeared for the Appellants, and the learned Advocate-General on behalf of the Crown.

On the 2nd November 1917, Waite was appointed Deputy Controller of Inspection in connection with the Munitions Board at Calcutta.

His duties were to assist the Controller of Munitions at Calcutta, to apply an independent check on the quality of stores and materials procured under the Munitions Board's orders for various intending officers and to scrutinize and advise on the suitability of rates paid for them.

On the 2nd May 1918, in addition to the

other duties he was appointed purchasing officer as regards oils and manufactured metals. In such capacity it was his duty, on receiving an indent from the Indian Munitions Board, Simla, to purchase the materials required. It was his duty to get the materials at the cheapest rate possible, as long as they were in accordance with the indent or specification. If firms asked too high a price it was open to Waite to ask the Controller to commandeer the materials, the price to be settled later by arbitration.

Waite went on leave on 23rd January 1919, and his service under the Munitions Board terminated on or about 23rd February 1919.

Michael was alleged to be a broker. From the evidence it appears that he was on intimate terms with Waite; he was frequently, almost daily, in Waite's office, and sometimes was seen at Waite's house. It was Michael who negotiated the business with which this case is concerned, all the orders from the Munitions Board having passed through Michael. He was also frequently in the office of Messrs Spalding & Co., and he was largely interested in the transactions which took place between the Munitions Board and Spalding & Co.

The total value of the orders given to Spalding & Co. was a little less than three lakhs and Michael's bills, according to his own statement, for excess rates and commission, amounted to no less than Rs. 49,777. We are satisfied on the evidence that in the transactions in question the position of Michael cannot be correctly described as that of a mere broker. The part taken by him in the various transactions will be dealt with when they are separately considered.

Billinghurst was a member and head of the firm of Messrs. Spalding & Co.,

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and it was through the instrumentality of Michael that the firm obtained orders to the extent of about Rs 3 lakhs from the Munitions Board, which orders were given by Waite.

The first order in point of date was given to Spalding & Co., on the 15th June 1918, for 600 gallons of raw linseed oil and 1,000 gallons of double boiled linseed oil. On the day prior to that, viz., on the 14th June 1918, an agreement was entered into between Spalding & Co. and Michael to the following effect —

Letter, dated 14th June 1918, from Messrs. Spalding & Co. to Mr. Michael.

"Dear Sir,

"We confirm the arrangements made with you to-day and agreed upon, whereby we appoint you exclusively to represent us for the sale of boiled and raw linseed oils for which we have the sole selling rights, and also for the sale of varnishes and bithulithic paints manufactured by us and for any other paints, varnishes, and oils that we may be interested in hereafter upon the following terms:—

"1 That we agree to pay you a commission of 1 per cent. on orders for linseed oils on prices as per list handed you.

"2 We agree to pay you a commission of 2½ (two and a half) per cent. on all orders for varnishes and bithulithic paints on prices as per list handed you. That we agree to pay you the above commissions on all repeat orders for linseed oils, varnishes, and paints directly or indirectly received by us.

"3. That we further agree to pay you in addition to the commissions as stated above on linseed oils, varnishes, and bithulithic paints any extra amount you may fix with the buyer and consumers on the prices quoted you by us as per list.

"4. That all orders to be secured in

name of the firm of Messrs Spalding & Co.

"5 That the agreement stands good for a period of 12 months from date provided we get reasonable orders.

"6 In the event should you be unable to secure orders owing to illness or any other unforeseen circumstances, this agreement becomes null and void, but you shall continue to receive your commission and excess prices on all repeat orders.

Yours faithfully,

"SPALDING & CO."

It was urged on behalf of the prosecution that there was no evidence to show that Messrs Spalding & Co. had any sole selling rights in respect of any linseed oils, and it was to be noted that the agreement referred not only to linseed oils but also to any other paints, varnishes, and oils that Spalding & Co. might thereafter be interested in.

It is not unreasonable to infer from this, as was urged by the prosecution, that Michael must have been in communication with Waite before the date of the agreement, inasmuch as on the 15th June 1918, in addition to the two orders already mentioned, Messrs Spalding & Co. obtained orders from the Munitions Board for 50 gallons raw linseed oil, 80 gallons double boiled linseed oil, and 600 gallons Copal varnish.

On the 17th June 1918, Waite received an indent, dated the 12th June 1918, from the Indian Munitions Board, Simla, for 150 tons of oil, linseed, genuine boiled. It was marked "Very urgent." The oil was to be shipped to the Deputy Controller, Transit for Munitions Board, Bombay. On the 20th June 1918, Waite gave an order for 50 tons of the oil to Messrs. Spalding & Co., at the rate of Rs. 8-12-0 per gallon and with a note in "cask of 40 gallons."

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A suggestion apparently was made on behalf of the defence in the trial Court that the words "in cask of 40 gallons" were not in the order when it was sent to Spalding & Co., and that they had been added after the documents were seized by the police in order to support the case for the prosecution.

The evidence of J. N. Bhattacharjee, in our judgment, shows that the suggestion is without foundation, and that the words were placed on the order by him at the time the order was given and in consequence of the note appearing on Ex 42.

On the 27th June 1918, a further order of 100 tons of linseed oil was given by Waite to Messrs. Spalding & Co at the same rate, Rs. 3-12-0 per gallon

Messrs. Spalding & Co. had to purchase the oil in order to comply with these two orders. They got six consignments of oil from the firm of Mohin & Co ranging from the 2nd July 1918 to 12th July 1918. The remainder of the oil was purchased from Messrs Birla Brothers, the deliveries ranging from 4th July 1918 to 5th September 1918. Spalding & Co paid for the oil purchased by them at a rate less than Rs. 3-12-0, viz., at about Rs 3-8-0 or Rs. 3-8-9.

The net amount of oil received by Spalding & Co., and paid for by Spalding & Co. was 32,038 gallons or 32,029, it is not quite clear which is the correct figure. The oil was delivered in casks by Mohin & Co., and Birla Brothers direct to the railway in Calcutta for transit to Bombay.

Spalding & Co. presented bills to the Munitions Board in Calcutta in respect of this oil for 39,975 gallons. In other words, taking the measure of about 9 lbs. to the gallon, which was the rate at which Spalding & Co. purchased from Mohin & Co., and Birla Brothers, they charged the Munitions Board for about

7,937 gallons of oil more than they purchased from Mohin & Co., and Birla Brothers. It is to be noted that this extra charge was made in respect of the identical casks of oil delivered by Spalding & Co.'s sellers to the Railway in Calcutta for transit to Bombay.

The prosecution case is that Spalding & Co took the gross weight of the casks and the oil, reduced such gross weight to lbs., and then divided the total number of lbs by 9, and thereby ascertained the number of gallons. The prosecution urged that by so doing Spalding & Co were charging the Munitions Board for 7,937 gallons of oil which they had not delivered, and that such additional weight was represented by the weight of the casks for which Spalding & Co charged, as if it were oil.

It was pointed out by the prosecution that if the gross weight of the various consignments is divided by 9, the resultant in gallons is the same as the number of gallons charged for by Spalding & Co. in their bills with a variation of a fraction in some instances.

The defence of Billinghamurst in this respect is that Messrs Spalding & Co. did not charge for the weight of the casks at the price of oil. It was stated that the number of gallons in each bill presented by Spalding & Co was ascertained by taking the gallon to represent $7\frac{1}{2}$ lbs. and not 9 lbs or thereabouts. It was contended that this measure was known in Calcutta, and that although Spalding & Co bought the oil at the rate of about 9 lbs to the gallon, they were entitled to sell at the rate of $7\frac{1}{2}$ lbs. to the gallon, especially as Spalding & Co. were to take the risk of the oil in transit to Bombay.

In support of Billinghamurst's case in this respect some documents which have been called EEEE were put in on behalf of

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Billinghamurst at the trial for the purpose of showing how the number of gallons charged for was ascertained. The documents were put in cross-examination by the learned Counsel for Billinghamurst to a witness Ashutosh Dutt, who had been an accountant in the firm of Messrs. Spalding & Co. They were not found by the police when the search for documents was made at Spalding & Co.'s premises.

It appeared from Dutt's evidence that when Spalding & Co. were purchasing oil from Mohin & Co., and Birla Brothers, one of Spalding & Co.'s sircars used to be present at the weighing. He used to bring the difference of the tare weight on slips of paper and before bills were made out calculations used to be made on sheets of paper. The slips were alleged to represent the actual weight of the casks before they were filled with oil, and the calculations were alleged to have been made in the handwriting of a lady typist. Neither the sircar nor the typist was called as a witness by the defence. Ashutosh Dutt, however, said he had no doubt that the slips were brought to him by the sircar and he knew the handwriting of the lady typist.

The learned Magistrate came to the conclusion that the documents marked EEEE were not genuine and were fabricated for the purpose of the defence. He gave his reasons in full and we need not repeat them here.

The evidence of the witness Ashutosh Dutt was described as untrustworthy both by the learned Advocate-General and by the learned Vakil for Michael and in our judgment there are some valid reasons for that conclusion.

Mohin & Co.'s bills were not produced but Messrs. Birla Brothers in delivering the accounts to Spalding & Co., deducted the tare weight of the casks, the tare

weight being given on each bill. Spalding & Co. accepted these tare weights as correct. Yet it is to be noticed that in the calculations and documents known as the EEEE, Spalding & Co. allowed for the tare weight of the casks in every instance less than the tare weights given by Birla Brothers. Birla Brothers' tare weights were arrived at by weighing the casks before they were filled with oil, and it is not reasonable to suppose that they would allow Spalding & Co. more than the actual tare weight. It is, therefore, surprising to find that in the calculations EEEE, Spalding & Co. give the tare weights in all cases as less than those given by Birla Brothers. If this matter had been an honest and straightforward transaction and if Billinghamurst honestly thought they were entitled to charge the Munitions Board at the rate of $7\frac{1}{2}$ lbs. per gallon instead of about 9 lbs. per gallon, we are at a loss to understand why Spalding & Co. did not take net weights of oil given by Birla Brothers arrived at after the deduction of the tare weights and divide the net weight by $7\frac{1}{2}$ in order to obtain the number of gallons.

If the matter was an ordinary business transaction, there does not seem to have been any good or valid reason or necessity for the elaborate calculations contained in the Exs EEEE. But apart from this, we are of opinion that these documents contain in themselves evidence (as was pointed out by the learned Advocate-General) which goes to show that they were not genuine documents.

We, therefore, come to the conclusion that they were made for the purpose of the defence in this case.

In this connection it is necessary to notice an argument put forward by the learned Counsel for Billinghamurst; he argued that if we come to the conclusion

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that the Exs. EEEE were not genuine documents, the Court should still hold on the evidence that Billinghamurst was not aware of the extra number of gallons charged for, and was innocent of any misrepresentation.

It is difficult to follow the argument; for if Billinghamurst was in fact innocent of any misrepresentation, as alleged, we do not understand why it was thought necessary to put forward documents which were not genuine, to support the method upon which, it was alleged, the bills were made out.

In our judgment the reason alleged for Spalding & Co selling at the rate of $7\frac{1}{2}$ lbs. to the gallon, when they bought at the rate of about 9 lbs. to the gallon, *viz*, that Spalding & Co were to take the risk of transit to Bombay, has no substance in it.

The 23 bills in respect of the supply of linseed oil were signed in the name of Spalding & Co. by Billinghamurst and were submitted by Spalding & Co to Waite. The first twelve bills were sent direct by Waite to the Deputy Controller of War Accounts (Munitions Branch), Simla, the remainder were forwarded by Waite to Simla through the Deputy Controller of War Accounts (Munitions Branch), Calcutta.

Inasmuch as the order for the linseed was placed before the 1st August 1918, these bills were passed on by the Deputy Controller, War Accounts, Calcutta, without any audit or check in accordance with the practice then prevailing as to orders placed before August 1918.

In the office of the Deputy Controller of War Accounts, Simla, the audit officers passed the bills, the evidence of J. P. Dutt being that his only concern was to see that the bills were duly countersigned by the purchasing officer, who in this case was

Waite, and that they were arithmetically correct.

The audit officers being thus satisfied endorsed the bills and passed the amounts of the bills and another officer relying on the audit officer's endorsement, drew cheques for the bills. The bills were paid before the duplicate bills were received from Bombay.

It was urged on behalf of the Appellants that the authorities at Bombay must have realized that the casks contained about 50 gallons each, according to the bills, which showed that the gallon must have been taken to be $7\frac{1}{2}$ lbs and that they accepted these as a correct rate.

We are not prepared to accept this suggestion. The evidence shows that the Bombay authorities did not check the contents of the barrels, nor did they weigh them, unless there was something out of the ordinary, such as bad leakage.

Ordinarily the barrels were not weighed before being put into the ship, if there was no leakage.

If there was a leakage they checked the portion of the consignment in which the leakage occurred and in respect of the leakage only the weight.

The goods were checked as regards number of packages with the railway receipts and vouchers. In view of this evidence, it is not possible to hold that the authorities at Bombay accepted the weight of the oil as correct.

There are two entries in Spalding & Co.'s journal showing how the profits made in respect of the 23 bills for linseed oil were dealt with.

The first entry under date 29th October was cancelled and another entry under the same date appears on a subsequent page after another entry dated 13th November.

The second entry contains the words

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"being 23 bills made out by Mr Michael" and "now considered as part of profits" which were not in the first entry.

Ashutosh Dutt said in his evidence that both entries were made by him and that the second entry [Ex 85 (3)] was made by him because Michael asked him to write the entry.

Michael now disputes this but he does not seem to have disputed it at the trial.

We do not understand, however, why Michael should be anxious to have it noted in the journal of Spalding & Co, that he had made out the bills.

The entry "now considered as part of profits" is applied to the "difference realized on excess measurement" and it is relied upon as supporting Michael's case that he was not aware of the excess measurement being made by Messrs. Spalding & Co. until after the bills were sent to Waite by Spalding & Co., and that when he did ascertain this he claimed half the difference realized by reason of the excess measurement.

The entry is to this effect:—

[Ex. 85 (3)—Entry in Ex. 85.]

Entry in Spalding's Journal, p 29

Journal Entries 1918.

	Rs	A	P	Rs.	A.	P
October 29th—						
Stock purchase account Dr. 24	10,958	1	10½			
To P. H. Michael commission account 84				10,953	1	10½
For statement of linsced oil supplied to Indian Munitions Board as per bills Nos 106 to 117, 124, 125 and 129 to 137 being 23 bills made out by Mr. Michael for as under—						
Total amount billed on 39,975½ gallons	1,49,908	7	0			
Total paid for purchasing 32,029½ gallons	1,13,240	2	3			
Hence difference realised on excess measurement between 39,975½ and 32,029½ gallons now considered as part of profits as per his statement, dated 1st October 1918	36,668	4	9			
Less amount of excess rates credited as per his statements, dated 9th October 1918, up to 12th September 1918, and B 137	8,673	0	3			
Amount of commission on same	1,589	0	9			
This is the total amount for commission and rates	10,262	1	0			
Then leaves a balance of	26,406	3	9			
Less amount payable to him as arranged as per his statement, dated 9th October 1918	4,500	0	0			
	Rs.	21,906	3 9			
Half of which is to be his share now transferred to his credit as per his statement, dated 9th October 1918	10,953	1	10½			
October 29th—						
Stock purchase account Dr. 24	4,500	0	0			
To P. H. Michael commission account 84				4,500	0	0
For amount Rs 4,500 debited to former account in order to adjust the latter account as per particulars given in Mr. Michael's statement, dated 9th October 1918.						

These entries show that in respect of the linsced oil transaction Michael was either paid or credited with Rs. 8,673-0-3 in respect of the extra price which he obtained from the Munitions Board.

He obtained Rs. 1,589-0-9 for commission, Rs. 4,500 as per his statement of 9th October 1918, and Rs. 10,953-1-10½,

which represented his half share of the difference realized by reason of excess measurement or a total of about Rs. 25,715.

The statement of 9th October 1918, referred to, has not been produced and no explanation has been given in respect of what the Rs. 4,500 was recognized as pay-

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able to him. Spalding & Co. received in respect of these transactions a commission from the sellers of the oil and half the excess profits realized in respect of the excess measurement.

Michael gave a receipt on the 6th September 1918, to Spalding & Co. for Rs. 10,000, being payment in part, viz., about 75 per cent of his share of the excess profit as arranged on linseed oil supplied to the Indian Munitions Board exclusive of the excess rate of three annas three pies per gallon and commission of one per cent. due and payable to him.

It was pointed out on behalf of the prosecution that this receipt of 6th September 1918, was given at or about the time of the last delivery of linseed oil in respect of the 150 tons and a considerable time before the Government of India made the final payment and that Michael then knew how much he was entitled to in respect of the excess profits by reason of the difference in measurement, inasmuch as, on the figures being ascertained, it appears that Rs. 10,000 was only Rs. 143 less than 75 per cent of Michael's share.

Another receipt, dated the 19th December 1918, for Rs. 2,500 was given by Michael to Spalding & Co., being further payment on account of certain bills for commission, difference in rates, and division of excess profits on double boiled linseed oil as per statement, and this was debited to his account and paid by cheque.

This transaction, even when considered by itself, is an extraordinary one and having regard to the above-mentioned facts, it is not possible to accept the suggestion put forward by Michael that he was a mere broker, and that the sums which he received were in respect of the services which he rendered as broker.

It is true that Ashutosh Dutt said that he posted these entries to the credit of

Michael's "Commission Account"—which apparently is correct, inasmuch as the account to which these sums were credited was called "Commission Account."

In this case, however, the name under which the account was carried, conveys little indication of the real character of the transaction.

The question inevitably arises why Spalding & Co. were willing to pay such large sums to Michael in respect of the transaction of linseed oil. No broker in the ordinary sense could possibly be entitled to such remuneration—he received 1 per cent commission, but over and above that commission he was allowed to receive the sum realized by the difference between the price quoted by Spalding & Co. and the price paid by the Munitions Board for the oil and half the excess profits realized by the difference in measurement. In addition to these sums, the amount of Rs. 4,500, in respect of which no explanation is forthcoming, was either paid or credited to him. The allegation of the prosecution is that this can only be explained by the fact that Michael was as much a principal as Billinghurst.

The prosecution further point to the fact that Michael took part in the correction of some of the bills which were initialed by him, that he was constantly in Spalding & Co.'s office, and that in other transactions he had taken an active part in Spalding & Co.'s business, as for instance, the water-soluble oil case in which Michael had arranged with Grandage, Moir & Co. for the supply of 50 gallons of water-soluble oil to Spalding & Co.

We are satisfied that Michael was not a mere broker but that he was acting with Billinghurst and that he knew as much as, if not more, than Billinghurst as to the

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details and nature of the transaction in linseed oil.

There was no evidence of any of the money received by Michael in respect of this linseed oil transaction passing into the hands of Waite; and the learned Advocate-General admitted that if the case of linseed oil stood by itself it would not be sufficient to prove that Waite was involved in the conspiracy alleged by the prosecution, though he argued there was much ground for suspicion, having regard to Michael's intimacy with Waite, the large sums of money received by or credited to Michael, and the entire absence of explanation as to the reason why the Rs. 4,500 was paid to Michael, the suggestion being that some of the money must have been paid to Waite.

The evidence, however, goes to show that the checking of the bills in Waite's office was of a meagre kind.

The accountant merely took the figures from the bill, satisfied himself that the rate was correct and then multiplied the number of gallons given in the bills by the rate and saw that the arithmetical calculation in the bills was correct.

The bills were then laid before Waite for signature and he signed them and the forwarding letter as well, relying on the clerks who placed them before him, and without making any calculation or check on his own account.

If the bills had been checked in Waite's office in a proper way, especially having regard to the note on the order that the casks were to be 40 gallons, the real nature of the transaction would probably have been discovered. There is, however, no evidence that they were properly checked and we agree, therefore, with the learned Advocate-General that, if the linseed oil case stood by itself, it would not be suffi-

cient to prove that Waite was involved in the alleged conspiracy.

Turpentine.—As regards the turpentine transaction, on the 26th June 1918, the Board of Munitions at Simla despatched a telegram in the following terms which was received by the Controller of Munitions, Calcutta, on the 27th June and referred to Waite as Deputy Controller, Inspection, "for favour of disposal and report within 10 days":—

"Require 5,000 gallons genuine turpentine. What quantity can you obtain and at what price? Also say whether Indian or imported. Must know rate. Difficulty in obtaining full requirements from Forest Department."

Then follows, in the official file, a note in Waite's handwriting of quotations given to him by Mr. Pratt, a dealer in the article:—

"American, 200 gallons, price (20 cases)—per case Rs. 50; Rs. 5 per gallon.

Government, 25 to 30 gallons—Rs. 26 per 5 gallon drum.

Yellow, No. 1, containing 250 gallons—5 gallon drum at Rs. 4-12-0 per gallon.

Habcock's 500 gallons—Rs. 13-12-0 per gallon."

There is also a note in Stoddart's handwriting of Messrs. Spalding & Co.'s quotations:—

	Rs.
"Black Japan, as per specification sent (2,500 gallons) ...	20
Turpentine, Java, No. 1 (5,000 to 10,000 gallons) ...	9
Turpentine, Java, No. 2 (5,000 to 10,000 gallons) ..	8
Turpentine, special, imported, 2,000 gallons ...	13
Immediate delivery."	

On 1st July, Waite telegraphed to Simla Spalding & Co.'s quotations for Java, Nos. 1 and 2, and Special American

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(2,000 gallons at Rs. 13). He also mentioned Pratt's quotation for Habbok's No. 1. Simla inquired whether he considered Java, No. 2, quite suitable and suggested that he should consult Director of Ordnance Factories. Waite or Stoddart, the latter being Waite's personal assistant, and under his immediate orders, then telephoned to Spalding & Co. for samples and received three bottles of Java, No. 1, Java, No. 2 and best American. These were sent to the Director who replied on 6th August that Java, No. 1 and No. 2 were not correct to specification and that the American sample was correct. Copies of the Director's letter were sent to Spalding & Co. and Pratt with an inquiry as to the quantity of turpentine available in stock. There is a reply from Pratt, dated 23rd August, stating that he could supply immediately 20 cases American turpentine and 2,500 gallons in November. It will be remembered that the price given by Pratt to Waite for American turpentine was Rs. 5 a gallon. There is no reply from Spalding & Co. on the record and no further reference was made by Waite to Simla. His next step, taken on the 31st August, was to place an order with Spalding & Co. for 3,500 gallons at Rs. 13 a gallon to be delivered at once.

It is not clear why he ordered that quantity. The original inquiry from Simla mentioned 5,000 gallons. In his own telegram to Simla he had given the quantity of American turpentine available as 2,000 gallons. We can only suppose that the order was the result of personal communications between Waite and Michael.

It is now, however, clear beyond dispute that Spalding & Co. could have had nothing approaching 3,500 gallons available for immediate delivery at the time.

In any case, Waite's action was precipitate to the point of recklessness and it is difficult to accept the suggestion that he was under a double misapprehension both as to Spalding & Co.'s ability to supply so large a quantity and as to the instructions which he had received from Simla. Simla had in fact given him no final instructions to buy turpentine and in the state of the market ought to have had the opportunity of considering Pratt's offer of 2,500 gallons in November at Rs. 5 a gallon.

Having secured this order, on the 3rd September, Spalding & Co. in a letter to Michael, confirmed their quotations to him for the supply of turpentine to Munitions. "Any rate," they added, "that you have quoted or may quote over and above the prices quoted you, the excess or difference in rates are payable to you as remuneration for services rendered." The rate given to Michael for English or American turpentine was Rs. 8 per gallon.

It may be assumed that in the usual course a copy of the order of 31st August was sent to Simla and on the 12th September Waite telegraphed to Simla referring to the inquiry of 26th June as "your telegraphic indent of 26th July (apparently a mistake for June) for 5,000 gallons turpentine" and asking for despatching instructions. The Controller, Indian Indents, replied by letter, dated 17th September, that "no further quantities are wanted at present as arrangements have already been made to secure our requirements from elsewhere." Waite did nothing on this letter. It is said that by the words "no further quantities" he understood Simla to mean that no more was required beyond the 3,500 gallons already ordered. But, if so, why were no despatching instructions given in respect of that quantity? After a delay of more than a month, Waite again telegraphed to Simla, referring

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ing to the telegraphic indent of 26th July (meaning June) and said that 3,500 gallons were "waiting despatching instructions." These words are misleading. In the order of 31st August, Spalding & Co had been directed to deliver the turpentine to the Munitions Stores Depot at Narauldanga. Waite was moved to obtain despatching instructions not by Messrs. Spalding & Co, but, in anticipation of delivery by the depot, to which a copy of the order had been sent. Up to the 29th October not a single gallon of the turpentine had actually been delivered. On the 9th November, Simla replied through the post, merely enclosing a copy of their previous letter of 17th September. Then on the 15th November, Waite wrote to Spalding & Co and asked them to treat the order of 31st August as cancelled.

Here again the suggestion can hardly be resisted that the delay which occurred after receipt of the Simla letter of 17th September was deliberate in order to give Spalding & Co more time in which to deliver the turpentine. The order was not cancelled till Waite felt that he could delay no longer.

Spalding & Co, however, did not accept the cancellation of the order. On the 21st November, Michael called on Mr. Peterson, then Controller of Munitions, who noted that he had told Spalding & Co, "that they should reply to us stating that they do not see their way to cancel the contract and request us to take delivery." He added: "I think we will have to take the material. For the present their letter may be awaited."

Spalding & Co's letter of 22nd November illustrates the firm's methods. "Our Mr. Michael," it says, "called on you yesterday and explained our position that we are unable to sell this stock, when you

were good enough to inform him that you will stand by the order. Kindly have the letter cancelling the order withdrawn. We also await your instructions to deliver the quantity ordered." Mr. Peterson was thus asked to believe that the firm had the whole quantity ordered in stock. But it was as true in the months of November and December 1918, and January 1919, as at the time of the order that Messrs. Spalding & Co. had nothing like 3,500 gallons available for delivery.

Mr. Peterson did not at once reply to Messrs. Spalding & Co.'s letter. Mr. R. D. Bell, Controller of Oils and Paints, had been sent from Simla to inspect Waite's office. On the 28th November he recorded a note, to which both sides have referred, stating among other things that "the rate Rs 13 per gallon charged by Spalding seems exorbitant" but that he did not see how the order could be cancelled. Acting on this note, Mr. Peterson on the 29th November called on Waite for an explanation which was received later on on the 14th January.—

* At this stage of the negotiations, Billinghamurst, on behalf of Spalding & Co., addressed a letter, dated 16th December, to Michael which we had better give in full, as Billinghamurst's learned Counsel placed considerable reliance upon it on his client's behalf. The letter runs:—

"16th December 1918.

"P. H. MICHAEL, Esq., Calcutta,

"Dear Sir,

"Against the Munitions Department order for 3,500 gallons of turpentine which was purchased and which we delayed sending on your advice till the full consignment had been collected and which is now left on our hands owing to cancellation of order, we would ask you what we are to do with this large expensive stock on which heavy interest charges are accru-

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ing. We understand that while we quoted you Rs. 8 per gallon leaving us a bare 10 per cent. difference to cover leakage, cartage and profit, you quoted Rs 13 per gallon to the Munitions Department, which extortionate price probably caused the cancellation of the order, that is, while Messrs. Spalding & Co, would have cleared a legitimate profit of about Rs 0-8-0 to Rs 0-12-0 per gallon, you would have bled the department to the tune of Rs. 5, and this without risk to yourself of any business losses. As the appointed receiver of this firm I am naturally anxious to prevent any loss and therefore ask you what is to be done with this stock and write to you to learn if you have any prospects of selling this

"Yours faithfully,
(Sd) SPALDING & Co "

Learned Counsel argued that this letter showed that Billinghurst was not responsible for any guilty dealings Michael may have had with Waite. But in the first place the letter is not ingenuous. As it begins and ends, it merely follows the line which had been taken at and after Michael's interview with Mr. Peterson on the 21st November and regard being had to Michael's relations with Spalding & Co., we cannot suppose that it was not as well known to him as it was to Billinghurst that the full consignment had not been collected. Then as to the price Spalding & Co. had adopted the price quoted by Michael to Waite and the letter shows that they knew perfectly well that the department was being bled. We regard the letter merely as a hint to Michael that he was to do his best to obtain the restoration of the order on the lines already agreed upon between him and the firm. We may add that the exhibit is not the original letter but the copy taken from Spalding & Co.'s press copy book. No

answer to the letter from Michael is forthcoming.

On the 9th January, Spalding & Co. wrote again to Mr. Peterson: "We beg to inform you," they said, "that storage charges and interest on the above (the 3,500 gallons) are accumulating. We were asked to store the turpentine on your account in September last as there was no accommodation at Narauldanga Dépôt pending despatching instructions. We regret we cannot undertake any further responsibility as we are unable to insure the goods, moreover, we are suffering loss on account of interest on heavy outlay of capital, and cannot continue it any longer." They were bold enough to continue "We have therefore to request you to arrange to store it elsewhere, and release the space for our own use which we are in urgent need of."

Waite's explanation was, as we have said, received on 14th January. As regards the giving of the order of 31st August and the price agreed to, the explanation, in view of all the facts, is insufficient and unconvincing. But in his concluding paragraph, Waite said this: "If the Controller desires that the order should be cancelled on the firm, there should in my opinion be no difficulty. As the firm did not make any attempt at delivering the turpentine, I am rather inclined to stand by my letter of cancellation owing to the reason of their failure or non-compliance of the order." Waite must therefore be acquitted of being a party to the representation made by Spalding & Co. to procure the withdrawal of the letter of cancellation. It must be remembered that Waite's conduct of his office had come under examination and it was incumbent on him at this stage to be circumspect. The main question, moreover, is not whether the reinstatement

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was procured by misrepresentation. but whether the original order was or was not collusive and dishonest.

Mr. Peterson then had before him Mr Bell's opinion and Waite's explanation. Neither Mr. Bell nor Mr. Peterson, however, was aware of the arrangement under which Michael was to receive Rs 5 on every gallon of turpentine sold to Munitions, so that Spalding & Co must have expected to make a profit on their share of Rs. 8 a gallon. Mr. Peterson may, perhaps, have noticed that Waite's statement that Spalding & Co had made no attempt at delivering the turpentine was inconsistent with the case they were making that they had been asked to store the turpentine. On the 15th January, he replied to Spalding & Co.'s letters of 22nd November and 9th January in a letter from which the following paragraphs are taken.—

"2 If you can prove to me that you have contracted for the supply of this turpentine on our account before receipt of Mr. Waite's letter No 5535-P—292, dated the 15th November 1918, cancelling the order, I should be obliged if you send your representative to me with the papers giving evidence of this.

"3. You state in your letter, dated the 9th January, that you were requested to store the turpentine on our account in September last, pending despatching instructions. I should be obliged if you would let me know whether this was a verbal arrangement or whether you have any document to this effect as the order for supply was for immediate supply and was not apparently complied with.

"4. If you can satisfy me on the above points, I am prepared to take delivery of the turpentine in accordance with the order."

On the same date, 13th January, Mr.

Peterson wrote to Simla that he had been endeavouring to cancel the turpentine order but was doubtful whether he would be able to do so as the firm insisted on delivery being taken.

On the 29th January, Spalding & Co. replied in a letter of some length headed "without prejudice" in the course of which they said :

"On the 1st September, we received Deputy Controller, Inspection, Demand No 3379-P—292, dated 31st August 1918, for 3,500 gallons of turpentine. About the 9th September our Mr Michael approached the Deputy Controller, Inspection, for instructions for making the cases which had been omitted on the order, when he was asked to await his instructions which would be given in a few days.

"A week later, we again asked for instructions to mark the packages to enable us to proceed with the delivery when we were informed not to deliver the turpentine at Narauldanga, as there was no room to store combustible goods under cover, all the space there being urgently required for other valuable stores, and we were instructed to store the turpentine until we received despatching orders.

"Our representative informed the Deputy Controller, Inspection, that we would store the turpentine, but we could not accept any responsibility for damages or loss by fire, and at the same time we would charge a nominal rent for storage; this was accepted by the Deputy Controller, Inspection, which we had confirmed, vide our letter, dated 18th September 1918.

"Since then we did not trouble the Deputy Controller, Inspection, any further and awaited his instructions for despatching. On 17th November last we received Deputy Controller, Inspection, letter No. 5535-P—292, dated the 15th, which was most surprising and inexplicable.

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cable to us. At that time our Mr. Michael, who had this matter in his hands was away at Simla and on his return he called on the Deputy Controller, Inspection, when he was informed that he was ill, not attending office, Mr. Michael then called on your goodself and explained the position when you assured him that you would stand by the order

"Under the circumstances you will see that there was no delay or want of attention on our part; we had to the best of our endeavours and at a loss of interest on the outlay, went (*sic*) much out of our way to assist the Deputy Controller, Inspection, in agreeing to store the turpentine and it is matter of deep regret to us that we should now be placed in such a position, which we least expected, more particularly in view of the fact that on all occasions we were very prompt in supplying and despatching all indents placed with us

"We request that you will be good enough to take delivery of the turpentine without further delay, as it is impossible for us to suffer the loss of interest and run any further risks. You are, no doubt, aware that the bank rate of interest has increased and our loss in this direction alone will be great.

"As regards your request to produce the correspondence in connection with this order, we shall be glad to comply with same if you will kindly appoint a day when it will be convenient for you to see them."

The comments we have already made apply to this letter for which Billinghurst was undoubtedly responsible. It is only necessary to add as regards the reference to a letter of 18th September, that no such letter is forthcoming and there is no copy of it in Spalding & Co.'s press copy book. Mr. Peterson has left Calcutta and has not been called as a witness. There is no evidence that he accepted Spalding & Co.'s

offer to show him their correspondence or that he made any further enquiry. Spalding Co.'s reiterated statements that they had been storing the turpentine, which we regard as wholly false, were certainly calculated to mislead

On the 11th February, Mr. Peterson wrote to Spalding & Co. directing them to deliver the 3,500 gallons after test and inspection by the Deputy Controller, Oils and Paints. There was some further correspondence as to the samples which Spalding & Co. submitted. But in the result a sample was approved. Spalding & Co. delivered 3,499 gallons and their bills, dated 30th April 1919, for Rs. 45,487, signed by Billinghurst in the name of Spalding & Co., was duly paid.

It must be emphasized that an examination of Spalding & Co.'s books shows, and that it is not now denied, that the firm could never have supplied anything like this quantity of turpentine from their own stock. Their books show that their stock increased from 8 gallons in June to 163 gallons in November 1918, and dwindled to 90 gallons on the 14th March 1919.

It is proved that of the 3,499 gallons ultimately supplied, 3,026 gallons were purchased from the Standard Oil Company, on various dates, ranging from the 17th to the 28th April, at the rate of Rs. 34 per 5-gallon drum or just over Rs. 6-12-9 a gallon.

Michael's share of the Rs. 45,487 paid to Spalding & Co. came to Rs. 17,495 for which he submitted a bill and received payment.

As regards this transaction, we conclude that when Waite sent a copy of his order of 31st August to Simla, he must be taken to have presented that he had done his duty and that the order was a proper order at a reasonable price. It may be that at the time there was a star-

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city of turpentine with a consequent rise in price, but it is evident that Spalding & Co. were in no position to fulfil the order till the market was replenished when the price would fall and in that state of things, the price charged was preposterous. No tenders were called for from such firms as the Standard Oil Company and in the circumstances it is not surprising that the transactions seemed to the authorities to demand inquiry and examination. The whole of the facts were not then elicited. Regard being had to the close relations which existed between Waite and Michael and to other facts which have now come to light, the transaction, even if it stood alone, would arouse a strong suspicion that an unlawful agreement existed between Waite and Michael to which Billingham, on behalf of Spalding & Co. and possibly other members of the firm, were willing parties. But the transaction does not stand alone and it must be considered along with the other two transactions which are in question.

On the evidence as a whole, we are forced to the conclusion that this was a dishonest transaction. In our opinion it was engineered by Michael in conspiracy with Waite and there is equally no doubt as to Billingham's complicity. There is the arrangement between the firm and Michael and there is the fact that Billingham was responsible for the letters and representations by which the restoration of the order was induced. Michael was too closely associated with the firm to make it possible to accept the suggestion that he acted independently and the undertaking involved in the acceptance of an order for the immediate delivery of 3,500 gallons could not have been honest. We must accept the conclusions arrived at by the learned Magistrate.

Water-soluble oil.—We turn to the

transaction relating to water-soluble oil. The indent from Simla for this oil is dated 19th August, 1918, and was registered in Waite's office on the 23rd August. The indent was for 1,800 gallons, 800 to be supplied at once and the remainder at the rate of 200 gallons a month. It appears that this oil is used in the Ichapur Rifle Factory in connection with machines for the cutting of component parts of metal fittings and the indent stated in its column 2 that the oil was required "for cutting compounds." In the same column Waite was instructed that "particulars of any substitute other than those proposed should be communicated for acceptance before the order is placed" and that "samples should be sent through the Superintendent, Rifle Factory, Ichapur." Then still in the same column, the statement is made that "the Asiatic Petroleum Company has an oil and the Burma Oil Company a composition which is suitable." It is clear that this oil and this composition are referred to in the antecedent phrase "particulars of any substitute other than those proposed."

In the remarks column, opposite the entry in column 2 referring to the Asiatic and Burma Companies, the note occurs: "Sample is being sent separately by parcel post registered." It does not appear of what oil the sample consisted or what became of the sample, but it is clear that Waite's attention was expressly drawn to the fact that the Asiatic Petroleum Company had an oil which was suitable. It is further beyond dispute that in August, 1918, the Company had an ample and immediately available stock of a water-soluble oil which they called "turnol," and which they were selling at Rs. 2-14-0 a gallon. If Waite be credited with nothing more than ordinary intelligence, there was no room for mistake on his part. He had

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only to apply to the Company and he would have obtained at the price stated an oil which would have satisfied the urgent needs of the Ichapur Factory.

He did not, however, take that simple course. In the first place, he was dilatory. He did nothing till he received a reminder from the Director of Ordnance Factories, Bengal, referring to the Simla indent, upon which he noted that "samples of this and Leone oil have been promised by Spalding & Co." Then comes a letter, dated 20th September, signed by P. H. Michael for Spalding & Co., informing Waite that they were in a position to supply him with his requirements and forwarding a sample in a pint bottle of an oil which they were prepared to deliver at Rs. 12 per gallon packed in one-gallon tins. For the present we pass by the question of what oil the sample consisted of.

On the same date, the 20th September, Spalding & Co. wrote to Michael to confirm their quotations to him "for water-soluble oil as per sample landed to you for the Indian Munitions Board at Rs. 8 per gallon packed in one-gallon tins." They continued "You are at liberty to cover yourself with any extra price. Such difference or excess price obtained by you will be payable to you as your remuneration for services rendered."

The sample in the pint bottle was sent on the 21st September, under Waite's order given on the 20th to the Ichapur Factory with a statement that it had been received from Messrs. Spalding & Co.

Another reminder, dated 20th September, this time from Simla, requesting the very early supply and despatch of the oil required, did not lead Waite to make further inquiries or change his line of conduct.

By a letter, dated 5th October, the Superintendent informed Waite that the

sample had been "tested and found suitable" and asked him "to arrange for a supply as soon as possible." On the 10th October, Spalding & Co. were informed by letter of the result of the test and that an order would be placed for the supply and that deliveries must be made immediately. Nevertheless, the formal order was not issued till the 23rd October. The order was for the immediate delivery of 1,800 gallons of "oil water-soluble as per sample approved" at the rate, including all charges, of Rs. 12 per gallon. By a foot-note Spalding & Co. were directed to despatch the oil direct to the Ichapur Factory.

Thus there was a delay of two months in placing an order which might have been placed at once and much more advantageously if Waite had made proper inquiries in the quarters indicated on the face of the Government indent.

Learned Counsel for Billinghamurst suggested that Waite was concerned to obtain "real" water-soluble oil. But the term is merely descriptive. The evidence shows that there are various preparations in the market which come within the description. They differ in their qualities and composition, some having a basis of vegetable oil and some a basis of mineral oil. Under his instructions it was Waite's clear duty to obtain as quickly and cheaply as possible an oil which would serve the purposes of the Ichapur Factory. It was not a question of academic chemistry but a practical question and there is no room for doubt that the Asiatic Company's oil at Rs. 2-14-0 or Rs. 3 a gallon would have been a very much better bargain than the oil supplied by Spalding & Co. at Rs. 12 a gallon.

The delay did not end with the issue of the order of the 23rd October. Another reminder, dated 31st October, was address-

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ed to Waite by the Director of Ordnance Factories which led to Spalding & Co. being told that "if no intimation is received" of the despatch of the oil ordered, "before the 13th instant, the demand will be cancelled on you." This letter bears date the 14th November, though the sentence quoted shows that the draft must have been prepared before the 13th. The office copy exhibited is not initialled but as issued the letter must have been signed by or for Waite and a copy was sent to the Director. Replying on the 15th November, Spalding & Co. informed Waite that 240 gallons of water-soluble oil had been despatched on the 14th November and that they expected to forward the balance during the ensuing week. As a matter of fact the railway receipt shows that the first consignment of 6 barrels was despatched on the 16th November.

What appears is that when Spalding & Co. stated as far back as the 20th September, that they were in a position to supply water-soluble oil, they were promising more than they could then perform.

Towards the middle or end of October they addressed some forty firms in Calcutta, including Messrs. Shaw, Wallace & Co. (agents for the Burmah Oil Company), Messrs. Heatly & Gresham, and the Asiatic Petroleum Company asking for quotations for water-soluble oil.

These inquiries were for the most part infructuous and at the hearing of the appeal learned Counsel for Billinghamurst obtained leave to prove a letter, dated 26th October, received from Mr. Edwin William Harlow of Messrs. Gullanders, Arbuthnot & Company, the agents of the Asiatic Petroleum Company.

Mr. Harlow was accordingly examined in this Court. He proved his signature on the letter which stated inability to supply the quotations asked for. In cross-

examination, however, by the learned Advocate-General, he explained that he had water-soluble oil at the time but he understood that the inquiries were made on behalf of the Government and he or his firm wished to keep all Government business in their own hands with a view to supplying the Government direct.

In this case at any rate refusal to furnish Spalding & Co. with the quotations for which they asked did not mean that Waite could not have obtained water-soluble oil if he had himself made the inquiries made by Spalding & Co. On the contrary, this evidence shows that if Waite had done what he ought to have done, *viz.*, inquired of the Asiatic Petroleum Company, he would have obtained the oil at a reasonable price.

The oil which Spalding & Co. eventually supplied was obtained as to two barrels from Messrs. Heatly & Gresham and as to the remaining 38 barrels from Messrs. Grandage, Moir & Co.

The transactions with the two firms named are on record. To begin with there is a bill, dated 26th October of Messrs. Grandage, Moir, against Michael for Rs. 20 on account of five gallons of their oil, called "koolkut" at Rs. 4 a gallon. The receipt on the bill shows that it was paid by cheque on the same date.

There was some dispute at the trial whether Messrs. Heatly & Gresham supplied one or two barrels of their oil called "thresol." Before us the learned Advocate-General did not press the point and it seems to us on the evidence that as contended for the defence, Spalding & Co. received two barrels from this source, the first on the 29th October and the second on the 14th November.

On the 9th November, Messrs. Spalding & Co. gave an order to Messrs. Grandage, Moir & Co. for 500 gallons at Rs. 4 a gal-

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lon as arranged by Michael and understood that "you will deliver us at the rate of 80 gallons or two casks, each containing 40 gallons from next week." On the 21st November, Messrs Grandage, Moir & Co. were asked for a further 500 gallons and were told that "it is very important that we should have further quantities delivered to us daily."

A book called Spalding's Factory Stock Book, relating to their depôt at Entally, shows the following receipts of Messrs Grandage, Moir & Company's oil (kool-kut) —

15th November 1918	4 barrels
21st do	4 do
28th do	6 do.
4th December 1918	10 do.
2nd January 1919	6 do.
6th do	5 do
9th do.	3 do

It is very pertinent to compare the dates on which Spalding & Co were negotiating for obtaining their supplies with the delay on Waite's part in placing the order and with the date—14th November—on which Spalding & Co were threatened with the cancellation of the order. It is difficult to resist the inference that the order was delayed to enable Spalding & Co. to feel their way and that the threat to cancel was held back till Spalding & Co had some prospect of obtaining supplies on a sufficient scale. In other words, the principal parties to the transaction were acting in concert.

On the 29th November, the Ichapur Factory wrote to Spalding & Co. acknowledging the receipt (through the Gun and Shell Factory where they had been mis-carried) of the six barrels despatched on the 16th. The case for the defence is that the six casks included the two casks supplied by Messrs. Heatly & Gresham, and the first four casks supplied by Messrs.

Grandage, Moir & Co. The Factory complained that all the barrels were not equally full. They added "Please also note that the barrels do not appear to contain the same quality of oil, it is, however, all soluble."

By the 20th December, the Factory had received 25 barrels and by a bill of that date Spalding & Co claimed payment of Rs 11,310, the equivalent of 1,195 gallons as Rs 12 a gallon. The bill was sent to the Factory for verification under cover of a letter, dated 8th January 1919. By a letter also of 8th January, signed by Meek for the Deputy Controller, Inspection, (Waite was at the time absent from the office), Spalding & Co were requested to consider the order cancelled in respect of the balance of the 1,800 gallons, namely, 605 gallons. On the 9th January, Spalding & Co replied that they had already complied with the demand in full, and on the 23rd January they submitted a further bill for Rs 7,752 as for 646 gallons.

The position taken by Spalding & Co., therefore, was that they had supplied 1,195 gallons in 26 barrels before the 20th December and 646 gallons in 14 barrels thereafter. The last three of the 14 barrels were received by the Factory on the 10th January. By computation the 26 barrels contained an average of just under 46 gallons a barrel and the 14 barrels an average of just over 46 gallons a barrel.

It had to be conceded in argument that the total of 1,841 gallons was from 80 to 100 gallons in excess of the whole quantity of oil originally supplied by Messrs. Heatly & Gresham and Messrs Grandage, Moir & Company. The excess may have been more but it was certainly not less than from 70 to 80 gallons.

We have said that Spalding & Company's bill was sent to the Factory for verification. It drew from the Superin-

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tendent, Captain Kinloch, a letter, dated 14th January 1919, of which some part must be quoted. Capt Kinloch began by regretting that he could not certify the bill as correct in respect of the quantity or condition of the goods supplied.

As regards quantity he said: "Had the barrels sent all been full, the quantity would have been correct, but 10 of them were not, and as my reducing a bill without reference to the firm causes annoyance, I wrote to them under my No. 393, dated 29th November 1918, pointing out that the oil was not all of the same quality, and asking them to say what the measurement of the doubtful barrels was, but up to now they have not answered and I have accordingly not completed the measurement. Could you kindly ask them to send some one alone to see to this?"

As regards conditions he said this: "As far as condition goes, no 3 barrels seem to be alike. Out of the whole consignment, only two appear to be really soluble oil. The others are slightly emulsified and they vary each from the other. I send you three samples marked 'A', 'B', and 'C'. I had two of them analysed. The sample marked 'A' had a specific gravity of '925, that marked 'B' 1'001, and the latter was reported to be in a semi-emulsified condition. It is evident they are not the same, and if one of them is according to the sample supplied by the firm the other cannot be."

Then he turned to the price and said: "I notice from the bill that the price charged is Rs. 12 per gallon; surely this is an error. I purchased a really good soluble oil from the Asiatic Petroleum Company during 1917 at Rs. 2-6-9 per gallon, and I notice that on the D. O. F. No. 14638-S, dated 13th August 1918, transferring the order to the Indian Munitions Board, a note to the effect that the

Asiatic Petroleum Company supply a suitable oil, is mentioned."

He continued: "For example, if the whole quantity invoiced had been received from Messrs Spalding & Company, i.e., 1,195 gallons, as each gallon as supplied makes 11 gallons for use at the machines, the total quantity of lubricants produced would have been 13,145 gallons, and the cost Rs. 14,340--annas, 17'11 per gallon. Of the Asiatic Petroleum Company's compound only 215½ gallons would have been required to make the same quantity of lubricant and the cost would have been Rs. 598-10-0--anna, '62 per gallon."

"I recognize that the price has been agreed upon with Messrs Spalding & Co.; and had the oil supplied all been the same and up to sample, I should have had no legal ground for complaint, but as it is not all the same and is mostly very inferior, and as these costs are all debited to the rifles produced here, I should be glad if you could see your way to obtain a reduction of the rate."

He concluded by asking that a representative of the firm might be sent out to discuss the matter with him and see the supply in bulk.

A copy of this letter was sent to Spalding & Co. and acknowledged by them in a letter, dated 30th January. "In reply," they said, "we beg to state that we were not asked to supply water-soluble oil to any specified specific gravity, nor had we undertaken to do so. The indent placed with us distinctly stated 'water-soluble oil' only and in accordance with this indent we have supplied the required quantity commencing from November last, and it was not till our bill was presented in January that for the first time the question of price and specific gravity have been raised by the Superintendent, Rifle Factory, Ichapur."

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They went on to say that "when the enquiry for water-soluble oil was placed with us for the required quantity, there was no contractor who was in a position to comply with this order." That shows how little they knew of the market. "We are, however," they added, "quite prepared to meet the Superintendent as desired by you."

In answer, Meek, on the 26th February, drew the attention of Spalding & Co to the fact that the order of 23rd October, distinctly stated "oil water-soluble as per sample approved," and to the further fact that the result of the test of their sample had been communicated to them.

Spalding & Co did not write again till the 29th April, when in a letter, headed "without prejudice," they maintained their position. "We supplied the oil," they then said, "according to the sample approved in November 1918, and it has not until end of the January 1919, after our bill had been presented for payment, that the question of specific gravity and price was raised by the Superintendent, Rifle Factory. We were never asked to replace any of the oil and were therefore satisfied that the soluble oil supplied by us must have been approved. As regards the rate, we were asked to tender our rate for the oil by the Deputy Controller, Inspection, the same had been accepted, *vide* your office demand dated 23rd October 1918. Under the circumstances we see no justification for repudiating the value of the oil supplied and delivered by us. We trust you will be pleased to pass our bills for same, as these had been considerably overdue. Bank interest is accruing on the amount and we cannot afford to suffer further loss."

In speaking of "the sample approved in November 1918," Spalding & Co. were apparently referring to the Factory's letter

of 29th November in which it was said that while the oil supplied was not all of the same quality, it was all soluble. That letter was in the nature of a complaint rather than an approval and what the firm had contracted to do was to supply oil according to the sample in the pint bottle. On the 30th April, Meek, acting under instructions from the Controller, Oils and Paints, Simla, with whom he had been in communication, finally refused to pass Spalding & Co's bills, which he returned. At the same time, he requested them to remove the rejected materials.

This last request was also made under a direction from the Controller, Oils and Paints, to the effect that so much of the oil as had not been used should be returned. A word must be said as to what followed.

According to the Factory, they had used the contents of 26 barrels of Spalding & Co's oil, amounting to 1,040 gallons (or an average of 40 gallons per barrel). They proposed to return the balance of 14 barrels. This appears from a letter, dated 16th May, addressed by Capt. Kinloch to the Controller of Munitions. Michael had visited the Factory on behalf of Spalding & Co before the letter was written and Capt. Kinloch begins his letter as follows: "The 14 barrels of oil which it is proposed to return to Spalding & Co have not been measured, 10 of them were not correct when received and a representative of the firm recently called here and satisfied himself that the quantity was not correct."

Further on Capt. Kinloch says: "The statement of the representative of the firm that the oil was correct to the sample, cannot be admitted. He called here, saw the oil and had to admit that no two barrels were alike except two which contained an oil utterly different to any of the others."

Capt. Kinloch then referred to the ana-

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lysis which had been made of samples taken from three different barrels.

Further details as to Michael's visit were given in the witness-box by Mr Fitzpatrick who was in 1919 Head Overseer of Stores of the Rifle Factory. In reference to Capt Kinloch's letter he corroborated the statements therein made and said that Michael was the representative of Spalding's firm. He also said: "With regard to there being only two barrels alike Michael explained that Spalding's chemist had been carrying out experiments and that probably accounted for the two barrels being utterly different from any other. In my opinion, the sample sent to us had been made of oil of the quality in the two barrels which were alike."

On the 5th June, a copy of Capt. Kinloch's letter was forwarded by Mr. Meek to Spalding & Co. with the request that they would submit a revised bill for the 1,040 gallons actually used and remove the remainder from the Factory.

Spalding & Co. replied in a letter, dated 8th July, the signature of which "Spalding & Co." is in Bilinghurst's hand-writing. The firm did not dispute the fact of Michael's visit nor did they challenge the statement that at the time of the visit there were at the Factory 14 barrels of their oil unused. They addressed themselves to the quality of the oil and stated their reasons for refusing to take back the 14 barrels.

Before we deal with the quality of the oil, it may be mentioned that ultimately the Factory sent away 14 barrels. Spalding & Co. refused to take delivery and the oil was sold. There has been some dispute whether 12 of these 14 barrels contained Spalding & Co.'s oil, but the point is really immaterial. There is some confusion and obscurity in the evidence and some mistake may have been made as re-

gards the barrels sent away. We will take it that at one time or another the Factory consumed the contents of 38 of the barrels received from Spalding & Co.

As to the quality of the oil it is common ground that two different kinds of oil were supplied, namely, the oil in the two barrels probably those obtained by Spalding & Co. from Messrs. Heatly & Gresham, and the oil in the 38 barrels, all of which probably come from Messrs. Grandage, Moir & Co. We gather from Capt. Kinloch's letter of 16th May that the two barrels contained an oil of identical kind and quality, utterly different from the oil in the 38 barrels. As to the latter oil it was all similar in kind though chemical analysis showed that it might vary somewhat in quality or composition from barrel to barrel. The oil or preparation in the two barrels had mineral oil as a basis while the basis of the preparation in the 38 barrels was a vegetable oil, probably castor oil.

Now we have said that according to the defence the sample in the pint bottle, which was found satisfactory, was a sample of the oil in the two barrels. The matter is not free from doubt but the contention is supported to some extent by the evidence of Mr Fitzpatrick to which we have referred. But if the contention be accepted, it is obvious that the oil in the 38 barrels was not in accordance with sample. On the other hand, on the footing that the contract for the supply of the oil was a valid mercantile contract, untainted by fraud, Spalding & Co. might well have said that the Factory had not taken either of the two courses indicated in sec. 118 of the Contract Act. They had not within a reasonable time rejected the oil altogether as not being up to sample nor had they within a reasonable time given notice that they would accept the oil but intended to claim compensation or

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damages. If the letter of 29th November was in the nature of a complaint as regards the first consignment, it was hardly a sufficient notice that damages would be claimed in respect of the oil taken into use.

The Factory apparently did not use the oil in the two barrels which Mr. Fitzpatrick considered was according to sample and it is not disputed that these two barrels at any rate were among the 14 ultimately sent away. The explanation probably is that the quantity in the two barrels was insufficient to meet the Factory's needs for any length of time, and that the best had to be made of the bulk of the oil supplied of which at least 26 barrels were used. Referring to the quantity used in his letter of 16th May, Capt. Kinloch said: "The reason why this large quantity (1,040 gallons) had to be used was that I had nothing else available and the quality was so poor that large quantities had to be used to make the correct emulsion for use at the machines."

But on the footing that the contract was valid, it was quite unnecessary for Michael to invent imaginary experiments by an imaginary chemist or for Billinghamurst to make the statement which follows in the firm's letter of 8th July:—"At the time when the enquiry for the oil was placed with us there was no such oil available in the market, and as this demand was a pressing one, we were asked to manufacture the oil. In this connection, we had to go very much out of our way to prepare this oil in order to meet the demand; in doing so we felt that we were assisting the Munitions Board at a needful time."

Such explanations of the variations in the kind and quality of the oil supplied were wholly disingenuous and dishonest. The suggestions made in argument before us, that Spalding & Co. wished to conceal the fact that they were mere middlemen,

because they were afraid of losing Government custom, cannot be entertained. In July 1919 Spalding & Co. could have had no prospect of receiving any further orders from Government in any of its departments. The desire to conceal the fact that they were middlemen must have been the product of other motives. Doubtless, they were unwilling that discovery should be made of the price at which they had purchased the oil from Messrs. Heatly & Gresham and Messrs. Grandage, Moir & Co.

But before we come to the bearing of the quality of the oil or the price charged on the *bona fides* of the transaction, there is another matter to be mentioned. We have said that according to their bills, Spalding & Co. supplied more oil than they obtained from their sources of supply. It has been suggested for the prosecution that in order to make up the excess, some of the oil obtained from Messrs. Grandage, Moir & Co. was in some way diluted or adulterated. We are not satisfied that this is established. In respect of the first consignment the Factory complained in their letter of 29th November that all the barrels were not equally full and in his letter of 16th May Capt. Kinloch stated that 10 of the 14 barrels were not correct in quantity. It may, therefore, be that Messrs. Spalding & Co. charged in their bill for a larger number of gallons than were actually supplied. The prosecution, however, have not complained of the bills on this ground and we shall therefore assume that if an excess charge of this kind was made, it was due not to design but to some mistake of calculation.

There remains the question whether the order given by Waite for this oil was an honest order. In this case, as in the other cases, it is clear that in forwarding a copy of the order to Simla, Waite repre-

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sented that it was in fact an honest order and that the price to be paid was a fair market price. If the order was the result of an unlawful arrangement between Waite and Michael and Billinghamurst acting on behalf of Spalding & Co. it follows at the least that an attempt was made by those privy to that arrangement to cheat the responsible authorities at Simla. It is scarcely disputed—it cannot be seriously disputed—that the price charged was exorbitant. If Waite had made the most cursory inquiries, inquiries which it might almost be said he was directed to make, he could have purchased, at something under Rs. 3 a gallon, ample supplies of an oil which would not only have served the Factory's purpose but would have gone much further than the oil supplied. The point as to the difference between the Asiatic Company's oil and the oil supplied is well brought out in the Superintendent's letter of 14th January, 1919, from which we have already quoted. But the poor quality of the oil is not the really important factor in this case. As the learned Magistrate said, the price was "exorbitant even for good oil." If we assume that neither Waite nor Spalding & Co. were aware that water-soluble oil is mixed with water before use and that some of these oils will mix with a larger proportion of water than others, there still remains the fact that Waite himself made no inquiries of the Asiatic Petroleum Company and did not call in the ordinary way for tenders. From observations already made it is apparent that we cannot accept Waite's statement made in a letter, dated 20th May 1919, written from Ootacamund that he made personal inquiries from certain firms including the Asiatic Petroleum Company. It is no violent presumption to suppose that on the 20th September

when Spalding & Co. sent in the sample in the pint bottle (obtained as it is said from Messrs. Healty & Gresham) and put in writing their agreement with Michael that he should retain any excess over Rs. 8 a gallon, the firm knew that the market price for such oil would not be more than Rs. 4 or 5 a gallon—the prices at which they subsequently purchased. If the bills for the oil had been paid by Government, Spalding & Co. would have received somewhat less than twice the price they themselves paid and an additional Rs. 4 per each gallon would have gone, in the first instance at any rate, into Michael's pocket. Indeed, Michael submitted a bill to Spalding & Co. for Rs. 7,200 (equivalent to Rs. 4 a gallon for 1,800 gallons) and was paid Rs. 2,500 on account though Spalding & Co. had not received and in the result did not receive anything from the Government. Waite, it must be remembered, was throughout in close communication with Michael while the latter took a large share in the conduct of Messrs. Spalding & Co.'s business. The price to which Waite agreed was so extravagant that Capt. Kinloch thought it must be a mistake. We are not surprised that he was dismayed when Spalding & Co.'s bill was sent to him or that the transaction attracted attention at Simla and apparently was instrumental in leading the authorities there to depute Mr. R. D. Bell, the Controller of Oils and Paints, to Calcutta for the purpose of examining Waite's office.

Regard being had to all the circumstances we have detailed we can come to no other conclusion than that this transaction was the result of a corrupt and dishonest bargain to which Waite and Michael and Billinghamurst were parties.

The above statement of facts relates to the three specific instances relied upon

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by the prosecution as showing the existence of a general conspiracy between the Appellants and Waite.

It was argued on behalf of the Appellants that the fact that there were three letters from Spalding & Co. to Michael relating to these three matters, proved that there could not have been one general conspiracy and that a separate agreement was entered into with respect to each of the three transactions, *viz.*, linseed oil, turpentine, and water-soluble oil.

On the other hand, it was argued on behalf of the prosecution that the conspiracy to cheat the Government of India was arrived at some time about the 14th June 1918, and that the subsequent agreements were merely supplemental to the original agreement. The dates of the three letters from Messrs Spalding & Co. to Michael were 14th June 1918, 3rd September 1918, and 20th September 1918.

It was pointed out on behalf of the prosecution that the letter of 14th June 1918, referred to other oils in which Spalding & Co. might be interested, as well as to linseed oil, to which special reference was made that the letter of 3rd September 1918 expressly referred to the previous letter of the 4th June 1918, and that with regard to the letter of the 20th September 1918, which dealt with water-soluble oil, Michael's bill to Spalding & Co. for Rs. 7,200, in respect of the difference in rate for water-soluble oil, referred not only to the letter of 20th September 1918, but also to the letter of 14th June 1918.

In our judgment the mere fact of there being these three letters in respect of the three articles is not inconsistent with the existence of one general conspiracy. The letters of the 3rd and 20th September 1918, appear to have been supplemental to the letter of the 14th June 1918.

The large order for turpentine had been

given by Waite to Michael on 31st August 1918, and it may not unreasonably be concluded that Michael desired to have it definitely stated that the terms with respect thereto should be on the lines of the letter of the 14th June 1918.

The amount of Spalding & Co.'s bill against the Munitions Board in respect of the order for turpentine was Rs. 15,487 and Michael's bill against Spalding & Co. was no less than Rs. 17,195.

It was therefore an important matter both for Michael and Spalding & Co.

It is to be noted that Michael received no commission in respect of that transaction but his remuneration was based on the excess rate charged to the Munitions Board, whereas in respect of the linseed oil he received commission as well as the other sums already mentioned.

It is further to be noted that this was not the first transaction in turpentine. It appears that on the 2nd July, Spalding & Co. received an order for 20 gallons of turpentine, Java, No. 2. Spalding & Co.'s account against the Munitions Board was Rs. 160, Michael's bill against Spalding & Co. was Rs. 80 in respect of the excess rate.

On the 11th July 1918, Spalding & Co. received a further order for 600 gallons of turpentine, Java, No. 2. Spalding & Co.'s bill against Munitions Board was Rs. 3,900 and Michael's bill against Messrs Spalding & Co. was no less than Rs. 2,400.

On the 9th August there was a further order for 25 gallons of turpentine, Java, No. 2, which was supplied at the rate Rs. 25 per gallon—a most extortionate charge.

Spalding & Co.'s bill against the Munitions Board was Rs. 625 and Michael's bill against Spalding & Co. was no less a sum than Rs. 500 out of a total of Rs. 625. It

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is difficult to find any justification for such transactions.

These bills of Michael's against Spalding & Co. were based on the excess rates obtained by him from the Munitions Board over and above the rates quoted to him by Spalding & Co.

These items are to be found entered in Spalding & Co.'s journal at p 21 under the heading of "Michael's Commission Account."

The number of bills, the excess rates and the amounts due to Michael are set out in the entries.

The learned Counsel for Billinghamurst said that Billinghamurst was unaware of these entries or transactions. We find it difficult to accept such a statement.

It is clear, therefore, that the arrangement set out in the letter of the 3rd September 1918, which related to turpentine, was in force and was being acted upon before the letter of the 3rd September 1918 was written and, in our opinion, that letter came into existence because of the large order which had been obtained on the 31st August 1918, in order that there should be no doubt as to the excess profits which Michael was to put into his pocket in respect thereof.

It was on the 20th September 1918, that in answer to an enquiry from Waite, Spalding & Co wrote saying they could supply the water-soluble oil and they were sending a sample; on the same day Spalding & Co. wrote the letter confirming their quotations to Michael and agreeing to allow him the differences or excess price obtained by him as remuneration for his services. No commission was payable in respect of this matter; but as already pointed out, Michael's bill in respect of water-soluble oil referred not only to the 20th September letter, but also to the letter of 14th June 1918, showing that it was treated as being

part and parcel of the original arrangement, with a variation as to the terms. Having regard to these facts, we are of opinion that the argument based on the three letters to the effect that there could not have been one general conspiracy, fails.

It was further urged on behalf of the Appellants that the fact that there were many transactions intervening between the dates of the three matters alleged as overt acts by the prosecution, and that it was not proved that such transactions were fraudulent or dishonest was inconsistent with the existence of one general conspiracy.

We are not prepared to accept that contention. Assuming for the sake of argument that all such other transactions were honest, but that the three which have been investigated were not honest, these facts are not inconsistent with a criminal conspiracy to defraud the Government of India as and when opportunity occurred.

Reference was made to Waite's banking account which showed the payment into his account of various large sums of money, some of them in cash, the result being that there was an accretion of about a lakh of rupees in the course of a year over and above his salary.

We are of opinion that no reliance can be placed upon this matter, as showing that Waite was a party to the conspiracy alleged in this prosecution, for no proof has been given that any of such sums were in connection with the transactions now under consideration.

Having regard to the facts which have been proved in this case, we are constrained to come to the conclusion that Michael and Billinghamurst entered into a criminal conspiracy, as charged by the prosecution, to cheat the Government of India of sums of money in connection with supplies by Spalding & Co. to the Munitions Board, and that the facts point to there having

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been one general conspiracy to carry out such cheating as and when opportunity occurred.

We are further of opinion that such cheating could not have been carried out except with the connivance, assistance and knowledge of Waite, and that Waite himself was a party to the criminal conspiracy alleged.

The result of our conclusion, arrived at after a prolonged hearing of the appeal, is that the decision of the learned Magistrate in respect of the first charge must be upheld.

The second charge was as follows:—
“ That between the 26th August 1918, and the 10th December 1918, in Calcutta, you (1) J. Stoddart, (2) H. P. Blackburn, (3) P. E. Billingham, and (4) P. H. Michael cheated the Government of India by dishonestly inducing them to deliver cheque No. 59258 for the sum of Rs. 59,265, the property of the Government of India, for credit of Messrs. Spalding & Co. in payment of fraudulent bills Nos. 133 to 137 for linseed oil and thereby committed an offence punishable under section 420, Indian Penal Code, and within the cognizance of my Court.”

The charge refers to the five bills Nos. 133 to 137, Vol. II of the Paper-Book, pp. 145 to 153. Objection was taken to the form of the charge on the ground that it did not state the person or persons who were deceived by the alleged fraudulent bills Nos. 133 to 137, and who were thereby induced to deliver the cheque for Rs. 59,265.

It was alleged that, although the Government of India might be said to be a person within the meaning of sec. 420 of the Indian Penal Code, there was no suggestion that the persons constituting the Government of India as defined by sec. 16 of the Indian Penal Code, were deceived or

induced to issue the cheque and that the defence were entitled to know the person or persons upon whose mind or minds the fraudulent bills were alleged to have operated.

In our judgment, the charge should have contained an allegation of the person or persons who were alleged to have been deceived and induced to issue the cheque.

We are of opinion, however, that the omission should not be regarded as a fatal defect in the charge, inasmuch as the accused were not misled and there was no failure of justice by reason of the omission of the above-named particulars from the charge.

Another objection was taken to the second charge. It was alleged that the five bills, therein referred to, were presented at different dates, and that if any offence was committed by the Appellants in respect of the bills, there were five separate offences of cheating and five separate offences could not be included in one charge.

In our judgment this contention cannot be accepted.

The offence charged under sec. 420, Indian Penal Code, would not be complete until the Government of India, being induced thereto by the alleged fraudulent bills, delivered the cheque for Rs. 59,265. Until the last of the five bills was delivered the inducement was not complete, and until the cheque was issued the offence under sec. 420, Indian Penal Code, was not complete.

In our judgment, therefore, the charge did not include five separate offences as alleged, but one offence only.

A further objection, however, was raised on the ground that the prosecution have not proved that any person or persons representing the Government of India was or were deceived by the alleged false and fraudulent representations contained in the

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bills or were induced to issue the cheque by reason thereof.

The material facts in this respect are as follows :—The bills Nos 133 to 137 were sent by Spalding & Co. to Waite : Waite, on the 10th October 1918, sent them to the Deputy Controller of War Accounts, Calcutta, with a covering letter of that date, addressed to Deputy Controller, War Accounts, Munitions Board, Simla.

The Deputy Controller, War Accounts (Munitions Board), Calcutta, forwarded the bills with Waite's letter to Simla.

He made an endorsement on the letter as follows —“ Not checked. order is prior to August, 1918 ”

In his evidence S. K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, explained that, with regard to bills relating to orders placed before 1st August 1918, he passed them from Calcutta to Delhi or Simla without audit or check which he left to the Delhi or Simla office.

In pursuance of this practice the above-mentioned endorsement was made.

The bills in question were dealt with in the audit office at Simla by an official, N. K. Ayer. The cheque for Rs 59,265 was signed by another official C. P. A. Aiyar. C. P. A. Aiyar, who signed the cheque, said that before issuing a cheque he saw that the bills had been properly signed and passed by the audit officer, viz., Mr I. P. Dutt in 12 cases and by the other audit officer, N. K. Ayer, as regards the rest of the bills in respect of linseed oil. The bills in question bear endorsement “ Passed for Rs. ————,” the endorsement in each case mentioning the amount of the bill and being initialled by N. K. Ayer.

N. K. Ayer, however, was not called as a witness.

The prosecution allege that the two persons deceived by the alleged fraudulent bills were S. K. Dutta Gupta, the Deputy

Controller, War Accounts, at Calcutta, and N. K. Ayer, the audit officer, at Simla; and that C. P. A. Aiyar was the person induced by the alleged fraudulent bills to issue the cheque.

In our judgment, however, it is clear from the evidence that C. P. A. Aiyar relied solely upon the endorsement and initials of the audit officer, N. K. Ayer, which authorized him to pay the bills, and not upon any statements contained in the bills.

N. K. Ayer, the audit officer, should have been called as a witness, as is now admitted by the prosecution.

S. K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, said in his evidence that if he had been informed that the proper quantity of linseed oil had not been supplied, he would not have allowed the bills to be forwarded to Simla.

He went on, however, to say that his instructions to his Superintendent were that before forwarding the bills for payment he was to see that they were countersigned by the Deputy Controller, Inspection, i.e., Waite.

It has already been stated that the bills were not checked in the office of the Deputy Controller, War Accounts, Calcutta, and it is clear that all that was done with regard to the bills in question in that office was to see that the bills were countersigned by Waite and the bills were then forwarded to Simla.

As far as the office of the Deputy Controller, War Accounts, Calcutta, was concerned, the officials relied upon the signature of Waite. It was his signature which induced them to forward the bills to Simla.

It has been admitted that unless it can be shown that Waite was a party to the conspiracy alleged in the first charge, the second charge must fail. It is clear that this must be so, for if Waite was not a

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party to the conspiracy, he would be one of the persons deceived by the alleged false and fraudulent representations in the bills and he has not been called as a witness to prove this.

The case, therefore, appears as follows :—

C. P. A. Aiyar issued the cheque relying on the endorsement on the bills initialled by the audit officer, N. K. Ayer, which authorized him to pay them.

N. K. Ayer has not been called to prove what it was which induced him to pass the bills.

The other audit officer I. P. Dutt, who did not pass the five bills in question was called as a witness and he said that as regards the bills with which he dealt, he was only concerned to see that the bills were duly countersigned by the purchasing officer (in this case Waite) and that they were arithmetically correct.

It is probable that N. K. Ayer did no more than I. P. Dutt, but, on the other hand, it is possible that he did more, and that he did not rely solely on the signature of Waite.

In a criminal case, such as this, it is not permissible to speculate on such a question and the audit actually applied by N. K. Ayer to the bills in question should have been proved by the prosecution.

S. K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, was little more than a forwarding agent in respect of the bills in question. He did not check them, and all he did was to see that they were countersigned by Waite.

In our judgment, the prosecution have not proved that any official of the Government of India was deceived by the alleged false and fraudulent representations contained in the bills, and they have not proved that any official of the Government of India was induced by the false repre-

sentations, alleged to have been made by Michael and Billinghamurst in the bills, to issue the cheque for Rs. 59,265.

Assuming that Waite was a party to the conspiracy with the two Appellants to cheat the Government, the prosecution, in our judgment, have failed to prove the elements necessary to constitute the charge under sec. 420, Indian Penal Code, in respect of the five bills Nos. 133 to 137.

Although the prosecution in our judgment have, for the reasons already stated, failed to prove at least one and perhaps two of the elements necessary to substantiate the offence contained in the second charge, viz., under sec. 420, Indian Penal Code, we are of opinion that the evidence produced in support of that charge is sufficient to support a charge of an attempt or attempts on the part of the Appellants to commit the offence involved in the second charge.

In our judgment, the Appellants presented the bills, referred to in the second charge, knowing that they contained false representations as regards the number of gallons of linseed oil by Spalding & Co.

The presentation of each of the bills was an application for the payment of money under false pretences. It was done dishonestly and with the object of deceiving the officials of the Government of India and inducing the Government of India to issue a cheque or cheques for the amounts of the bills.

As soon as each of the bills was presented the offence of the attempt was committed.

The Appellants might have been convicted of the attempt although it was not charged (*see* sec. 237 of the Criminal Procedure Code).

The Magistrate, however, did not take this course, as in his view the offence charged had been proved. Nor was it sug-

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gested in argument that the Appellants should now be convicted of the attempt and we do not propose to take that course in appeal. We are of opinion, however, that the evidence in respect of the charge, so far the Appellants are concerned, is material on the question of the conspiracy alleged in the first charge.

It is necessary in this connection to notice an argument which was urged by the learned Counsel on behalf of Billinghamurst; *viz*, that even assuming he knew that the bills presented by Spalding & Co contained false representations as regards the number of gallons of linseed oil supplied by Messrs. Spalding & Co., his action in presenting the bills could not be regarded as dishonest, as he expected and believed that the bills would be checked by the Government of India officials and that if they did check the bills and passed them, after such checking, Spalding & Co would legitimately be entitled to receive the amounts of the bills.

We cannot for a moment accept such an argument. If we were to give any sanction to such conduct, as being legitimate, it would entail a serious inroad upon the principles of common honesty and commercial integrity.

The result of our judgment is that the Magistrate's decision as to the first charge must be upheld, and that the conviction under the second charge should be set aside.

We have now to consider the question of sentence. The premises of Messrs. Spalding & Co. were searched on the 23rd December 1919, and at other times between that date and the 22nd August 1920, when the complaint in this case was lodged.

Billinghamurst was arrested in September 1920, and released on bail on the 9th September 1920. Extradition proceedings

were instituted with regard to Waite, Blackburn and Michael who were in England. Waite was seriously ill and was not extradited but in pursuance of the extradition proceedings Blackburn and Michael were brought before the Court in April 1921, under arrest.

On the 24th May 1921, on the application of Billinghamurst the High Court made an order that the trial of the case should proceed, though the presence of Waite could not be obtained, and gave a direction that the proceedings before the learned Magistrate should be continued as far as possible from day to day and completed with all possible despatch.

The trial began on the 7th June 1921, the hearing was not finished until 22nd August 1922, and judgment was delivered on the 28th November 1922.

In our judgment it is necessary to draw attention to these dates and to express our grave concern at the length of time occupied by the trial of this case.

From whatever point of view the matter is approached, it is equally serious. However guilty an accused person may be, it is most undesirable that he should be subjected to the strain and anxiety of such prolonged proceedings unless it is absolutely unavoidable.

From the other point of view it must be obvious that the cost of proceedings, such as these, must be increased proportionately as the proceedings are prolonged.

From the materials before us it is clear that adjournments were at various times granted on the application of one or other of the accused, sometimes on the ground of illness, and that they were responsible for some of the delay. On the other hand, they certainly were not responsible for anything like all the delay, as, for instance, on one occasion the Magistrate was unable to proceed with the case for a whole month



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owing to his being deputed to other work, viz, enquiry into a disturbance at the jail.

What amount of unnecessary repetition and additional labour was entailed by such an interference with the proceedings, only those engaged in the trial and conduct of the case can say it was a case full of details with many exhibits and the extra work and time involved by reason of such an interference must have been very considerable.

We recognize that the case was by no means an easy one, there were many documents and accounts to be examined, and materials had to be collected from various places but, making all allowances for these matters, we see no real justification for so long a time being occupied in the disposal of this case, and we have felt bound to draw attention to this matter in the public interest.

There is another reason for referring to the length of the proceedings and that is that we consider it material on the question of sentence.

As already mentioned, Billinghurst was arrested in September 1920, subsequently released on bail, and convicted in November 1922.

Michael was brought from England and placed before the Court in April 1921, and convicted in November 1922.

The strain, anxiety and mental suffering, to which the Appellants must have been subject during this long time, must have been severe, and that is a matter which, in our judgment, may legitimately be taken into consideration in passing sentence.

For these reasons we reduce the sentence of one year to one of nine calendar months.

With regard to the appeal of the Crown against the acquittal of Blackburn, viz.,

No. 1 of 1923, in our judgment, the prosecution have not shown sufficient reasons for interference on our part with the decision of the learned Magistrate and consequently the appeal in this case must be dismissed.

During the course of the argument a statement was made by the learned Counsel, appearing for Billinghurst, to the effect that an offer had been made on behalf of the Government of India to withdraw the case on certain terms. We thought it necessary to ask the learned Advocate-General to ascertain precisely what occurred as he said he was not instructed with respect to this matter.

He afterwards made the following statement:—"Government never offered to release Billinghurst on any terms at all. On the———(sic?) August 1921, the case against Sukhlal Kernani was withdrawn.

By a letter, dated the 9th August 1921, Mr. Armstrong, the investigating officer, reported to Government that Blackburn had called that morning at the Munitions office and that the question of withdrawing the prosecution against Spalding & Co. which arose as a possible consequence of the withdrawal of Kernani's case, was discussed. Blackburn was told very clearly that the withdrawal could not be recommended, if there was any chance of Government being subsequently harassed with claims by the accused; he was told that the accused might submit for consideration a petition that if the case against Spalding were withdrawn, the accused undertook to bring no claim for damages or costs against Government in respect of it, that the circumstances of the case justified the extradition and the case being put in Court and that they withdrew all imputations made in a petition presented to Court on the 12th July.

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He was further told that if he put in such a petition it would be forwarded to Simla.

By letter, dated 10th August 1921, Mr. Armstrong reported to Government that Billinghamurst did not intend to apply for withdrawal unless Government were prepared to pay him compensation.

On the 15th the Government issued orders that "Spalding's case should not be withdrawn but should be prosecuted to a conclusion."

In our judgment this matter is outside the scope of this appeal, and it is not necessary for us to express any opinion with respect thereto.

The Appellants must surrender to their bail at once.

With regard to what the two learned Vakils have just urged, namely for dealing with the accused Billinghamurst under the First Offenders Act or for further reduction of the sentence of the accused, we desire to say that we considered this matter fully and carefully before we delivered our judgment and we regret that we can see no reason for altering the decision at which we have arrived.

The application for granting compensation to Mr. Blackburn is rejected.

N. G.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD BUCKMASTER.

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

LORD SALVESEN.

1922,

Heard, 27 and

28, November.

Judgment,

20, December.

MUSAMMAT HAFI-

ZAN BIBI,

Appellant,

v.

MUSAMMAT SUBA

Bibi and ors.,

Respondents.

Fact, issue of—Reversal of judgment of trial Court on appeal, upheld—Oral agreement to pay a

dower of a lakh of rupees alleged to have been made at marriage which took place 36 years before suit—Nature of evidence needed to establish case.

Where the question was whether at the Plaintiff's marriage with her deceased husband, which took place 36 years before this suit against his estate for her dower money, the latter had verbally agreed to a dower of a lakh of rupees.

Held—That in view of the fact that the Plaintiff's case came (in the absence of documentary evidence) to rest entirely on the recollection of persons who were present at the marriage, the evidence of the agreement had to be clear and convincing in order to establish her claim against her husband's estate.

That though it appeared that the social standing of the Plaintiff's family was much below that of her husband's in whose family the customary dower of females was proved to be a lakh of rupees, as the marriage appeared to be a love match, there was no inherent improbability in the husband, infatuated as he seemed to be with her, agreeing to such a large dower if the Plaintiff's relations insisted. But in the absence of evidence of such insistence and having regard also to the generally unsatisfactory character of the evidence adduced by the Plaintiff, the Judicial Committee agreed with the High Court in dismissing the suit though the same had been decreed in the Original Court.

This was an appeal from a decree of the High Court, Allahabad, dated the 31st August 1915, reversing a decree of the Subordinate Judge of Gorakhpur, dated the 18th July 1913.

The parties were Mahomedans and the suit was brought by the Appellant to enforce her alleged right to a dower of Rs. 1,00,000 from the estate of her late husband.

The Subordinate Judge upheld her con-

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tention and passed a decree in her favour which was, however, reversed by the High Court on appeal. The Plaintiff thereupon filed this appeal to His Majesty in Council.

The arguments of Counsel were directed towards the facts which are fully set out in the judgment of their Lordships.

Mr. Narasimham for the Appellant

Messrs. Montgomery, K. C. and A. Majid for the Respondents

Their LORDSHIPS' JUDGMENT was delivered by

LORD SALVESEN.—In this suit the Appellant sued for payment of Rs. 75,000 as the amount of the dower debt due by the heirs of her late husband, Mujib Ullah. The latter died in 1909, and the present suit was commenced in April 1912. The Appellant was married about thirty-six years before the date of suit and had lived with her husband till his death. Her allegation was that at the time of the marriage an agreement was made on her behalf with her husband that her dower was to be a lakh of rupees. As she had succeeded to one-fourth of his estate the demand was correspondingly restricted.

The Subordinate Judge held on a consideration of the evidence led before him that the Appellant had established her case, but his judgment was reversed by the High Court, who gave decree in favour of the Appellant for three-fourths of Rs. 107, *i.e.*, for Rs. 80-4-0, and otherwise dismissed her claim. The sum of Rs. 107 represents the so-called "*fatmi*" dower, or the legal minimum to which the widow of a Mohammedan is entitled. No question was raised as to the amount of the "*fatmi*" dower if this is all to which the Appellant is entitled.

The issue was thus entirely one of fact, *viz.*, whether the Appellant had proved

the agreement which she alleged. She adduced ten witnesses in support of her case, of whom the Subordinate Judge held two to be unreliable, but as regards the others he considered them respectable and worthy of credit. The Respondents adduced six witnesses, all of whom the Subordinate Judge regarded as unreliable, and whom therefore he did not believe. Their story was that at the time of the marriage the dower was settled to be "*fatimai*" or "*fatmi*" dower.

The High Court proceeded on the assumption that the evidence for the defence was interested and unreliable, but on an examination of the evidence led on behalf of the Appellant held that she had failed to prove that her dower was fixed at one lakh of rupees at the time of her marriage with Mujib Ullah. This indeed was the main issue of fact which the Appellant sought to establish, although in the course of the trial a mass of conflicting statements as to the social position of the Appellant's family and the customary dower of female members was elicited from the witnesses examined on both sides. The materiality of this evidence if an agreement were clearly proved is not obvious, but, on the other hand, it afforded some test of the reliability of the witnesses on whom the Appellant chiefly relied if the conclusion upon it was unfavourable to her contentions.

When the evidence was led thirty-six years had elapsed since the date of the marriage and the verbal agreement relied on. There was admittedly no documentary evidence, and the Appellant's case came thus to rest entirely on the recollection of persons who were present at the marriage. In such circumstances the oral evidence of an agreement must be clear and convincing in order to establish a claim against the estate of the man who

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is said to have been a party to it. The Judges of the High Court have pointed out numerous matters on which the Appellant's witnesses gave evidence that was demonstrably false, and they accordingly reached the conclusion that their evidence in support of the allegation that the dower was fixed at one lakh was unreliable and ought to be rejected.

It would serve no good purpose to recapitulate in detail the grounds on which the High Court reached this conclusion. It will be sufficient to indicate generally their Lordships' own conclusions on the facts in controversy.

The marriage between the Appellant and Mujib Ullah was a love match. The Appellant was at the time a beautiful girl of eleven or twelve years, while Mujib Ullah had already reached the comparatively mature age of twenty-five. He was fond of hunting, and on one of his expeditions saw the Appellant, and fell in love with her. He kept the marriage a secret from his elder brother, the head of the family, but a good many of his relatives were present at it. The celebration was attended by many guests, variously estimated at 100 to 500 persons. Had the Appellant been a member of her husband's family, in which the customary dower of females is proved to have been a lakh of rupees, or had she been of equal social standing, there would have been a strong probability that her people would have stipulated for a similar dower before consenting to the marriage. The truth, however, appears to have been that while her father had at one time had some interest in landed property, it had been confiscated owing to the part he had taken in the Mutiny, and both he and his sons were in very reduced circumstances. A good many of the Appellant's witnesses testified to their belief that they did a considerable business (very

variously estimated) in grain and as money-lenders, but they are all open to the observation that they had very inadequate means of knowledge. A striking feature of the case is that the Appellant's mother and two brothers, who are all alive (the eldest brother having alone died), were not called as witnesses. On the matter of their social position, and especially as to their financial circumstances, they alone were in a position to give definite information, which might have been borne out or checked by reference to accounts or other documentary evidence. No evidence was led, apart from the Appellant's own statement in regard to a maternal aunt, as to what was the customary dower of females of the Appellant's family. It was argued that none was available, as the Appellant had no sisters and no other female relatives whom she knew. Her ignorance, however, of other members of her family is commented on by the Judges of the High Court, and certainly, if it be real, it suggests that the social importance of her family was much below that of her husband's, which is the conclusion that their Lordships have arrived at on the other evidence in the case.

Granting all this, there is no inherent improbability that the Appellant's husband, infatuated as he seems to have been with her, might not have agreed to so large a dower as a lakh of rupees if her relatives had insisted on this as a condition of the marriage. Of any such insistence there is no trace in the evidence, and all the persons who took part in the actual celebration or in arranging the amount of her dower—the kazi, the vakil and the witnesses—are all dead. Those who give evidence in the case were merely guests who had no special interest in the matters to which they depose and whose

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evidence in chief is singularly bald and devoid of detail. Under cross-examination they made such divergent statements as seriously to impair their reliability. Thus, to add only one instance to the many to which the High Court Judges refer, two of the Appellant's witnesses assert that Nasrat U'llah (the elder brother of the Appellant's husband) was present at the marriage, although if there is one thing certain in the case it is that the marriage had been kept secret from him, as the brothers were on bad terms. On the whole, therefore, their Lordships are of opinion that the High Court reached a correct decision in holding that the Appellant had failed to prove the agreement on which her claim was based, and they will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitor: Mr. Douglas Grant for the Appellant

Solicitor Mr. John Tucker for the Respondents

G. D. M

[CRIMINAL APPELLATE JURISDICTION.]

Full Bench Reference

No. 1 of 1923

IN

GOVT. APP. NO. 2 OF 1923.

SANDERSON, C. J.

CHATTERJEA, J.

RICHARDSON, J.

BUCKLAND, J.

PANTON, J.

1923,

11, June.

THE GOVERNMENT OF

ASSAM, Appellant,

v.

SAHEBULLA and ors,

Respondents.

Criminal Procedure Code (Act V of 1898), secs. 90, 537, Sch V, Form 7—Warrant, issued against witness in statutory form, but without previously recording Magistrate's reasons therefor—Validity—Reasons, recording of, if imperative or directory—Test to determine whether statute mandatory or directory—Penal Code (Act XLV of 1860), sec. 92.

Per CURIAM —(CHATTERJEA, J., dissentient)—In a case in which the Magistrate had materials before him sufficient, under sec 90, Criminal Procedure Code, to justify the issue of a warrant and to which he applied his judicial discretion and in which the warrant was good and valid on the face of it and stated the reason upon which the Magistrate relied, the warrant was not invalid merely by reason of the fact that the Magistrate omitted to record in writing otherwise than in the warrant the reasons which actuated him in issuing the warrant.

Per SANDERSON, C. J. (BUCKLAND AND PANTON, JJ, concurring)—The words in sec 90 of the Criminal Procedure Code requiring a Magistrate to record his reasons for issuing a warrant in the place of a summons for the appearance of a witness are not imperative but directory.

Per SANDERSON, C. J. (PANTON, J, concurring)—Sec 555 of the Criminal Procedure Code deals with the form of the warrant itself and nothing more and does not absolve the Magistrate from complying with the provisions of sec. 90. It is the duty of the Magistrates to record their reasons specifically as required by sec 90 before issuing a warrant and they should not be satisfied with merely signing their names to warrants in the form given in the schedule.

Per CHATTERJEA, J.—The mere signing by the Magistrate of a warrant in form No 7 of Sch V of the Criminal Procedure Code which states that the Court has reason to believe that the witness will not attend unless compelled to do so is not sufficient compliance with the requirement of sec. 90 of the Code.

The mere statement that the Court "has good and sufficient reason to believe" is not stating what those reasons

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are, and the words in sec. 90 "after recording its reasons in writing" show that it must be done before issuing the warrant.

The recording of his reasons by the Magistrate is a preliminary condition to the issuing of a warrant under sec. 90 of the Code, and a warrant issued under the section without recording those reasons in writing has no legal force and effect, the requirement that the reasons should be recorded being mandatory and not directory only.

Per CHATTERJEE AND BUCKLAND, JJ.—Sec. 537 of the Code had no application to the case.

Per RICHARDSON, J.—Where a warrant is issued in the statutory form, the omission of the Magistrate to record his reasons (apart from the statement in the warrant) does not go to the Magistrate's jurisdiction to the extent of making the warrant null and void in the hands of the police officer or deprive him of the authority to execute it.

Per RICHARDSON AND BUCKLAND, JJ.—If a warrant is an invalid warrant issued without jurisdiction, the act of the police officer in attempting to make the arrest would be a wholly unauthorised act, and the question whether the act was or was 'not strictly justifiable' within the meaning of sec. 99 of the Penal Code would not arise.

Tests for determining whether a provision of a statute is mandatory or directory discussed.

SUKHESWAR PHUKHAN v. EMPEROR (2) considered.

This Reference to the Full Bench was in relation to Government Appeal No. 2 of 1923.

(2) 1. L. R. 38 Cal. 789; a. c. 15 C. W. N. 1001 (1911).

The material facts of the case appear in the judgment of Buckland, J., referring the case to the Full Bench.

The appeal was first heard before Buckland and Cuming, JJ., who made the following Order of Reference:—

BUCKLAND, J.—This is an appeal by the Government of Assam against a judgment of the senior Extra Assistant Commissioner at Dhubri acquitting 12 persons charged under sec. 147, Indian Penal Code, as members of an unlawful assembly, the common object of which was to resist the execution of a warrant of arrest.

For the present purpose a bare outline of the facts suffices, for there has been no decision upon the merits and this appeal turns wholly upon a question of law and if it succeeds a remand is inevitable.

Certain constables were deputed to execute a warrant of arrest against a recalcitrant witness of the name of Sanaka Bibi in connection with a criminal case in the Court of the Extra Assistant Commissioner. The execution of the warrant was resisted and the learned Judge has held that the warrant was illegally issued with the consequence that the resistance did not amount to an offence. The warrant was issued under sec. 90 of the Criminal Procedure Code, but it appears that the Court by which it was issued did not record in writing its reasons for issuing it. What has now to be considered is whether a warrant issued in such circumstances is or is not a valid warrant.

The learned Advocate-General has submitted to us that the defence to which the learned Judge who tried the case gave effect amounts to that which stated in the words of the Indian Penal Code is the exercise of the right of private defence. Though the learned Judge did not in so many words so define it, I think that

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this is correct. Upon that the learned Advocate-General has contended that under sec. 99, Indian Penal Code, the right of private defence has no application to the case as the acts resisted were done by a public servant acting in good faith under colour of his office though the acts may not be strictly justifiable by law. He has further relied upon *Bisu Halder v. Emperor* (1) in which a search warrant had been issued under sec. 96, Criminal Procedure Code, whereas it should have been issued under sec. 100 of the same Code. Its execution was resisted and the accused persons were convicted under sec. 147, Indian Penal Code, and one of them under sec. 353, Indian Penal Code. The warrant was held to have been wholly illegal and on that ground the accused persons were held to have committed no offence as sec. 99, Indian Penal Code, did not apply. A distinction was there drawn between cases where there is a complete absence of jurisdiction and an excess of jurisdiction. We have been asked to make the same distinction in this case.

The foregoing argument in my opinion is fallacious. The question of the constable acting in excess of any jurisdiction which the warrant purported to confer upon him does not arise in the case as it comes before us now. The judgment of the learned Judge is founded upon the initial invalidity of the warrant as I shall shortly show. Whether or not the constable acted in excess of his jurisdiction if the warrant was a valid warrant is a question of fact to be determined upon the evidence. This is the question which arises upon the application of sec. 99, Indian Penal Code, which does not involve the question before us, *viz.*, the validity of the warrant itself. If the warrant was illegal

from the beginning there is no question of excess of jurisdiction for there could have been no excess where there was no jurisdiction at all. Further with reference to sec. 99, Indian Penal Code, if the warrant was illegal it could not be used to support any acts of the constable and the question whether or not any act of his was such as was not strictly justifiable could not arise.

The learned Judge in support of his decision that resistance to an invalid process cannot amount to an offence has referred to *Sukheswar Phukhan v. Emperor* (2). In that case a warrant was issued under sec. 90, Criminal Procedure Code, for the arrest of a witness. The Magistrate did not, however, record his reasons in writing for adopting that course. The warrant was executed by the arrest of the witness but she was released by the Petitioner to this Court, who had been tried and convicted of an offence under sec. 225B, Indian Penal Code. The rule was granted upon the grounds that the action of the Court issuing the warrant of arrest was illegal and vitiated the subsequent proceedings including the conviction of the Petitioner for resisting an invalid process. The rule was made absolute and in the judgment it is stated that the procedure was illegal as on the face of it no reasons were recorded by the Court issuing the warrant. Their Lordships referred to and commented upon the circumstance that in lieu of a summons a warrant was ordered in the first instance but that is justified by the Code of Criminal Procedure and I do not gather from the judgment that however much they may have condemned that course they based their judgment upon that ground.

I find myself unable to distinguish this

(1) 11 C. W. N. 886 (1907).

(2) I. L. R. 39 Cal. 789; s. c. 15 C. W. N. 1001 (1911).

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case from the appeal now before us. But with great respect to the learned Judges who decided it I find myself also unable to agree with them. The position is that stated by Mr. Mayne in his well-known work on the Criminal Law of India (4th edition, p. 205) where he classifies the ways in which acts purporting to be done under the authority of the law may be illegal. This case falls within the class first stated where the warrant under which the officer acts is on the face of it legal even though defective in form and is issued by an authority competent to issue such a warrant but was improperly or irregularly issued. Here there is no suggestion that the warrant was defective on the face of it, and the judgment of the learned Judge has proceeded entirely upon the basis of its having been illegally issued. In such cases the learned author states resistance is always unlawful, which proposition he supports by reference to English authorities. But as the procedure in this country is governed by the Code of Criminal Procedure it is to that Code alone that one must refer for matters for which it provides.

I do not propose to refer to decisions in cases where the Code states that something shall be done and the question is whether or not that which was done amounted to a compliance with the law, for they do not assist in coming to a decision where a particular act does not even purport to have been done. In *re Karuthan Ambalam* (3), it was decided that the failure to record reasons in writing vitiated a warrant under sec. 90 and that the omission to do so was not cured by sec. 537, Criminal Procedure Code, as the recording of reasons was a necessary preliminary to the exercise of the jurisdiction. The judgment of the learned Judge does not, however, give reasons

for this statement of the law and it appears moreover very questionable whether the warrant with which his judgment dealt was issued under sec. 90, Criminal Procedure Code, though for the purposes of the case he assumed that to have been so.

Now the section is not mandatory in its terms. The issue of the warrant is to follow the recording of reasons. That is indicated by the use of the preposition "after". But the section, if analysed further, does not in so many words prescribe the recording of reasons. Rather, it assumes the recording of reasons and by the word "after" states the order of events. I do not go so far as to suggest that it is merely permissive but in my opinion it is far from mandatory, and the rules applicable to the construction of mandatory sections of the Code have no application to it. Even if the section may be said to require or prescribe that the Court shall record its reasons in writing I do not consider that it is more than directory in that respect.

I have considered the application of sec. 537, Criminal Procedure Code, but have come to the conclusion that it can have no application to a case such as this. It applies to the reversal or alteration of findings, sentences and orders on the ground of errors, omissions or irregularities. But though we are concerned with an error, omission or irregularity there is no question of the reversal or alteration of a subsequent finding or sentence, and the circumstances are not such that the section could apply. The question involved here primarily arises between the witness and the person desiring his or her attendance and if it is permissible to refer to the principles of sec. 537 it is difficult to see how the witness could be prejudiced in any way by the Court not having recorded its reasons in writing for the issue of the war-

(3) I. L. R. 33 Mad. 1063 (1914).

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rant. Sec. 90, however, also applies where a warrant is issued for the arrest of a person accused of an offence who fails to obey a summons, and if in such a case the reasons of the Court had not been recorded in writing I should hesitate to say that sec. 537 had no application though the ultimate test would be whether any failure of justice had been occasioned thereby. It would be anomalous absolutely to hold that as regards a witness the warrant is illegal if no reasons in writing have been recorded before it is issued; whereas in the case of a person accused of an offence a warrant issued in similar circumstances may be of full legal force and effect. Sec. 538 of the same Code, though it has no application to the present case, is interesting as an analogy, and that section lays it down in the clearest terms that in circumstances not far removed from those with which we are concerned a person making a distress shall not be deemed a trespasser.

For the reasons I have given in my judgment the warrant was not illegal, because the reasons for issuing it were not recorded. This is as far as it is necessary to go as the learned Judge has considered himself concluded by the judgment in *Sukheswar Phukhan v. Emperor* (2) and consequently has refrained from discussing the evidence against the 12 persons charged by him under sec. 147, Indian Penal Code. I therefore express no opinion as to the facts nor as to the legality or otherwise of the way in which the warrant was executed, which may involve the application of sec. 99, Indian Penal Code.

In consequence of the view of the law which I have expressed the order which I would make in this appeal is that the order of the learned Judge acquitting the accused under sec. 258, Criminal Procedure

Code, should be set aside and the case remanded to him to dispose of subject to our judgments on this point. As he has already recorded all the evidence on both sides no further evidence need be taken.

But as we are differing from the judgment of a Division Bench of this Court on a point of law, under Chap. VII of the Appellate Side Rules, the point must be referred to a Full Bench of the Court. The question to be referred is.—If a Court under sec. 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?

CUMING, J.—This is an appeal by the Government of Assam against an order of acquittal. One Chapai Sheik brought a criminal complaint against certain persons among them one Kancha of enticing away his wife Sanaka under sec. 498, Indian Penal Code. Process was issued and also a warrant against Sanaka who was a witness. This warrant was issued under the provision of sec. 90, Criminal Procedure Code, and according to the provision of the section the Court before issuing the warrant should have recorded its reason for issuing a warrant and not a summons. No such reasons were recorded. When the constable went to execute the warrant he was resisted by the girl's father and a number of other persons and a riot ensued.

These persons were duly prosecuted. The learned Magistrate acquitted the accused relying on the authority of the case of *Sukheswar Phukhan v. Emperor* (2). He held that as no reason had been recorded for issuing a warrant instead of a summons as required by sec. 90, Criminal Procedure Code, the arrest was illegal and hence the accused were entitled to resist

(2) I. L. R. 38 Cal. 789: s. c. 15 C. W. N. 1001 (1911).

(2) I. L. R. 38 Cal. 789: s. c. 15 C. W. N. 1001 (1911)

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the execution of the warrant. The learned Advocate-General who appears for the Government of Assam has contended that the case relied on by the learned Magistrate, *Sukheswar v. Emperor* (2) is distinguishable and that the present case falls within the purview of sec. 99, Indian Penal Code. Sec. 99, Indian Penal Code, provides that there is no right of private defence against an act which does not reasonably cause the apprehension of death or grievous hurt if done or attempted to be done by a public servant acting in good faith under colour of his office though that act may not be strictly justifiable by law.

The Magistrate who issued the warrant had full jurisdiction to do so and his proceedings were only so far irregular in that he omitted to record his reasons for issuing the warrant instead of a summons. His omission to record these reasons is in my opinion an irregularity but the omission did not render the warrant illegal so as to give the accused persons that right of private defence against the constable executing it. This view of the law is in direct conflict with the view taken in case of *Sukheswar Phukhan v. Emperor* (2) relied on by the learned Magistrate and in my opinion the cases are not distinguishable. The facts of that case are that the accused persons were prosecuted on a charge of unlawfully rescuing from custody a person who had been arrested on a warrant similar to the warrant now under discussion and the learned Judges held that such a warrant was illegal because of the omission to record the reason for issuing a warrant and not a summons and this case also turns entirely on exactly the same point, viz., whether the warrant was or was not a legal one. I do not think that this

is a case in which it can be held that there was an excess of jurisdiction as distinct from a complete absence of jurisdiction. There was in this case either complete jurisdiction or no jurisdiction.

The Magistrate in issuing the warrant did nothing in excess of his jurisdiction for he had jurisdiction to issue the warrant. The omission to record his reasons cannot be said to be doing something in excess of his jurisdiction. Neither in executing it can the constable be said to have done anything in excess of his jurisdiction. The warrant was either a good one or a bad one and this would depend on whether the omission to record the reasons for issuing it was an irregularity, or an illegality. In my opinion it is an irregularity only. The provision for recording the reasons for issuing the warrant is directory and not mandatory. The warrant was therefore a good and valid warrant. As this finding is in direct conflict with the authority relied on by the learned Magistrate, the question should be referred to a Full Bench.

[On the case coming on for hearing before the Full Bench.]

The Advocate-General (Mr. S. R. Das) with Babu Surendra Nath Guha for the Appellant—It is immaterial whether the accused was acting in self-defence. The whole question turns on sec. 90 of the Criminal Procedure Code. The section is directory and not mandatory. Magistrate has jurisdiction to issue warrant. Omission on his part to record "reasons" is no justification for resisting execution. Refers to cls. (a) and (b) and Schedule, Form VII. "Reasons" does not mean that Magistrate is to state grounds of belief. He may issue warrant if he believes the person will not attend. He may state this in the warrant. Refers to *Maher Singh v. Emperor* (14).

(2) I. L. R. 33 Cal. 739; A. C. 15; 5 W. N. 1001 (1911).

(14) 15 All. L. J. 1149 (1920).

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Distinguishes *In re Karuthan Ambalam* (3), also *Clarke v Brojendra Kishore Roy Chowdhuri* (7), which deals with civil liability.

Babu Manmatha Nath Mukherjee with *Babu Srish Chandra Biswas* for the Respondents (*amicus curiæ*)—The accused were charged under sec 147 of the Indian Penal Code with the common object of resisting legal process. Prosecution must show that process was lawfully issued. The recording of reasons under sec 90, Cr P C. in mandatory and one of jurisdiction Magistrate must satisfy first that witness will not attend as provided for in cls (a) and (b), secondly, must record "reasons" which is a condition precedent to the issue of warrant. Whether provision is mandatory or directory is to be determined by reference to *Hriday Nath Roy v Ram Chandra* (18), *Mussuwanjee Pestonjee v Mynodeen Khan* (19) and *Fort Gloster Jute Manufacturing Co v. Chandra Kumar Das* (20). The object of cls. (a) and (b), sec. 90 is to provide safe-guard against abuse of power which superior Courts will not be able to check unless conditions complied with. Compliance or non-compliance with such conditions is a question of jurisdiction. Refers to *Sargujsharan Lal v. Dukhit Mahato* (21) and *Clarke v. Brojendra Kishore Roy Chowdhuri* (7), approved by Privy Council on appeal. See *Clarke v. Brojendra Kishore Roy Chowdhury* (8). These cases show that recording of reasons is a condition precedent to special jurisdiction. Cites Maxwell, 6th Ed., p. 657. Warrant in—

(3) I. L. R. 38 Mad. 1088 (1914).
 (7) I. L. R. 36 Cal. 433; s. c. 13 C. W. N. 458 (1909).
 (8) L. R. 39 I. A. 163, 176; s. c. I. L. R. 39 Cal. 953; 10 C. W. N. 865 (1912).
 (18) 81 C. L. J. 482 (1920).
 (19) 6 M. I. A. 134 (1855).
 (20) 24 C. W. N. 791 (1919).
 (21) 17 C. W. N. 490 (1913).

valid if not sealed:—*Mahajan Sheikh v. Emperor* (10) Warrant cannot be issued unless Magistrate satisfied on sufficient materials that summons will not be obeyed. *In re Mohesh Ch Bannerjee* (22) and *Walker v Sutherland* (23) Refers also to the following cases on the question of compliance of statutory provision being condition precedent *Sukheswar Phukhan v. Emperor* (2), *In re Karuthan Ambalam* (3) and *Beta Sing v. Emperor* (24). To establish offence under sec. 147, I. P. C., the validity of warrant and its proper execution must be established. Prosecution not also proper under sec. 114 when validity of judicial act is questioned.

The Advocate-General in reply—Sec 555, Cr P C., shows that the form in the schedule, if used, is sufficient. Recording of reasons does not go to jurisdiction, see *Khosh Mahmud Sarkar v Nazir Mahomed* (12). See also Maxwell, 6th Ed., pp 647, 649, 657, 659. Warrant sufficient on the face of it is a valid process. Mayne's Cr L., 4th Ed., p 223.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is a Reference by two learned Judges of this Court sitting as a Criminal Appeal Bench; and, the question referred is—"If a Court under sec. 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?"

(2) I. L. R. 38 Cal. 789; s. c. 15 C. W. N. 1001 (1911).

(3) I. L. R. 38 Mad. 1088 (1914).

(10) I. L. R. 42 Cal. 708; s. c. 19 C. W. N. 224 (1914).

(13) I. L. R. 33 Cal. 352, 356; s. c. 9 C. W. N. 1065 (F. B.) (1905).

(22) 13 W. R. Cr. 1 (1870).

(23) 14 W. R. Cr. 20 (1870).

(24) 19 Cr. L. J. 413 (1918).

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In my opinion it is necessary, and, at all events, advisable, to state the facts which gave rise to this Reference. One Saifuddin took criminal proceedings against certain persons under sec. 498 of the Indian Penal Code, alleging that such persons had enticed away Sanaka Bibi, who was alleged to be the complainant's wife. A warrant was issued by the Extra Assistant Commissioner, who was a 1st class Magistrate, for the arrest of Sanaka Bibi in order that she might be brought before the Court as a witness in these proceedings. The warrant was in the following form:—

"To—The Police Officer in charge of thana Salmora.

Whereas complaint has been made before me that Kancha Sheik of Dimatola has committed the offence under sec. 498, Indian Penal Code, and it appears likely that Sanaka Bibi of Dimatola can give evidence concerning the said complaint and whereas I have good and sufficient reason to believe that she will not attend as a witness on the hearing of the said complaint unless compelled to do so:

This is to authorise and require you to arrest the said Sanaka Bibi and on the 15th May to bring her before this Court. You will be competent to enlarge the witness on bail of Rs. 50 to make her appear in Court on the day fixed, to be examined touching the offence complained of.

Given under my hand and the seal of the Court this the 27th day of April 1922

D. SARMA,

Magistrate, 1st class "

When the police officers went to execute the warrant at the house of Sahebulla, who was the father of the woman Sanaka, it was alleged that an attack was made upon the police officers by Sahebulla and others. Consequently proceedings were instituted under sec. 149, Indian Penal Code, against

29 persons: and, the common object of the unlawful assembly alleged was to resist the execution of legal process, *viz.*, the warrant.

The learned Commissioner who tried the case discharged accused Nos. 13 to 29 under sec. 253 of the Code of Criminal Procedure.

After the evidence in the case had been finished the learned Pleader for the defence, in concluding his argument, took the point that the Magistrate who issued the warrant did not record his reasons in writing before he issued the warrant and relied upon the decision in *Sukheswar Phukhan v. Emperor* (2). The learned pleader argued that the process was illegal and that consequently the offence charged against the accused had not been committed. The Magistrate was of opinion that he must hold, in view of the High Court decision, to which I have already referred, that the process was invalid and that the accused had not committed the offence of being members of an unlawful assembly the common object of which was resistance to legal process.

Thereupon, the Government of Assam appealed to this Court.

The appeal was dismissed as regards 11 of the Respondents but it was admitted against one, namely, Sahebulla. This course was taken, as we were informed by the learned Advocate-General, for the purpose of raising the point which is now in issue.

My learned brothers, who were then sitting as the Criminal Appeal Bench, disagreed with the decision in the case of *Sukheswar Phukhan v. Emperor* (2), and consequently they referred the matter to the Full Bench.

Those are the facts which I think it is

(2) I. L. R. 38 Cal. 759. s. c. 15 C. W. N. 1001 (1911).

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necessary for the purpose of my judgment to state.

Sec. 90 of the Criminal Procedure Code provides as follows —

“ A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons, or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure ”

The form of the warrant is given in Sch. V, form 7, and, the warrant in this case, to which I have already referred, followed the form given in the Schedule

The form in the Schedule, in my opinion, was obviously framed in such a way as to cover all the contingencies contemplated in sec 90 and, it might be argued that the Magistrate by signing the warrant thereby recorded his reasons in writing, for, it must be obvious that the Magistrate had signed the warrant before it was issued. The warrant is good and valid on the face of it, and, in my opinion, it is sufficient to inform the person against whom it was issued of the reason for its issue; and assuming as I do, that in this case the Magistrate was in fact justified in issuing the warrant on the materials before him, I am not prepared to hold that a warrant in such a form would be invalid merely by reason of the fact that the Magistrate did not record in writing on the order-sheet of the case the reason for

its issue which might be the same as that which he had stated in the warrant itself, and for which he made himself responsible.

The learned Advocate-General has referred to sec 555 of the Code of Criminal Procedure and argued that the provisions thereof were sufficient to absolve the learned Magistrate from doing anything more than signing the warrant in the form prescribed. I am not prepared to accept that argument. In my judgment sec. 555 deals with the form of the warrant itself and nothing more, and the words of sec. 555, in my opinion, are not intended to supersede the provisions of sec 90

The main ground, however, upon which the learned Advocate-General relied was that the material words, namely, “after recording his reasons in writing” are not *imperative* but merely *directory* and that by reason of the omission of the Magistrate to record his reasons otherwise than in the warrant the warrant was not invalid

I have already said that for the purpose of this Reference I assume that the learned Commissioner had materials before him which would justify the issue of a warrant instead of a summons and that he applied his judicial discretion in the matter.

On the question whether the material words are *imperative* or *directory*, I do not think much assistance, if any, can be obtained from considering the many decisions given on this matter.

The principle which ought to be applied in considering whether the provisions of a Statute or an Act are *imperative* or *directory* cannot be better stated, in my judgment, than in the passage which is to be found in the judgment of Lord Penzance in the case of *Howard v. Bodington* (4)—the passage to which I refer to is to be

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found at page 211 : there, Lord Penzance said this :—

“ Mr Jeune was good enough to refer me to Sir Benson Maxwell's book ‘ On the Interpretation of Statutes,’ and to quote a number of cases from it (Maxwell, on the Interpretation of Statutes, Ch XII, sec 3, pp 330-345. Since the matter was argued I have been very carefully through these cases, but upon reading them all the conclusion at which I am constrained to arrive is that you cannot glean a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of *The Liverpool Borough Bank v Turner* (5) Lord Campbell was then sitting as Lord Chancellor. In an appeal from the Vice-Chancellor, and in giving judgment, his Lordship said this :—‘ No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.’

“ I believe, as far as any rule is concerned you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act, and, upon a review of the case in that aspect, decide whether the matter is what is called imperative or only directory.”

(5) 30 L. J. Ch. 379 (1860).

I adopt that as the principle which ought to be applied in this case ; and, I do not believe that by searching through the numerous cases which have been decided upon different Statutes and upon different words, we will get any assistance upon such a question as the present.

The learned Vakil, who argued the appeal on behalf of the Respondents, and to whom we are much indebted inasmuch as he took upon himself to argue the case at the request of the Court, submitted that the object of the material words in sec 90 was two-fold. *First*, to ensure that the Magistrate should exercise his judicial discretion and satisfy himself upon the materials before him that it was right and proper to issue a warrant instead of a summons, and, *secondly*, to give the person against whom the warrant was issued an opportunity of knowing on what grounds the warrant had been issued, and if necessary, testing the legality of the warrant.

I am prepared to assume that both of those objects might have been in the minds of those who were responsible for the drafting of this Act. I think it is quite possible that they intended to draw attention to the fact that a warrant ought not to be issued, where a summons would suffice, and that care should be exercised by the Court to satisfy itself, upon the materials before it, that it was really necessary to issue a warrant which, of course, might result in the arrest of the person against whom it was directed. Further, it might have been intended that there should be a record in writing, otherwise than in the warrant itself, of the reasons, which induced the Court to issue the warrant, in order that the person affected by it might have no doubt as to the grounds, on which the warrant had

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been issued, in case he or she desired to test the validity of it.

But these arguments, to my mind, are not conclusive upon the point; for, it seems to me that if the Magistrate in this case had written upon the order-sheet the reason which was included in the warrant itself, namely, that he had good and sufficient reason to believe that the person, against whom the warrant was issued, would not attend as a witness on the hearing of the complaint unless compelled to do so, it would have been difficult to hold that he had not complied with the section; and, I fail to understand how, if this had been done, the person, against whom the warrant was issued, would have been in a better position, if she wished to test the validity of the issue of the warrant, than she would be by reading the warrant itself.

Further, in my judgment, in considering the general scope of the section one must have regard to the consequences which might follow upon our holding in favour of the learned Vakil's argument.

Our attention was drawn to a passage in Maxwell 'On the Interpretation of Statutes' which is taken from the case of *The Margate Pier Co v Hannam* (6). The judgment in the case was delivered by Abbot C. J., who was considering what was the effect of a warrant issued by a Justice of the Peace, who had not taken the oath at a general sessions in accordance with the Statute. The learned Chief Justice pointed out what serious consequences might result if it were held that a warrant issued by a Justice of the Peace, who had not complied with the Statute by taking the oath, was invalid. The learned Chief Justice said:—

"It is obvious that if the act of the Justice issuing a warrant be invalid on the

(6, 3 B. and Ald. 206 (1819)."

ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority; a constable who arrests, and a gaoler who receives a felon will each be a trespasser, resistance to them will be lawful; everything done by either of them will be unlawful, and a constable, or persons aiding him, may, in some possible instance, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. An exposition of these Statutes pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction."

The principle which is stated in that judgment, to my mind, may be applied to this case. This was a warrant, good and valid on the face of it, signed by the Magistrate, sealed with the seal of the Court, addressed to a police officer with reference to a person, whose attendance as a witness was desired. The warrant itself stated that the Magistrate had good reason to believe that the person in question would not attend as a witness unless compelled to do so.

If we were to hold that such a warrant was invalid merely by reason of the fact that the Magistrate had omitted to record the reason for the issue of the warrant otherwise than in the warrant itself, it might lead to very serious consequences, such as those indicated by Abbot, C. J., and such a construction of the section ought not to be placed upon it, if it will admit of any other reasonable interpretation.

I have said enough to show that, in my judgment, the words in sec. 90, now under consideration, are not *imperative* but *direct-*

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tory and consequently I am not prepared to hold that in a case, in which the Magistrate had materials before him sufficient to justify the issue of a warrant and to which the Magistrate did apply his judicial discretion and in which the warrant was good and valid on the face of it and stated the reason upon which the Magistrate relied, the warrant was invalid merely by reason of the fact that the Magistrate omitted to record in writing otherwise than in the warrant the reasons which actuated him in issuing the warrant.

In my judgment, therefore, with the above-mentioned reservations and upon the above-mentioned assumptions, the question contained in the Reference should be answered in the affirmative.

Before parting with this case we think it desirable to state distinctly that Magistrates should record their reasons specifically in writing before issuing a warrant and should not be satisfied with signing their names to warrants in the form given in the schedule. If in the future they will follow the clear provisions of the section, they will save the High Court a great deal of time and trouble.

The result is that we direct the acquittal to be set aside and remand the case to the learned Judges, who referred the case to the Full Bench, for disposal.

CHATTERJEE, J.—The question referred to the Full Bench is as follows:—If a Court under sec. 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?

Sec. 90 of the Criminal Procedure Code lays down that a Court may, in any case in which it is empowered by the Court to issue a summons for the appearance of any person other than a juror or assessor,

issue, after recording its reasons in writing, a warrant for his arrest—(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or (b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

The normal course is to issue summons in the first instance. The Court can, however, issue a warrant in either of the cases mentioned in cls. (a) and (b) of the section. But in either case the Court can do so after stating its reasons in writing. The question is whether a warrant issued without complying with the said provision, is a valid and legal warrant. Form 7 of Sch. V prescribes the form for a warrant under sec. 90 and it states (to quote the material portion) "Whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so." It is contended by the learned Advocate-General that the signing of this warrant is sufficient compliance with the provision of the Statute, and that it does not matter whether the same reasons which are recorded in the form of the warrant are or are not again recorded on another paper on the record. I think, however, that this contention is not correct. The form does not state the reason. It merely says that the Court has "good and sufficient reason to believe," and words to that effect appear in cl. (a) of sec. 90. But that is merely a statement that the Court has reasons. It is not stating what those reasons are. Sec. 90 requires not merely the statement in the form of the warrant that the Court

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has good and sufficient reasons but those reasons should be stated. I think, therefore, that the mere signing of the warrant which states that the Court has reason to believe is not sufficient compliance with the law. If it were so, it would have been wholly unnecessary to state in the body of the section that the Court after recording its reasons in writing may issue a warrant.

Then the question arises whether a warrant issued by a Court without recording its reasons in writing is an illegal process. The words "after recording its reasons in writing" show that it must be done before issuing the warrant. The Legislature had some object in view in making the provision. The objects, it seems to me, are, first, to insure deliberation on the part of the Magistrate before issuing the warrant, and, secondly, that the person to whom the warrant is issued may know the reasons why it is issued so that such person may come before a higher Court and show that it has been wrongly issued. Somewhat similar words are used in sec. 25 of the Indian Arms Act. That section provides for the search and seizure of arms by the Magistrate, and the third paragraph of that section lays down as follows:—"Such Magistrate having first recorded the grounds of his belief may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms . . . are or is to be found." The words "having first recorded the grounds of his belief" have been judicially construed in the case of *Clarke v. Brojendra Kishore Roy Chowdhuri* (7). In that case Maclean, C. J., observed as follows at page 447. "These words must have been inserted in the sec-

tion with an object and the object probably was to protect the public against searches being inconsiderately directed and to ensure the exercise of deliberation by the Magistrate before he ordered the search. A fine distinction is often drawn between what is mandatory and what is merely directory in the language of any particular Statute. The present case appears to fall within that class of cases in which, when a Statute creates a special right, but certain formalities have to be complied with antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of the right. As the Defendant in the case now before us did not comply with the required formality by recording the grounds of his belief before he proceeded to search, this section does not appear to protect him from the consequences of his action." Harington, J., observed (at page 451) as follows:—"It is admitted that the Defendant did not record the grounds of his belief in this case, but it is urged that the provision that he should do so is merely directory and that his entering the premises is justified as he had good grounds for his belief that arms were stored in the *cutchery* notwithstanding his failure to record these grounds. I do not agree with this and I think that where a Statute authorises the doing of an act which is *prima facie* a wrong to an individual, the doer must comply strictly with the condition imposed by the Statute if he desires to rely on the Statute as a justification for his act. He cannot claim as against the individual who is injured by his act, the protection of the Statute, unless he strictly complies with the conditions on which the Statute affords that protection." The decision of the majority of the Court of Appeal was reversed by the Judicial Committee. See *Clarke v. Brojendra*

(7) I. L. R. 36 Cal. 433 : s. c. 13 C. W. N. 459 (1909).

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Kishore Roy Chowdhury (8). But so far as the particular question was concerned their Lordships observed at page 176 : " Their Lordships are disposed to agree with the majority of the Court of Appeal that Mr. Clarke, not having complied with the preliminary condition prescribed by the Arms Act, cannot defend his action under that Statute " It is contended that the question before the Privy Council was whether Mr. Clarke, not having complied with the provisions of the Statute, could claim protection under the Arms Act and that it is a totally different thing from saying that the search was illegal. It is urged that although the Magistrate issuing the process may, by not complying with the provisions of a Statute make himself liable for damages, it does not follow that the process is illegal. But I have referred to this case to show that the recording of the grounds of belief was held to be an essential preliminary to the search being made. The Judicial Committee distinctly stated that it was a *preliminary condition* for the action to be taken under the Act. It appears, therefore, that although the Magistrate may have perfectly good grounds of belief for making a search, it would not be legal unless he first records the grounds of his belief, because if it were legal notwithstanding the omission to record the grounds of his belief, there is no reason why he could not defend his action under the Statute. Two of the learned Judges of this Court, as stated above, were of opinion that the provision that the Magistrate should act " after having first recorded the grounds of his belief " is mandatory and not directory, and if the Judicial Committee were of opinion that it was merely directory, their Lordships would not have held that the Magistrate not

having complied with the preliminary condition could not defend his action under the Arms Act. In this connection I may refer to the case of *Thakur Sankar Baksh v. Balwant Singh* (9), where in laying down that although reasons should be recorded by the Judge under sec. 626 of the Code of Civil Procedure when granting an application for review, their absence is not a ground for special leave to appeal, Lord Hobhouse observed :—" It is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it." In *Clarke's* case (8), on the other hand, the Judicial Committee were of opinion that the recording of reasons is a preliminary condition. These two cases illustrate the ground of distinction between the two classes of cases.

It is said that it would make no difference to the person for whose arrest the warrant is issued, whether the reasons were or were not stated in the record. But would it have made any difference to the person whose house was searched [in *Clarke's* case (8)] whether the grounds of belief of the Magistrate were or were not first recorded before the search was made. Then again, how would the absence of a seal on a warrant (otherwise good) affect the person to be arrested? But it was held in *Mahajan Sheikh v. Emperor* (10), that under sec. 75 the affixing of the seal of the Court is essential to the validity of a warrant, that an arrest under a warrant duly signed but not sealed is therefore illegal, and that a conviction under sec. 225B of the Penal Code is bad in law.

The learned Advocate-General has re-

(8) L. R. 39 I. A. 163; s. c. I. L. R. 39 Cal. 953; 16 C. W. N. 865 (1912).

(9) L. R. 27 I. A. 79; s. c. I. L. R. 27 Cal. 823; 4 C. W. N. 303 (1899).

(10) I. L. R. 43 Cal. 708; s. c. 19 C. W. N. 224 (1914).

(8) L. R. 39 I. A. 163; s. c. I. L. R. 39 Cal. 953; 16 C. W. N. 865 (1912).

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ferred to certain passages from Maxwell on the Interpretation of Statutes, 6th Edition. At page 664 it is stated: "The usual provision in the commission of the peace that no justice named in it shall be capable of acting or authorised to act unless he shall have taken the oaths required by law, would lead to intolerable inconvenience and injustice if it were imperative, and struck with invalidity every act of an unqualified justice. If his acts were held void, it was pointed out by the King's Bench, "all persons who acted in the execution of a warrant issued by him, would act without authority, a constable who arrested, and a gaoler who received the arrested person, under it, would be trespassers. Resistance to them would be lawful; everything done by them would be unlawful, and a constable, and the persons aiding him might become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity of which they were wholly ignorant." But the omission to take oath by a justice does not stand on the same footing as an omission to comply with the provisions of a Statute enacted on grounds of public policy, as some sort of guarantee that the Court should carefully consider the circumstances, which is involved in writing out the reasons for issuing a process affecting the liberty of a person.

Another passage is cited from page 650 which runs as follows:—"When a public duty is imposed, and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the

duty would result, if such requirements were essential and imperative."

The question of inconvenience and injustice will be considered later, but I may here refer to a passage from the book (page 657): "The same imperative effect seems, in general, presumed to be intended even where the observance of the formalities is not a condition exacted from the party seeking the benefit given by the Statute, but a duty imposed on a Court or public officer, in the exercise of the power conferred on him, when no general inconvenience or injustice calls for a different construction. The 5 Eliz. C. 23 requiring that the writ *De Contumacia Capiendo* shall be brought into the Queen's Bench and there opened in the presence of the Judges, the omission of this apparently idle ceremony was deemed fatal to the validity of an arrest made in pursuance of the writ, though it had been enrolled in the Crown Office. An enactment which provided that every warrant issued by a Court should be under its seal, was equally imperative, and not only was a commitment under an unsealed warrant invalid, but the person who had obtained it without taking care that the Court performed its duty of sealing it was liable in damage to the person arrested under it. This was hard on the former, but it was essential for the latter that the warrant should be duly authenticated."

As pointed out by Lord Campbell, L. C., in the case of *The Liverpool Borough Bank v. Turner* (5): "No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending

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to the whole scope of the Statute to be considered."

It is contended that if a warrant which is on the face of it valid is to be treated as unlawful because of the omission to record reasons for issuing it, it may result in serious consequences to the person executing the warrant who may have no means of knowledge of such omission. But the question of inconvenience or consequences should be considered not only with reference to the person executing the process, but also with reference to the person who is to be affected by the process and for whose benefit the provision is made. A warrant may be issued for the arrest of a respectable *purdanashin* lady, and if the provision for recording reasons is made on grounds of public policy with the object of insuring deliberation on the part of the Magistrate so that he may apply his mind to, and take into consideration, all the circumstances of the case, the observance of the condition precedent laid down by the Statute before issuing the process should not be held to be directory merely because inconvenience may otherwise result to the person executing it. If the process is unlawful, can it be held to be lawful merely because the person executing it may have no means of knowing the defect in the process where it affects the liberty of the person affected by the process? The consequence of taking such a view would be to deprive the person for whose benefit the salutary provision is made by the Legislature of that benefit. In cases affecting the liberty of the subject there is weighty authority for holding, that even in matters of form, every form and every step in the process be followed with extreme precision [see *Dale's case* (11)]

The learned Advocate-General referred

(11) 6 Q. B. D. 376 (463) (1811).

to two Full Bench decisions under sec. 145 of the Criminal Procedure Code, *viz.*, *Sukh Lal Sheikh v. Tara Chand* (12) and *Khosh Mahmud Sarkar v. Nazir Mahomed* (13). The first dealt with the question whether the omission to publish a notice under sec. 145 (3) of the Code of Criminal Procedure at some conspicuous place at or near the subject of dispute is an illegality which deprives the Magistrate of his jurisdiction. It was held that the omission did not affect the jurisdiction of the Magistrate, that the provision was merely directory and not a condition precedent. In the second case it was held that an initiatory order under sec. 145 was not defective because it was not self-contained and did not state in express terms the grounds upon which the Magistrate was satisfied that a dispute likely to cause a breach of the peace existed when such grounds appeared in the police report on which the order was founded and to which it made reference in express terms. These cases therefore do not help the Appellant.

Reference was also made to some passages from Mayne's Criminal Law where the learned author deals with the question of resistance to processes of the Court with reference to English authorities. But as pointed out by Buckland, J., in the referring order the procedure in this country is governed by the Code of Criminal Procedure, and it is to that Code alone that one must refer for matters for which it provides. It is to be noted that in this reference we are not concerned with the legality or otherwise of the manner in which the warrant was executed which may involve the application of sec. 99 of the Indian Penal Code.

(12) 1 L. R. 33 Cal 68; s. c. 9 C. W. N. 1046 (F. B.) (1905).

(13) 1 L. R. 33 Cal. 357; s. c. 9 C. W. N. 1065 (F. B.) (1905).

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The only reported decision of this Court under sec. 90 of the Criminal Procedure is that of *Sukheswar Phukhan v. Emperor* (2), in which the Court held that the omission to record the reasons in writing rendered the warrant illegal. A similar view was taken in *Re : Kharuthan Ambalam* (3), where it was held that the recording of reasons is a *necessary preliminary* to the exercise of the jurisdiction. In the Allahabad Court [*Maher Singh v. Emperor* (14)], Gokul Prasad, J., did not follow *Sukheswar Phukhan's* case (2) on the ground that sec. 537, Criminal Procedure Code, had not been referred to in that case. But as pointed out by Buckland, J., in the referring order, sec. 537 has no application to a case like the present *Sukheswar Phukhan's* case (2) has been followed in the Punjab Chief Court [see *Bela Singh v. Emperor* (15)].

For all these reasons I regret I am unable to agree with the view taken by the learned Chief Justice, and I would answer the question referred in the negative.

RICHARDSON, J.—The question referred is—“If a Court under sec. 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?”

I will not again read sec. 90. It is sufficient to observe that the two cls. (a) and (b) are in the alternative. Provision is made for the issue of a warrant against a witness in two contingencies, (1) under cl. (a) in the first instance, no summons having been issued, if the Court sees reason to believe that a summons will not

be obeyed, and (2) under cl. (b) as a remedial measure, if the witness has already failed to appear in answer to a summons duly served. The Code says that in either of these contingencies the Court may, after recording its reasons in writing, issue a warrant.

A form of warrant for use under sec. 90, will be found in Sch. V of the Code (Form No. VII). This form with letters substituted for most of the blanks is as follows—

“Whereas complaint has been made before me that A. B of Z has committed the offence of N and it appears likely that C. D can give evidence concerning the said complaint and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so,

“This to authorize and require you to arrest the said C. D and on (a day to be stated) to bring him before this Court to be examined touching the offence complained of;

“Given under my hand and the seal of this Court this (date to be stated).

Signature.”

It will be observed that the form is so framed as to be applicable in either of the contingencies above-mentioned.

As to the signature, under sec. 75 of the Code, every warrant of arrest issued by a Court under the Code must be in writing signed by the Presiding Officer and bear the seal of the Court. A warrant so signed and sealed remains in force until it is cancelled by the Court which issued it, or until it is executed.

Further, sec. 80 of the Code provides that “the Police Officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant.”

(2) 1, L. R. 38 Cal. 789; s. c. 15 C. W. N. 1001 (1911).

(3) 1, L. R. 38 Mad. 1088 (1914).

(14) 18 All. L. J. 1149 (1920).

(15) 7 P. W. R. 1918; 44 I. C. 271 (1918).

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As to the forms in Sch. V, it is laid down generally in sec. 555 of the Code, that subject to certain powers conferred on the High Courts "the forms set forth in the fifth schedule, with such variations as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient."

Lastly, as to the word "writing" which occurs in secs. 75 and 90, under sec. 3 (58) of the General Clauses Act (X of 1897) "unless there is anything repugnant in the subject or context, expressions referring to 'writing' shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form"

Regard being had to the meaning so given of the term "writing" it has been contended that when in a particular case the Presiding Officer of a Court, for instance a Magistrate, signs a warrant in the statutory form stating that he has good and sufficient reason to believe that the witness C, D will not attend unless compelled to do so, the Magistrate has sufficiently complied with requirement of sec. 90 as to recording his reasons in writing before the issue of the warrant. The warrant, of course, is not issued until after the Magistrate has signed it.

The case, however, has been argued before us on the footing which I adopt, that the mere signature by the Magistrate of a stereotyped form is not a sufficient compliance with sec. 90. Mr. Mookerji, who has been good enough to appear at our request as *amicus curiæ* to present the case for the Respondents, urged that the reasons contemplated by the Legislature should or must show that the Magistrate has applied his mind to the facts of the particular case and should or must show

whether the Magistrate is acting under cl (a) or under cl. (b) of the section. That argument is material not only on the question whether the warrant is itself a sufficient compliance with the section but on the further question with which I am about to deal I will only say now that I do not think the Legislature could have intended that the Magistrate should record his reasons at any length. It may be a matter of urgency that the warrant should be issued with all possible despatch. The witness may be intending to leave the jurisdiction. His train or his ship may be about to start, and time waits for no man, while he is setting out reasons at length.

On the footing indicated, that some record of the Magistrate's reasons is required apart from the warrant, the main controversy is whether the words "after recording his reasons in writing," are mandatory or directory. The terms are familiar and useful but in *R. v. Justices of the County of London* (16), Lord Bowen is reported to have said:—"Now, it seems to me that the truth lies rather between the two, and that there is no such exact division of sections in Acts of Parliament into those that are directory and those that are imperative as is ordinarily assumed to be a categorical decision which exhausts every possible class of sections. You must look at each Act of Parliament and at each section to see exactly what it means. No other rule of construction of Acts of Parliament that I know of is of much use, except to try and find out as best you can what the Act of Parliament means, and that is not a rule of construction at all."

In other words, it may not always be possible to bring a statutory enactment of the kind now in question wholly under the

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category "mandatory" or wholly under the category "directory." In the present case I hesitate to say that the material words of sec. 90 are "mandatory" and obligatory at one pole or "directory" and permissive at the opposite pole.

If the law requires a record of the Magistrate's reasons and the attention of the Magistrate is drawn to the law it is not for him to decide whether he will record his reasons or not. He is bound to make the record. He has no choice in the matter. Nor can neglect on the Magistrate's part of such a duty be regarded as immaterial or a matter of no substance, to be lightly passed over. The superior Courts have no dispensing power.

Accordingly, it might be no answer to an application by a witness under arrest or in custody for a direction of the nature of a *habeas corpus*, that the provision requiring the Magistrate to record his reasons was merely directory. So too, putting aside the Judicial Officers' Protection Act (XVIII of 1850), such a plea might be of no avail to a Magistrate against whom a suit was brought for damages for unlawful arrest or false imprisonment.

On the other hand, if inadvertently or wilfully, the Magistrate omits to record his reasons, I am not prepared to say that the warrant in the hands of a police officer, though on the face of it a perfectly valid warrant, is wholly void, issued without jurisdiction, nothing more than a piece of waste paper, so that the police officer, if he attempts to execute it, may be resisted by force, possibly injured the more severely the more he tries to do what he thinks it his duty, and may in addition be amenable for trespass or assault and battery. If such were the law, the police officer, if anyone could be found to be a police officer, would no doubt have to

make the best of it. But the consequences at least justify a doubt whether such is the law. And if the policy of the law be in question, we have not yet reached an age when the services of police officers are no longer requisite, and it is not in the public interest that men of self-respect, common prudence, and common sense should be deterred from undertaking police duties.

If the execution of the warrant might be lawfully resisted, not only if it turned out that the Magistrate had not recorded his reasons, but also as Mr. Mookerjee suggested if it turned out that he had not recorded his reasons sufficiently, the consequences would be still more serious. Mr. Mookerjee was driven to make the suggestion to meet the point that the statement of the reasons in the warrant was a sufficient compliance with sec. 90. And if the record of the reasons is essential to the jurisdiction it is hardly possible to stop short of saying that jurisdiction also depends on the reasons being sufficiently recorded. Under such a construction of the law, resistance would be countenanced to an extent subversive of the power conferred on Magistrates to compel the attendance of recalcitrant witnesses. Recalcitrant witnesses would be encouraged to risk continuing in their recalcitrance and the position of police officers would be still more intolerable.

What I have said, as it appears to me, furnishes an answer to the argument founded on the observation of their Lordships in one of the concluding paragraphs of their judgment in the case of *Clarke v. Brojendra Kishore Roy Chowdhury* (8). There the Respondent had brought a suit claiming damages for trespass on the allegation that Mr. Clarke, then District

(8) L. R. 89 I. A. 163; S. C. I. L. R. 20 Cal. 253; 16 O. W. N. 265 (1913).

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Magistrate of Mymensingh, had illegally searched his *cutchery*. Under sec. 25 of the Indian Arms Act, 1878, a Magistrate "having first recorded the grounds of his belief" may cause a search to be made of premises in which he believes that arms are stored for some unlawful purpose. Mr. Clarke had caused the Plaintiff's *cutchery* to be searched for arms by the police in his presence and under his personal direction. Nothing incriminating had been found. At p. 176 of the report, their Lordships said "that they were disposed to agree with the majority of the Court of Appeal (in India) that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute." In saying that their Lordships were dealing with a suit against the Magistrate and not with such a case as the present

In order to determine whether sec. 90 is mandatory or directory for the purpose now material, the section must be read with the other provisions of the Code relating to warrants including the form in Sch. V and the provision in sec. 555. So read, sec. 90 does not, in my opinion, lead to the result for which Mr. Mookerjee in his very able and concise address contended.

The Code of Criminal Procedure confers powers on Courts (including Magistrates) for the purposes of the general administration of criminal justice. In connection with the exercise by Magistrates of their general jurisdiction, the Code, *inter alia*, confers powers on Magistrates to issue warrant of arrest and one of the classes of warrants are warrants for the arrest of witnesses which may be issued under sec. 90. As a safeguard, introduced, no doubt, for the protection of witnesses, the law requires that the Magistrate should record his reasons before exercising this

particular power. The object may be to ensure due deliberation on the part of the Magistrate or the object may be to give the witness after his arrest the opportunity of acquainting himself with the Magistrate's reasons and possibly of removing the Magistrate's belief that he would not have attended in obedience to a summons. Possibly the Legislature had both these objects in view. But whatever the object of the Legislature may be, and, however, important it may be that a Magistrate who desires to inspire confidence in his administration of justice should comply with the requirements of the Code and follow strictly the procedure therein indicated, in my opinion the omission of the Magistrate to record his reasons will not invalidate the warrant in the hands of the police officer.

I can find nothing in the Code inconsistent with the reasonable view or principle that when a Magistrate, having general jurisdiction over the subject-matter or the case pending before him, issues a warrant in a statutory form, as to which the Code itself provides that, if used, it shall be sufficient, the warrant is a valid warrant and neither the police officer to whom the warrant is delivered for execution nor the witness whose arrest is ordered, nor his friends are at liberty to treat it as invalid. At that stage it must be assumed that the Magistrate has done his duty.

The conclusion, therefore, at which I arrive is that where, as in this case, a warrant is issued in the statutory form the omission of the Magistrate to record his reasons (apart from the statement in the warrant) does not go to the Magistrate's jurisdiction to the extent of making the warrant null and void in the hands of the police officer or deprive him of the authority to execute it. I differ, therefore, with respect from the learned Judges who de-

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cided the case of *Sukheswar Phukhan v. Emperor* (2). Those learned Judges had not the benefit of any argument for the Crown or of the close examination to which the provisions of the Code have been subjected on the present occasion.

On the authority of Mayne (Criminal Law of India, 2nd Edition, pp 439 and 440), I apprehend that the view I take is consistent with English Law on this topic. "It is sufficient," says the learned author, "if the process itself be legal in the frame of it and issue in the ordinary course of justice from a Court or person having jurisdiction in the case." He continues: "No error or irregularity in the previous proceeding will affect it or excuse the party killing the officer in the execution of it from the guilt of murder." If, therefore, in the present case, the police officer had been killed in attempting to arrest the witness, it seems that under the English Law his assailants would have been guilty of murder and the attempt to arrest would not have been regarded as provocation reducing the crime to manslaughter. Further on, the learned author adds: "So, although the cause be not expressed with sufficient particularity, the officer is justified if enough appear to show that the Magistrate had jurisdiction over the subject-matter. This must, however, be understood of a warrant containing all the essential requisites of one . . ."

The warrant before us fulfils the conditions thus laid down. It was issued in proper form, with all the requisites and marks of a valid warrant by a Magistrate having general jurisdiction over the subject-matter or the case which was pending before him.

An examination of the Code has led me to the view that resistance to such a war-

rant is unlawful and in my opinion that view is in accord with the interests of justice at large and of accused persons as well as complainants in criminal cases.

It may be said that if a Magistrate stops to record his reasons, he may not issue the warrant at all. But if a remedy be required for such neglects of duty on the part of Magistrates, it must be sought in other directions, for instance, in the provision of a penalty or in some amendment of the Judicial Officers' Protection Act. The law, as I understand it, furnishes no excuse for resistance to the warrant.

The present case must, of course, be distinguished from cases where the warrant on the face of it is defective in form or where the police officer does not follow the procedure laid down for him. If the warrant is not signed and sealed in the prescribed manner or if the police officer does not notify the substance of it to the person to be arrested, obviously different considerations may arise.

In the course of the argument, mention was made of two cases in which their Lordships of the Privy Council held that words requiring reasons to be stated by the Court in connection with a step taken in the progress of a cause were not mandatory. In one of those cases their Lordships dealt with a provision in the Civil Procedure Code of 1859 corresponding with Or. 41, r 27 (2) of the present Code [*Ganga Govind Mandal v. The Collector of the 24-Parganas* (17)]. The other case related to a provision in the Code of 1882 which has now been omitted [*Thakur Shankar Baksh v. Balwant Singh* (9)]. In those cases, however, no question of the liberty of the subject was involved and there is a general agreement that the ques-

(2) 1 L. R. 34 Cal. 789; s. c. 15 C. W. M.

1001 (1911).

(9) L. R. 27 I. A. 79; s. c. I. L. R. 27 Cal. 338; 4 C. W. N. 203 (1899).

(17) 11 M. I. A. 245 at p. 268 (1907).

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tion whether a particular enactment is mandatory or directory depends little, if at all, on the form of the words but rather on the whole scope of the Statute to be construed. [Howard v. Bodington (4), Craies' Statutory Law, 2nd Edition, p 251]. On the other hand, it seems to me that generally speaking a requirement that reasons should be recorded will rather be directory in its nature than mandatory. If the jurisdiction depends on reasons being recorded, it would seem, as already stated, that it must also depend on reasons being sufficiently recorded and probably it would not be the intention of the Legislature to make a requirement as to which so much doubt might arise, a condition precedent to the exercise of jurisdiction.

Some reference was made to the observations of Brett, L. J., in Dale's case (11). With great deference, the actual decision in that case seems to me to have carried the law to an extreme point, but so far as I may, I will adopt for the present purpose every word which the learned Lord Justice uses in the passage referred to and will only add that he was not dealing with resistance to a warrant in proper form issued by a Court having jurisdiction over the subject-matter and delivered to a police officer to execute.

Before concluding I desire to say that I agree with the learned Judges who made this reference that the question at issue is not in any view of it governed by sec 99 of the Penal Code. If the warrant was an invalid warrant issued without jurisdiction, the act of the police officer in attempting to make the arrest cannot properly be described as "an act not strictly justifiable by law." It was a wholly unauthorised act. On the other hand, if in the hands of the police officer the warrant

was a valid warrant, there is no occasion for recourse to sec. 99.

Similarly, as regards the second clause of sec 141 of the Penal Code, if the view I take is right, the warrant was a "legal process" within the meaning of that clause.

With these observations I concur in the answer to the question referred, proposed by the learned Chief Justice.

BUCKLAND, J.—I agree that the question referred should be answered in the affirmative for the reasons given in the judgments of my learned brethren in support of that conclusion, in addition to those which I have already expressed.

PANTON, J.—I agree with my Lord the Chief Justice.

N. G.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD ATKINSON.

LORD SUMNER.

LORD CARSON.

MR. AMEER ALI.

1922,

Heard, 6 and

7, November.

Judgment,

20, December.

HURNANDRAI

FULCHAND,

Appellant,

v.

PRAGDAS BUDH-
SEN, Respondent.

Sale of future goods to be made by named Mills—Fixed quantity to be delivered as and when received from Mills, but fully by a certain date—Supply of goods by Mills, if condition precedent to fulfilment of contract—Goods not received from Mills, owing to latter taking up contracts to supply Government—Case, whether one of "frustration of contract"—"Methods and points of view of business men," how far to be looked into in interpreting business contracts.

Upon an agreement for sale of future goods, to be manufactured at and obtained from named Mills, "the same to be taken delivery of as and when the same may be received from the Mills,"

(4) L. R. 2 P. D. 203 at p. 211 (1877).

(11) 6 Q. B. D. 376 (1883) (1881).

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the Defendant failed to deliver the whole of the 864 bales agreed to be delivered to Plaintiff in full by 31st December 1918, by reason of the Mills preferring to execute contracts entered into by them with Government.

Held—That the words “as and when same may be received from the Mills” cannot be construed as if they were “if and when the same may be received from the Mills.” The words certainly regulated the manner of performance but did not reduce the fixed quantity sold to a mere maximum or limit the sale to such goods, not exceeding 864 bales, as the Mills might deliver to the Defendants during the remainder of the year.

That the refusal of the Mills to deliver the goods to the Defendants did not constitute a “frustration of the contract” within the principle of *TAYLOR v. CAIDWELL* (1) and other cases, when it appeared that the Mills continued to exist and manufacture the goods in question, though these were made for and delivered to somebody else.

Semle —That the closing or even the destruction of the Mills would not affect a contract between third parties which, as in this case, was in terms absolute.

In interpreting a business bargain, it is important to appreciate the methods and point of view of business men, but this does not justify the Court in excluding liability expressly incurred by a business man on the ground that it was not a liability which a reasonable business man would have bound himself to.

This was an appeal from a decree of the High Court at Bombay, dated the 17th November 1919, dismissing an appeal from a decree of that Court, dated the 19th June 1919.

A contract for the sale of *dhoties* contained the following clause :—

“Delivery by the 31st December 1918; goods under manufacture ‘banto’ are sold. The same are to be taken delivery of as and when the same may be received from the Mills. If you delay, delivery interest insurance charges and godown rent will be charged according to the bazar practice.” The Respondents failed to supply the requisite number of bales and the Appellants thereupon filed the suit under appeal.

The main defences to the action were :—

(1) That the goods were to be manufactured by Mills which by reason of Government interference were unable to manufacture and that therefore the Respondents were freed from their obligation to supply.

(2) That the contract was made subject to an implied term that the Mills would and could manufacture and supply the goods contracted for so that the contract would be frustrated on the failure of the Mills to supply them.

The suit was tried by Macleod, C. J., who said in the course of his judgment—

“The words are very similar to those in another contract I had to construe in a recent case with reference to goods to arrive from Europe, and, to my mind, it is perfectly clear that this contract is conditional. It is open to the parties to contract absolutely and it is open to the Defendants to bind themselves to deliver the goods whether they get them or not. But it is difficult to suppose that any prudent man contracting for the delivery of goods to be manufactured at the date of the contract in the future by a third party would contract to sell those goods absolutely. In my opinion, the words in this contract admit of only one possible con-

HURNANDRAI FULCHAND & PRAGDAS BUDH SEN.

struction. The goods are stated to be under manufacture and delivery is to be taken by the purchasers as and when they are received from the Mills. It follows that if the seller does not get the goods from the Mills he cannot possibly give delivery, and it would require very plain words in the contract to bind him to pay damages to his purchaser on account of non-delivery if he had done everything in his power to get the goods."

On the evidence he found that certain bales had been delivered by the Mills to the Respondents in addition to those supplied by them to the Appellants and that the latter were entitled to a share of such surplus along with other purchasers to whom they had been supplied.

He accordingly passed a decree in favour of the Appellants for damages for non-delivery of such surplus.

The Appellants appealed but the Division Bench which heard the appeal dismissed it. Heaton, J., the Senior Judge, founded his judgment (1) on the view that it was improbable that a business man would absolutely contract to deliver goods to be manufactured by a particular Mill, (2) that the word "banto" in the contract ("goods that had not been completely manufactured") showed that the basis or foundation of the contract was the common anticipation of both parties that the Mill would supply the goods contracted for and that therefore if the goods were not supplied to the vendors (Respondents) the foundation of the contract disappeared. He quoted the case of *Taylor v. Caldwell* (1). Martén, J., the other Judge, hearing the appeal concurred, suggesting that a condition might be implied that the goods were to be manufactured and supplied by the Mills and that if that condition was not fulfilled both parties

were to be released quoad these unmanufactured goods.

The Appellants now appealed to His Majesty in Council.

Messrs. Upjohn, K. C., E. B. Raikes and S. C. Chaudhuri for the Appellants.—There was no condition in the contract limiting the liability of the Respondents.

The agreement was in terms absolute and as the Respondents have failed to carry out those terms they must recompense the Appellants for the loss occasioned.

The defence that the Mills were commandeered by the Government was not raised in the pleadings and is not supported by evidence.

The assumption by the High Court that every contract contains an implied condition that the goods contracted for can be obtained by the vendors is untenable.

Messrs. Mackinnon, K. C. and S. I. Porter for the Respondents.—There was no breach of contract for which the Respondents were responsible.

The contract specifies that the goods are to be delivered as and when received from the Mills; "as and when" received means "if and when" and if the goods are not received there is no obligation to deliver.

[LORD SUMNER.—You read the words "as and when delivered, etc.," as a description of the goods but it appears to me to be a separate clause relating to delivery to be read with "Delivery by December 31st."]

If you read all the clauses together provision is made for incomplete delivery.

"Goods to be manufactured" and "goods to arrive" are analogous expressions and the same principle is applicable in each case.

[LORD SUMNER.—Your contention seems to me to be a considerable extension

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of *Taylor v. Caldwell* (1). If I contract to sell you next year's Derby winner I may be permitted to say it is impossible if there is no Derby, but not to avoid my contract on the ground that the present owner is too fond of him or that my purse is not long enough.]

Although the evidence is not very clear it does show that some sort of Government compulsion arose by reason of which the contract came to an end.

F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Co., Ltd. (4).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER —Though there is some difference between the various texts of the agreement, on which this action was brought, there is no doubt as to its substantial terms. It is an agreement for the sale of future goods, to be manufactured at and obtained from named Mills. It provides for the quantity and descriptions of these goods, for the prices at which the different descriptions are sold, and for the time and rate of delivery. To some minor and independent provisions and to the fact that some of the words are interlineated, no importance attaches. The agreement is simple and of a common type, and the whole question in dispute is whether it is an absolute contract to deliver the whole of the goods mentioned or whether the sellers are relieved from their obligation to deliver a part of them in the events which happened.

In the text adopted by the Courts below the provision as to delivery, after the words which complete the description of the goods, *viz.*, "goods under manufacture are sold," runs as follows: "The same are to be taken delivery of as and

when the same may be received from the Mills. Delivery is to be caused to be given in full by the 31st December in the year 1918." An endeavour was made in argument to treat these words as a further part of the description of the subject-matter of the contract, so as to confine the goods to such as might be received from the Mills during the remainder of the year 1918. In their Lordships' opinion this attempt failed. The goods to be manufactured are already very elaborately described, and the goods which are to be delivered are the 864 bales so described. It was also suggested that the words "as and when same may be received from the Mills" should be construed, as if they were "if and when the same may be received from the Mills." This is to convert words which fix the quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all, and virtually makes a new contract. The words certainly regulate the manner of performance, but they do not reduce the fixed quantity sold to a mere maximum, or limit the sale to such goods, not exceeding 864 bales, as the Mills might deliver to the Defendants during the remainder of the year.

If the contract is for a fixed quantity and, as was the case, less than that quantity was delivered within the time fixed, the sellers must either find in the contract some matter of excuse or discharge, or they must pay damages.

The High Court of Bombay found this excuse in the fact that the Mills failed to perform their contract to manufacture and deliver the goods to the Respondents in the circumstances of the case. As a matter of fact the Mills remained in existence and at work, and the looms which could otherwise have manufactured goods

(1) 3 B. & S. 820 (1863).

(4) [1916] 2 App. Cas. 897 at p. 403.

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deliverable under this contract were fully occupied in making goods for the Government of India. The utmost that the evidence on this point amounts to is to be found in the following evidence given by a witness from the Mills:—

"I know of contracts with the Defendants up to March, 1918; delivery was up to date. After that Government contract work began, and Defendants' *dhoties* were not proceeded with. The Mills were commandeered by Government. I had no personal knowledge of what took place between the agents and Government."

No evidence was given of the powers of Government to require their contract work to take precedence of other contract work, nor do the judgments of the High Court allude to the existence of such powers. No evidence was given that the Mills were requisitioned. It is clear that the Government did not take possession of them and, in spite of the use of the word "commandeered," it is the plain result of the evidence that the Government placed an order with the Mills for goods to be manufactured, and it was executed in preference to the order of the Defendants. Whether the manufacturers' motives were patriotic or commercial does not matter. It was not suggested that there would be anything illegal in the receipt of these goods by the Defendants, if they could have got them, or in the delivery of them over to the Plaintiffs. Accordingly, having failed to perform their bargain, the Respondents must pay damages.

The High Court of Bombay appear to have been guided by considerations, which seem to their Lordships to have been mistaken. They interpreted the contract by asking themselves what it was likely that a reasonable business man would have bound himself to do; they

thought that there had been what is called "frustration of the contract"; and they held that the case fell within the principle of *Taylor v. Caldwell* (1), and that a condition of things had failed to subsist at the time of performance, which had been mutually contemplated by the parties and finally agreed to be essential to the obligation of the seller to deliver.

On the first point, the learned Judges, no doubt by inadvertence, expressed a different proposition from that which they must have had in mind. To interpret a business bargain, expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of business men, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from thus concluding that, whatever the words of the contract say, that kind of liability, and that alone, is the obligation of the contract. As a matter of fact there is nothing surprising in a merchant's binding himself to procure certain goods at all events. It is a matter of price and of market expectations. No doubt it is a speculation, but many dealings even in cotton goods are of that character.

As to the doctrine of "frustration," the High Court of Bombay had not the advantage, at the time when the appeal was heard before them, of several discussions and decisions which have taken place in England since then in the House of Lords as well as in the Court of Appeal. The adventure, of which the commercial purpose is suggested to have been frustrated, is, of course, the purchase and sale of these goods between the parties

(1) 3 B & S. 826 (1863).

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to this contract, and this adventure was not frustrated. All that happened was, that the Defendants failed to perform their contract. When they have paid the damages, one commercial purpose, at any rate, will, so far from being frustrated, have been fulfilled. Their Lordships think it unnecessary to enlarge upon the recent authorities.

The Mills, from which the goods were to come, no doubt were contemplated as continuing to exist, though it does not follow that, in a bargain and sale such as this, the closing or even the destruction of the Mills would affect a contract between third parties, which is in terms absolute; but the Mills did continue to exist and did continue to manufacture the goods in question, only they were made for and delivered to somebody else. This is completely outside the principle of *Taylor v. Caldwell* (1) or of the Coronation cases [*Krell v. Henry* (2) and *The Civil Service Co-operative Society, Ltd. v. The General Steam Navigation Company* (3)].

The parties having failed to agree (2) the damages, the case must be remitted to the Court of the Trial Judge to assess them and to increase the amount adjudged to the Plaintiffs accordingly, the appeal being allowed with costs here and below, and their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. E. F. Turner & Sons* for the Respondents.

G. D. M.

(1) 3 B. & S. 826 (1863).

(2) [1903] 2 K. B. 740.

(3) [1903] 2 K. B. 756.

[CIVIL APPELLATE JURISDICTION.]

SMALL CAUSE COURT REFERENCE

No. 1 OF 1923.

MOOKERJEE, J.

RANKIN, J.

1923,

M. L. CHAKRABARTY

v.

Heard, 3 and

4, May.

OLOF BORIN.

Judgment,

16, May.

The Presidency Small Cause Courts Act (XV of 1882), secs 38, 69—Reference if can be made on an application under sec 69—Reference made by one of the two Judges constituting the Court, if proper—"Statement of facts"—Its meaning—"Statement of facts," if to be signed—Requirements of a valid reference under sec 69—Meaning of the term "suit"—Sec 6 of 38 and 39 Viet, c. 50.

The Chief Judge and the Sixth Judge of the Small Cause Court, Calcutta, who heard an application for new trial under sec 38 of the Presidency Small Cause Courts Act, differed in their opinion and delivered separate judgments. The Chief Judge in his judgment narrated the history of the case, gave an exposition of his view of the law and concluded with the expression of opinion that the suit should have been decreed and formulated two questions which he referred to the High Court under sec. 69 of the Presidency Small Cause Courts Act. The judgment of the Sixth Judge similarly contained a statement of facts, an exposition of the law and an expression of opinion that the suit had been rightly dismissed by him.

On the hearing of the Reference two questions were raised, viz.;

(a) whether a Reference under sec. 69 is permissible on an application under sec. 38;

(b) whether the Court has drawn up a "statement of facts" within the meaning of sec. 69;

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Held—That the application under sec. 38 is an application in the suit and attracts the operation of sec. 69 and that the Small Cause Court is competent to make a Reference under sec. 69 upon such an application.

NUSSERWANJEE v. PURSUTAM (1), OKHOY KUMAR v. KOYLASH CHUNDRA (23) and RAJENDRA MALLIK v. NANDALAL (24) referred to.

Held also—That the Reference was not in proper form. Sec. 69 contemplates that a statement of facts should be drawn up by the Court, that is, two or more Judges where the case is heard by more than one Judge, and should be signed by them. They must then formulate the point on which there is a difference of opinion. This statement of facts and of the point on which there is a difference of opinion is to be accompanied by statement of reasons assigned by each Judge in support of his view.

RAMASAMI v. MADRAS TIMES PRINTING AND PUBLISHING CO. (8), JARDINE SKINNER & CO v. MONEY (25), BINODE LAL v. RIVER STEAM NAVIGATION CO (26), R. v. DUDLEY (27) and R. v. COMMISSIONERS OF SEWERS FOR ESSEX (28) referred to

The meaning of the term "suit" in sec. 69 considered.

GAGAN CHAND v. CASPERSZ (9), BATASU v. JAITY (10), NAINAPPA v. CHIDAMBARAM

- (1) I. L. R. 11 Cal. 298 (1885).
- (8) 30 Mad. L. J. 207 (1915); [1915] Mad. W. N. 784.
- (9) 4 C. W. N. 44 (1897).
- (10) 3 C. W. N. lxii (1899).
- (23) I. L. R. 17 Cal. 387 (1890).
- (24) I. L. R. 31 Cal. 1001 (1904).
- (25) 14 W. R. 812 (1870).
- (26) 1 C. W. N. 143 (1897).
- (27) 14 Q. B. D. 278 (1884).
- (28) 14 Q. B. D. 561 (1885).

(11), SHYAMA CHARAN v. DEBENDRANATH (12), VENKATA CHANDRAPPA v. VENKATA RAMA (13), ACHHA MIAN CHOWDHURY v. DURGA CHARAN LAW (14) and SAMEED SHEIKH v. NABA NEPAL (15) referred to.

Held further—That a Full Bench of the Presidency Small Cause Court sitting under sec. 38 has no jurisdiction to decide questions of fact, whether they are raised generally or in consequence of its finding on another question of fact or law.

SASOON v. HARIDAS (17) and JOHAN SMIDT v. RAMPRASAD (18) referred to.

This was a Reference in the Small Cause Court Suit No. 14995 of 1922. This suit was heard by Mr. K. N. Banerjea, 6th Judge, on the 18th August 1922, and the application for new trial was heard by F. K. Dobbin, Esq., Officiating Chief Judge and K. N. Banerjea, Esq., 6th Judge and the Chief Judge made a Reference to the High Court.

The facts of the case will appear from the judgment.

Messrs. B. K. Ghose and D. N. Mitter for the Plaintiff.

Mr. F. R. Surita for the Defendant.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference under sec. 69 of the Presidency Small Cause Courts Act, 1882. The suit, which was brought by the buyer against the seller for damages for breach of an indent contract, was instituted on the 18th July 1922. The trial took place before the Sixth Judge who

- (11) I. L. R. 21 Mad. 18 (1897).
- (12) I. L. R. 27 Cal. 484; a. c. 4 C. W. N. 269 (1900).
- (13) I. L. R. 22 Mad. 256 (1898).
- (14) I. L. R. 25 Cal. 146; a. c. 2 C. W. N. 187 (1897).
- (15) 19 C. L. J. 310 (1914).
- (17) I. L. R. 24 Cal. 455 (1896).
- (18) I. L. R. 38 Cal. 425 (1911).

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dismissed the suit on the 18th August 1922. On the 7th September 1922, the Plaintiff made an application under sec. 38 before the Chief Judge and the Sixth Judge who directed notice to issue. The matter was adjourned from time to time till the 16th February 1923, when the application was heard in the presence of both sides. There was a further hearing on the 22nd February 1923, when the Court reserved judgment. On the 8th March 1923, two separate judgments were delivered, one by the Chief Judge, the other by the Sixth Judge. They disagreed in their conclusions. The judgment of the Chief Judge narrates the history of the case, contains an exposition of his view of the law, concludes with the expression of opinion that the suit should have been decreed and formulates two questions which are referred to this Court. The judgment of the Sixth Judge similarly contains a statement of facts, an exposition of the law, and an expression of opinion that the suit had been rightly dismissed by him. We have to consider whether the Reference thus made is in conformity with sec. 69 of the Presidency Small Cause Courts Act, 1882, and in this connection two points require examination, namely, first, whether a Reference under sec. 69 is permissible on an application under sec. 38, and, secondly, whether the Court has in this case drawn up a "statement of the facts" within the meaning of sec. 69.

As regards the first point, we are of opinion that the Small Cause Court is competent to make a Reference under sec. 69 on an application under sec. 38. Sec. 38 is in these terms :—

"Where a suit has been contested, the Small Cause Court may, on the application of either party made within eight days from the date of the decree or order

in the suit (not being a decree passed under sec. 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings."

Sec. 69 is in these terms :—

"If two or more Judges of the Small Cause Court sit together in any suit, or in any proceeding under Chap. VII of this Act, and differ in their opinion as to any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, or if in any suit or any such proceeding, in which the amount or value of the subject-matter exceeds five hundred rupees, any such question arises, and either party so requires the Small Cause Court shall draw up a statement of the facts of the case, and refer such statement, under sec. 617 of the Code of the Civil Procedure, for the opinion of the High Court, and shall either reserve judgment or give judgment contingent upon such opinion."

The decision of Garth, C. J. and Wilson, J. in *Nusserwanjee v. Pursutam* (1) is an authority for the proposition that an order rejecting an application for a new trial, subject to the decision of the High Court on certain point or points referred, is not a contingent judgment within the meaning of sec. 69, and points of difference between the Judges at that stage cannot form matters for reference. In support of this view, reference was made to the decision of Couch, C. J. and Pontifex, J., in *Hall v. Joachim* (2). On the other hand, the decision of Peacock, C. J., and Mitter, J., in *Ishan Chandra v.*

(1) I. L. R. 11 Cal. 293 (1896)

(2) 12 B. L. R. 34 (1878).

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Haran Sardar (3) points to the opposite conclusion. The Madras High Court in *Oaksnot v B I. S. N. Co.* (4) followed the decision in *Nusserwanjee v. Pursutam* (1). The later decisions in Madras, however, have uniformly adopted the contrary view; *Seshammal v Munusami* (5), *Rangiah v. Rungiah* (6), *Lodd Gobindoss v. Ruhmani Bai* (7) and *Ramasami v Madras Times Printing and Publishing Co.* (8). In this conflict of judicial opinion, we must turn to the language of the statute and ascertain its plain meaning.

Sec 69 authorises a reference when two or more Judges of the Small Cause Court sit together in any suit and differ in their opinion as to any question of law or usage having the force of law or the construction of a document, which construction may affect the merits. The term "suit" is not defined either in the Presidency Small Cause Courts Act or in the Code of Civil Procedure, and its meaning cannot be determined apart from the context. The decisions in *Gagan Chand v. Caspersz* (9) and *Batasu v. Jaiti* (10) show that the term "suit" sometimes includes the Appellate stage, while sec 10 of the Civil Procedure Code 1908 speaks of an appeal before His Majesty in Council as a suit. We are not unmindful that, notwithstanding this, it has been held that an application for leave to appeal to His Majesty in Council is not a suit within the meaning of sec 10. *Namappa v Chidambaram* (11). In *Shyama Charan*

v. Debendranath (12), it was held that the term "suit" includes even execution proceedings, though *Venkata Chandrappa v. Venkata Rama* (13) might be invoked to support the view that the term "suit" does not include an application under sec. 47 of the Civil Procedure Code. In *Achha Mian Chowdhury v Durga Charan Law* (14), it was ruled that an application to review an order made in a suit is a proceeding in the suit itself. Again, in *Samed Sheikh v Naba Nepal* (15) an application to re-hear an appeal was treated as an application in the suit and not merely an extraneous proceeding which if granted in effect revives the appeal. We are not disposed to place a narrow and restricted interpretation upon the term "suit" in sec 69 of the Presidency Small Cause Courts Act and we cannot find any conclusive reason against the view that an application under sec 28 is a stage in the suit which is not necessarily terminated by the decree. This, no doubt, seems to militate at first sight against the view propounded in *Nusserwanjee v Pursutam* (1). But Sir Richard Garth, C. J., appears to have overlooked that though sec 69 of Act XV of 1882 was similar in its terms to sec. 7 of Act XXVI of 1864, which was in force when *Hall v. Joachim* (2) was decided, sec 38 of Act XV of 1882 is materially different from sec. 53 of Act IX of 1850 which was moulded on sec. 89 of the County Court Act, 1846. Sec 53 of Act IX of 1850 was in these terms,--

"Every order and judgment of any Court holden under this Act, except as

(1) I L R 11 Cal 298 (1885).

(3) 8 B L R 135, 11 W R 525 (1869).

(4) I. L. R. 15 Mad. 178 (1891).

(5) I. L. R. 20 Mad. 358 (1896).

(6) I L R 31 Mad. 490 (1908).

(7) I. L. R. 38 Mad. 433 (1913).

(8) 30 Mad. L. J. 207 (1915), [1915] Mad W. N. 785.

(9) 4 C. W. N. 44 (1897).

(10) 3 C. W. N. 121 (1899).

(11) I. L. R. 24 Mad. 18 (1897).

(1) I. L. R. 11 Cal. 298 (1885).

(2) 12 B L R 34 (1873).

(12) I. L. R. 27 Cal. 484 s. c. 4 C. W. N. 269 (1900).

(13) I L R. 22 Mad. 256 (1898).

(14) I. L. R. 25 Cal. 146 s. c. 3 C. W. N. 137 (1897).

(15) 19 C. L. J. 310 (1914).

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herein provided, shall be final and conclusive between the parties, but the Judges shall have power to non-suit the Plaintiff, in every case in which satisfactory proof shall not be given to them, entitling either the Plaintiff or Defendant to the judgment of the Court, and shall also in every case whatever, have the power, if they shall think fit to order a new trial to be had, upon such terms as they shall think reasonable, and in the meantime to stay the proceedings."

Thus, it will be observed, refers to new trial only. Sec. 38 of Act XV of 1882, on the other hand, is far more comprehensive in scope and empowers the Court not only to order a new trial but also to alter, set aside or reverse the decree. The substance of the matter is that, on an application under sec. 38, the Court may exercise what is essentially Appellate Jurisdiction. We need not, however, lay stress on the change in the heading of Chap. VI from "New trials and re-hearing" to "new trials and appeal" by sec. 13 of Act I of 1895. Reference may be made to the decision of the Full Bench in *Sai Sikandar v. Ghouse Mohudin* (16), which overruled the decision in *Ramasami v. Madras Times Printing and Publishing Co.* (8) and held that a Full Bench of the Presidency Small Cause Court sitting under sec. 38 has no jurisdiction to decide questions of fact, whether they are raised generally or in consequence of its finding on another question of fact or law. This accords with the view taken in this Court in *Sqsoon v. Haridas* (17) and *Johan Smidt v. Ramprasad* (18). A similar attempt was made unsuccessfully in

Cousins v. Lombard Deposit Bank (19) to maintain the view that sec. 6 of 38 and 39 Vict., c. 50 contemplated an extension of the right to appeal in suits arising within what used to be called the common law jurisdiction of the county Court; it is now settled that there is no appeal on questions of fact in that class of cases, though under sec. 11 of 13 and 11 Vict., c. 61 not only might a new trial be ordered but judgment entered for either party; *Murtagh v. Barry* (20), *Robinson v. Fawcett* (21) and *Clarke v. West Ham Corporation* (22). We are of opinion that although sec. 38 provides for a more extended jurisdiction than what would be technically called a new trial, a jurisdiction analogous to an appeal, yet there is no appeal on facts. But though the power of interference is thus restricted, the application under sec. 38 is nevertheless an application in the suit and attracts the operation of sec. 69. The conclusion follows that in this case it was competent to the two Judges to make a reference under sec. 69 in conformity with the requirements thereof. We may add that this view accords with what has been the recognised practice in recent years, notwithstanding the decisions in *Nusserwanjee v. Pursutam* (1) and *Obhoy Kumar v. Koylash Chundra* (23) and *Rajendra Mallik v. Nandalal* (24) may be mentioned as instances where references under sec. 69 made on applications under sec. 38 were heard by this Court without objection.

As regards the second point, we are of opinion that the reference is not in proper form. Sec. 69 contemplates a state-

(8) 30 Mad. L. J. 207 (1915); [1915] Mad. W. N. 785.

(16) I. L. R. 40 Mad. 355 (F.B.) (1916).

(17) I. L. R. 24 Cal. 455 (1898).

(18) I. L. R. 38 Cal. 425 (1911).

(1) I. L. R. 11 Cal. 298 (1885).

(19) 1 Exch. Div. 440 (1876).

(20) 24 Q. B. D. 632 (1890).

(21) [1901] 2 K. B. 325.

(22) [1914] 2 K. B. 448.

(23) I. L. R. 17 Cal. 387 (1890).

(24) I. L. R. 31 Cal. 1001 (1904).

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ment of the facts of the case drawn up by the Court, that is, by the two or more Judges where the case is heard by more than one Judge. This cannot create any difficulty, because when an application under sec. 38 is heard, the Judges cannot disagree on the facts. There is no appeal on the facts as we have already explained and the facts as found by the trial Judge must be accepted. Consequently, the first step, when a reference is to be made under sec. 69 is to draw up a statement of the facts of the case, to be signed by the Judges. They must then formulate the point on which there is a difference of opinion. This statement of facts and of the point on which there is a difference of opinion is to be accompanied by statements of the reasons assigned by each Judge in support of his view. This was emphasised by the Madras High Court in *Ramasami v. Madras Times Printing and Publishing Co.* (8); see also *Jardine Skinner & Co. v. Money* (25) and *Binode Lal v. River Steam Navigation Co.* (26). Useful examples of a case stated will be found in *R. v. Dudlen* (27) and *R. v. Commissioners of Sewers for Essex* (28).

The result is that the Reference must be discharged and the records returned to the Small Cause Court so that such steps as may be considered necessary may be taken in accordance with law. Each party will pay his own costs in this Court.

Mr. S. C. Bose, Solicitor for the Plaintiff.

Messrs. Watkins & Co. Solicitors for the Defendant.

D. N. S. Reference discharged

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1621 of 1919.

CHATTERJEA, J.	PROBODH CHANDRA
SUHRWARDY, J.	MITTER, Plaintiff,
1923,	Appellant,
Heard,	v.
16, February.	HARISH CHANDRA
Judgment,	NASKAR, Defendant,
11, May.	Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 60—Land Registration Act (VII, B. C. of 1876); secs 78, 79, 81—Lease granted by eight annas registered proprietor—Suit by lessor's ijaradar for entire rent—Plea of payment of eight annas rent to registered proprietor of remaining eight annas, if maintainable.

P, the proprietor of an estate, after sale of an 8 as. share of the same to C, granted a lease of a plot of land to the Defendant. Plaintiff as ijaradar of P's remaining eight annas share having sued Defendant for the entire rent, the latter pleaded that he stood discharged in respect of an eight annas share of the rent as he had paid the same to C's representative who was registered as proprietor of an eight annas share (P's representatives being registered as proprietors of the remaining 8 as. share):

Held—That neither sec. 60 of the Bengal Tenancy Act nor secs. 78 and 79 of the Land Registration Act applies where the suit is by an ijaradar.

The receipt which under sec. 60 of the Bengal Tenancy Act is to operate as a discharge for rent must be a receipt by a person or persons registered as the owner or owners of the entire estate and not only of a part of the estate.

The third person referred to in the concluding portion of sec. 60 of the Bengal Tenancy Act means a third person whose name is not registered at all.

Semble:—If secs. 78 and 79 of the Land

(8) 30 Mad. L. J. 207 (1915); [1915] Mad W. N. 785.

(25) 14 W. R. 312 (1870).

(26) 1 O. W. N. 143 (1897).

(27) 14 Q. B. D. 278 (1884).

(28) 14 Q. B. D. 291 (1885).

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Registration Act had applied to the case, the right of P and his successors to recover the entire rent under the written lease granted by P to the Defendant would be saved by sec. 81 of the Act.

This was an appeal preferred on the 22nd of July 1919, against the decree of J. F. Graham, Esq., Additional District Judge of Zillah 24-Parganas, dated the 14th of April 1919, affirming the decree of Babu Bhagbat Charan Kundu, Subordinate Judge, 4th Court of that District, dated the 17th of September 1917.

The facts of the case will appear from the judgment.

Babu Byan Kumar Mukherjee for the Appellant.

Babus Ram Ch. Mozumdar and Harendra Kumar Sarbadhucary for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This appeal was heard once before [see the judgment in *Probodh Chunder v. Harish Chunder* (1)], but as the judgment proceeded partly upon a concession made by the pleader for the Appellant, the judgment was set aside on review, and the appeal has been heard again.

The appeal arises out of a suit for rent under the following circumstances :—One Purna was the proprietor of an estate in the Sunderbuns. He sold an 8 annas share of the estate to one Chandranath on the 9th August 1897. The latter got his name registered in respect of the 8 annas share under the Land Registration Act. About six years afterwards on 12th May 1903 the Defendant No. 1 took a lease of 400 bighas of land from Purna alone and executed a registered *kabuliyat* in his favour agreeing to pay a fixed rent of

Rs. 350. He appears to have paid rent for some years to Purna alone. Purna died leaving two sons, and the Plaintiff is the *iqaradar* of an 8 annas share of the estate from the sons of Purna whose names were registered in respect of the 8 annas share. The Plaintiff brought a suit against the Defendant for the rent reserved in the lease. The Defendant pleaded that he had paid an 8 annas share of the rent to the representative of Chandranath who was registered as proprietor of an 8 annas share of the estate under the Land Registration Act and that, therefore, the Plaintiff was not entitled to rent in respect of the 16 annas share. The Courts below have given effect to this contention and the Plaintiff has appealed to this Court.

Now the name of Purna was registered under the Land Registration Act in respect of 8 annas share, and, although the name of Chandranath was registered in respect of the other 8 annas share, he had nothing to do with the lease which was granted by Purna alone and without reference to his co-sharer Chandranath. It appears that the land was not cultivated at the time when it was let out as it was to be held rent-free for the first few years. The position, therefore, was this : one of the co-sharers alone let out a portion of the land of the estate in order to make a profitable use of it by bringing it under cultivation through his tenant. Whether Chandranath had similarly let out other lands or not, and what the arrangement was between the co-sharers we do not know. But this much is certain that Chandranath had nothing to do with this lease of 400 bighas.

The first question for consideration is whether the provisions of sec. 60 of the Bengal Tenancy Act are applicable to the present case. That section lays down that where rent is due to the proprietor,

(1) 1. L. R. 48 Cal. 1078 (1921).

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manager or mortgagee of an estate the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate or of his agent authorised in that behalf, shall be a sufficient discharge for the rent, and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person. We are of opinion that sec. 60 does not apply to the present case. In the first place, that section deals with cases where rent is due to the proprietor of an estate. Here the rent is not due to the proprietor, as the Plaintiff is not a proprietor but is an *iyadar*, and as *iyadar* the Plaintiff could not get his name registered under the Land Registration Act. In the next place, even assuming that the rent can be said to be due to a proprietor because it was originally payable to Purna who was a proprietor, the section speaks of the proprietor of an estate, and "the receipt of the person who is registered under the Land Registration Act as proprietor of that estate." Purna to whom the rent was originally due under the *habuliyat* executed by the Defendant, was, and after his death his sons were, the proprietors of an eight annas share of the estate. Chandranath and after his death his representatives to whom the Defendant is said to have paid a moiety of the rent and from whom he obtained a receipt therefor, are registered as the proprietors of another eight annas share of the estate. So that neither Purna's sons, nor the representatives of Chandranath are the proprietors of an estate.

No doubt "proprietor" is defined in sec. 3, cl. (2) as a person owning an estate or part of an estate, and it is contended that Chandranath who was the owner of an eight annas share of the estate is a

"proprietor." But sec. 60 lays down that the receipt of the person registered under the Land Registration Act "as proprietor of that estate" shall be a sufficient discharge, so that although a proprietor may be the owner of an estate or a part of an estate, the section merely speaks of proprietor of that estate which indicates an entire estate. The same observations apply to the sons of Purna from whom the Plaintiff obtained his *iyara*.

The expression "proprietor" is defined in sec. 3 (8) of the Land Registration Act as every person being in possession of an estate or of any interest therein, and sec. 78 of that Act lays down "No person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act, and no person being liable to pay rent to two or more such proprietors, managers or mortgagees holding in common tenancy shall be bound to pay to any one such proprietor, manager or mortgagee more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor, manager or mortgagee is registered bears to the entire estate or revenue-free property."

It appears therefore that the case where rent is payable to two or more proprietors the extent of whose interest is required to be registered under the Land Registration Act, and which is dealt with in the second part of sec. 78 of that Act, is not dealt with by sec. 60 of the Bengal Tenancy Act.

The words "that the rent is due to a third person" in the concluding portion of sec. 60 of the Bengal Tenancy Act seem

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to refer to a third person whose name is not registered at all. The object of sec. 60 of the Bengal Tenancy Act appears to be to afford indemnity to tenants who pay rent to the person whose name is registered under the Act, and to debar them from pleading in defence to a claim for rent by such person that the rent is due to a third person, but the section does not appear to have provided for cases where the names of all the part proprietors have been registered under the Land Registration Act.

In the case of *Ibdul Iziz v Kanthu Mallik* (2), it was held that "an unregistered part proprietor of an estate is not entitled to succeed as against the Defendant who relying upon sec. 60 of the Bengal Tenancy Act has established that his debt has been discharged by payment of rent to the registered proprietor." In that case the name of the part proprietor (the Plaintiff) was not registered, and it was pointed out by the learned Judges that there was no contest between two persons both of whom were registered as proprietors under the Act. What the precise position might have been if there had been a contest between two persons both of whom were registered under the Act was not considered in that case.

As already stated, although the name of Chandranath was registered in respect of an 8 annas share of the estate he had nothing to do with the lease which was granted by Purna alone, and without reference to him. The land was not cultivated at the time of the lease. Purna as a co-owner could have himself cultivated the land and if in order to make a profitable use of the lands, a portion (400 bighas) of the estate consisting of 4,000 bighas was let out by him to his tenant,

without any denial of Chandranath's right, Chandranath would not necessarily be entitled to a share of the rent merely on the ground of his being a co-sharer. It is true that sec. 60 of the Bengal Tenancy Act is not concerned with questions of title, but if the Defendant claims a discharge for the rent by reason of his payment to the heirs of Chandranath, he must bring his case strictly within the terms of the section, when he wants to defeat the suit for rent based upon a lease which he obtained from Purna alone, without reference to Chandranath, although the latter at that time had become co-owner of the estate to the extent of 8 annas.

The next question is whether the provisions of the Land Registration Act are applicable to the case. We have already referred to sec. 78 of that Act, the second paragraph of which lays down that "no person being liable to payment to two or more such proprietors . . . holding in common tenancy shall be bound to pay any one such proprietor . . . more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor . . . is registered bears to the entire estate . . ." Sec. 79 provides that "the receipt of any proprietor . . . whose name and the extent of whose interest is registered under this Act shall afford full indemnity to any person paying rent to such proprietor." It is contended on behalf of the Respondent that having regard to the provisions of sec. 78 (second paragraph) the Defendant would not be bound to pay more than an 8 annas share of the rent to the Plaintiff, and under sec. 79 the receipt of the heirs of Chandranath whose names are registered with respect to an 8 annas of the

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estate, would afford full indemnity in respect to such share.

Sec. 81, however, provides: "Nothing contained in the three last preceding sections shall be held to interfere with the conditions of any written contract." In the present case there was a written contract under which the entire rent was due to Purna and his successors. There is some difference of opinion as to the construction to be placed upon sec. 81 of the Act. See *Iswar Chandra Bera v. Kali Chandra Santra* (3) and *Surja Kanta Ghattal v. Ananda Mohan Chatterjee* (4).

In our judgment before review, we followed the latter case treating the *ijaradar* as being in the same position as a proprietor, on the assumption that he is merely an assignee of the rent from the proprietor. But it is contended on behalf of the Respondent that the Plaintiff as *ijaradar* is merely a lessee, and that sec. 81 has no application to a person who is not himself a proprietor but who has an interest subordinate to a proprietor. We think this contention is correct. The Plaintiff is a lessee under the proprietor. Sec. 81 seems to be a rider to secs. 78 to 80, and as those sections deal with the case of proprietors, there is no reason to think that sec. 81 refers to cases of persons other than a proprietor. It is unnecessary therefore to consider the question of construction of sec. 81. But in that view neither sec. 78 nor 79 applies to the present case, as the Plaintiff is an *ijaradar* and not a proprietor. In the case of *Sukurulla Kazi v. Bama Sundari Dasi* (5), it was held upon a construction of sec. 3, cl. 1, secs. 38 and 78 of Act VII of 1876, that a *putnidar* or an *ijaradar* is not a

proprietor of an interest in an estate within the meaning of the Land Registration Act, and it is not necessary therefore for a *putnidar* or *ijaradar* to register his name under the Act to entitle him to sue. In the case of *Syed Serapat Hossain v. Tarini Prasad* (6) it was held that sec. 78 has no application to the case of a person to whom rent has been assigned by a proprietor whose name has not been registered under the Act. It may be said that if the proprietor himself was, under the section, under a legal disability to claim the rent because his name was not registered, he could not simply by granting a lease confer upon the lessee a right higher than what he possessed. This was considered in that case and the learned Judges (though with some hesitation) observed as follows: "Having regard to the fact that sec. 78 is the only provision which prohibits a proprietor from bringing a suit for recovery of rent against a person who is not bound to pay him such rent unless he gets his name registered it seems to us that the Plaintiff being a person who does not come within this prohibitory section cannot be said to be under the same legal disability as his assignor was." Having regard to the fact that the section in terms refers only to proprietors and not to lessees who are not required to get, and cannot get their names registered under the Land Registration Act, we agree with the view taken in the above case. On behalf of the Respondent we were referred to an unreported decision of this Court in certain suits in which payment of an 8 annas share of the rent to Chandranath's representatives was held to be a sufficient discharge for the rent. (See Second Appeal No. 1368 of 1916 and analogous cases decided by Teunon and Newbould, JJ., on

(3) 27 C. L. J. 474 (476) (1917).

(4) 24 Ind. Cas. 303 (1914).

(5) 1 C. W. N. 201 (1897).

(6) 11 C. W. N. 141 (1906).

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25th June 1920*). These cases, however, did not relate to the rent of the 400 bighas covered by the *kabuliyat* in the present case, but related to other lands though of the same estate, and the questions considered by us do not appear to have been considered by the learned Judges in those cases.

We are accordingly of opinion (being the same which we held before review, though on different grounds), that the decrees of the Courts below should be set aside and the case remanded to the Court of first instance for decision of the other questions in the case and disposal of the case according to law. Costs to abide the result.

N. G.

*[CIVIL APPELLATE JURISDICTION]

APPEALS FROM APPELLATE DECREES

Nos. 1388, 1605 TO 1611 OF 918

TEUNON, J.	}	PROBODH CHANDRA MITRA,
NEWBOULD, J.		• Plaintiff, Appellant,
1920,		v.
25, June.		RAM CHANDRA CHANDRA and ors., Defendants, Respondents.

These were appeals against the decrees of A. J. Chotzner, Esq., District Judge of Zillah 24-Perganahs, dated the 21st of March 1918, affirming the decrees of Babu Satchidananda Mukherjee, Munsif, 4th Court at Diamond Harbour, dated the 27th of February 1917

Dr. Dwarka Nath Mitter and Babu Bijan Kumar Mukherjee for the Appellant

Babu Sasi Sekhar Bose for the Respondents.

THE JUDGMENT OF THE COURT* was as follows:—

These eight appeals arise out of suits for rent. In them as *ijaradar* from two proprietors named Kartic and Akhoy the Plaintiff claims from the tenant Defendants 16 annas rent for the years 1319 to 1322. It appears that the father of Kartic and Akhoy in the year 1304 executed a conveyance of one moiety of his interest in favour

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE

No. 173 OF 1920.

CHATTERJEA, J.	}	SURENDRA NATH alias
CUMING, J.		KARTICK CHANDRA
1923,		GHOSE and ors.,
Heard, 30 and		Defendants, Appellants,
31, January.		v.
Judgment,		RAJA RESHEE CASE LAW
29, March		and ors., Plaintiffs, Respondents.

Limitation Act (IX of 1908), Art. 132, limitation for recovery of money due under an instalment mortgage bond providing for recovery of whole amount on default of any instalment—Acceptance of overdue instalments, if amounts to waiver.

An instalment mortgage bond provided for payment in twelve yearly instalments,

of one Chandra Sapui This Chandra Sapui got his name registered in respect of this moiety On the death of their father, Kartic and Akhoy applied for registration in respect of the 16 annas This application was opposed by Chandra, in the result Kartic and Akhoy obtained registration only in respect of 8 annas share in the property Before the decision of their application they had executed an *ijara* in favour of the Plaintiff on the basis of which the Plaintiff claims The *ijara* is in respect of 16 annas of the property In these suits for the years in question the Plaintiff, as *ijaradar*, claims 16 annas rent. It is alleged that Chandra Sapui is a mere *benamidar*; and the suggestion in these appeals is that that is a question which should have been tried in the present suits. No issue was, however, framed in these suits on that point and Chandra Sapui is no party to these suits There is, further, the finding of fact that the rent for the years in suit in respect of the 8 annas share has been paid by the tenants. The receipts granted by Chandra Sapui in view of the provisions of sec. 80 of the Bengal Tenancy Act must be held to be valid discharges for the rent paid by the tenants. On these findings of fact, these appeals must necessarily fail and are dismissed with costs.

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the first falling due in Pous 1308 B. S. It was further provided that on default in payment of any one instalment the whole would be recoverable with interest. The instalments for 1309 to 1311 B. S. were paid out of time and accepted. The mortgagee sued for the subsequent instalments:

Held—That the article applicable to the suit was Art 132 of the Limitation Act

That though Art 132 does not provide for cases of waiver, and there is no case directly deciding that the principle of waiver would apply to mortgage bonds payable by instalments, having regard to the weight of authority in connection with cases under Art 75 and instalment decrees, it may be held that the payment and acceptance of overdue instalments in the present case constituted a waiver, and that the mortgagee was entitled to recover the subsequent instalments

HURRONATH ROY & MAHEROOLA MOOLAH (1), HEMP v GARLAND (2) and MON MOHAN ROY v DURGA CHARAN GOOER (3) followed

MOHESH CHANDRA BANERJEE v PROSARNA LAL SINGH (4) distinguished.

JAGAT MOHINI DASSEE v. MONOHAR KOONWAR (6), SITAB CHANDRA NAHAR v. HYDER MOLLA (7) and other cases referred to

This was an appeal preferred on the 9th of July 1920 against the decree of Babu Jatindra Chandra Lahiri, Additional Subordinate Judge of Zillah Bakergunj, dated the 29th of March 1920, reversing the decree of Babu Satish Chandra Chakravarti,

Munsif, 7th Court at Barisal, dated the 31st of January 1917.

The facts will fully appear from the following material portions of the lower Court's judgment:—

This is an action for enforcement of a mortgage security, dated 23rd Bysak 1308 B. S. It is for a sum of Rs 314 payable in twelve annual instalments, the first falling due in the month of Pous 1308 B. S. and others in the month of Pous of the consecutive 11 years ending in 1319 B. S., and it also provides that in case of default in payment of any of those instalments the entire unpaid amount will fall due and will carry interest at 24 per cent per annum.

Defendants Nos 1 and 2 are the mortgagors and the other Defendants have been made parties on the allegation of their having subsequently purchased the mortgage property. Various objections have been raised, but the most important one that has been pressed is that the claim is barred by limitation. All the endorsements on the back of the bond have been denied and it has further been alleged that the entire amount due under it was paid up in lump and all at once in Pous 1309 B. S.

The learned Munsif disbelieved the Defendants' plea of payment but dismissed the suit on the finding that the repayments alleged by the Plaintiffs were not established, that there was no waiver and that hence the suit was time-barred.

On appeal by the Plaintiffs the Subordinate Judge observed as to the question of limitation: "I regret I am obliged to differ from the Munsif as to the application of the law and appreciation of evidence. I observe that sec. 20, Limitation Act, has no application to this case, for it is not on the ground of any payment of any part of the principal amount of

(1) 7 W. R. 21 (F. B.) (1867)

(2) 4 Q. B. 519 (1843)

(3) I. L. R. 15 Cal. 502 (575) (1888)

(4) I. L. R. 31 Cal. 83 (87) s. c. 8 C. W. N. 66 (1903)

(6) 25 W. R. 278 (1876)

(7) I. L. R. 24 Cal. 291 (1896)

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interest thereon that the Plaintiffs want an enlargement of the period of limitation. The payments that are said to have been made were not in respect of the eight instalments now sued for but for the previous ones, which according to the Plaintiffs were fully satisfied though out of time

"The case is evidently governed by Art. 132 of the Act which prescribes a period of 12 years counted from the date on which the money sued for becomes due. This article is no doubt silent as to the operation of any default provision as is specifically provided for in Art 75; but as found in *Sitab Chandra Nahar v. Hyder Molla* (7), the principle of waiver is the same in both cases. We have therefore to decide if the Plaintiffs waived their right under the default provision in respect of the earlier instalments, some of which were admittedly not paid in time. Now in deciding what is waiver, we may refer to *Ram Chunder v. Rawatmull* (9) and find that waiver is not a mere delay but a consent to dispense with or forego something to which a person is entitled. Such consent in the present case may be implied from the receipt of an overdue instalment or from any other act even without any such receipt which shows that Plaintiffs rendered themselves incompetent to claim the advantage at a time when it was their option to claim it Thus we have it sufficiently proved that the instalment which fell due in 1310 was paid up in full in 1311 and 1313 and that it was in 1313 and 1317 that the instalment for 1311 was fully paid up. The acceptance of interest on the defaulted instalments only clearly shows that no other instalment was treated as

defaulted. Thus we have it established that the instalments which fell due before Pous 1312 were fully paid up within the period of 12 years from the due date of first instalment. It follows that the subsequent instalments now in claim fell due in and after Pous 1312 and that the suit is quite within time. Issue answered in favour of Plaintiffs "

Babus Trailakhya Nath Ghose and Monmatha Nath Roy (Jr) for the Appellants.

Babus Narendra Ch Bose and Nalin Ch Pal for the Respondents

The JUDGMENT OF THE COURT was as follows --

This appeal arises out of a suit upon an instalment mortgage bond, dated the 23rd Bysak 1308

The bond provided for payment of the debt in twelve instalments, the first falling due in Pous 1308 and the others in the month of Pous of each of the next 11 years ending with 1319. It was further provided that on default in payment of any one instalment the creditor would be entitled to recover the entire amount due under the bond with interest thereon at 2 per cent per mensem, without waiting for the future instalments falling due. The Plaintiff alleged that the first instalment was duly paid and the instalments for 1309 to 1311 together with interest thereon were paid and accepted although the payments were made out of time and the suit was brought for the subsequent instalments.

The main defence was that the suit was barred by limitation. The Court of first instance disbelieved the case set up by the defence but also disbelieved the case of the Plaintiff as regards payments made by the Defendants, and holding that there was no waiver, came to the conclusion

(7) I. L. R. 24 Cal. 261 (1896).

(9) 19 C. W. N. 1172 (1915).

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that the suit was barred by limitation. On appeal the learned Subordinate Judge held that the Plaintiff's case was proved and that there was waiver and accordingly gave the Plaintiff a decree. The Defendants have appealed to this Court.

The question for consideration is whether the suit is barred by limitation. The article applicable to the suit is Art. 132 which provides that for a suit to enforce payment of money charged upon immovable property the period of limitation is 12 years from the time when the money sued for becomes due.

The question therefore is when did the money become due in the present case? A number of decisions has been cited before us mostly in connection with cases coming under Art. 75 of the limitation Act, or relating to instalment decrees.

It is a general rule that where money is payable by instalments with a provision that the whole of the money will become due on default of payment of one of the instalments, the money becomes due when default is made in any of the instalments. [See *Hurronath Roy v. Maheroola Moolah* (1) and *Hemp v. Garland* (2).] But as pointed out by Wilson and O'Kinealy, JJ. in *Mon Mohan Roy v. Durga Charan Gooce* (3) an exception has been engrafted upon the general rule in certain cases, viz., that if the right to enforce payment of the whole sum due upon default being made in payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then the penalty having been waived, the parties are remitted to the same position as they would have been in, if no default had occurred. In the case of *Moheesh Chandra*

Banerjee v. Prosanna Lal Singh (4) Ram-pini and Pargiter, JJ. appear to have taken a different view relying upon certain decisions of the Bombay High Court. But in that case no instalment was paid in full, and the learned Judges referring to the decisions of this Court pointed out that part payment and acceptance of part of an overdue instalment has never been held even by this Court to amount to a waiver.

A distinction, however, has been taken between a waiver by payment and receipt of an overdue instalment and a mere omission to sue or take steps on the default, and although there may be a waiver by the payment and receipt of the overdue instalment, there could be none by the mere fact of doing nothing. It was held accordingly in *Girendra Mohan Roy v. Khir Narayan Das* (5) (where the cases on the point are collected) that mere abstinence on the part of the Plaintiff from bringing a suit for recovery of the whole amount due on the failure of payment of the instalments (as agreed upon in that case) did not amount to waiver. In the present case there was payment and acceptance of the overdue instalments.

As already stated most of the decisions on the point relate to cases coming under Art. 75 of the Limitation Act which provides for waiver of default in payment of instalments, or to cases relating to instalment decrees to which the principle has been applied.

Art. 132 of the Limitation Act does not provide for cases of waiver, and there is no case directly deciding that the principle of waiver would apply to mortgage bonds payable by instalments. In the

(1) 7 W. R. 21 (F. B.) (1867).

(2) 4 Q. B. 519 (1843).

(3) I. L. R. 15 Cal. 502 (506) (1888).

(4) I. L. R. 31 Cal. 83 (87); s. c. 8 O. W. N. 66 (1903).

(5) I. L. R. 36 Cal. 824; s. c. 13 O. W. N. 1004 (1909).

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case of *Jugat Mohini Dassce v. Monohar Koonwar* (6), however, Mitter, J., observed that the principle indicated in Art. 75 might be adopted in determining "when the money sued for becomes due" within the meaning of Art. 132, but the learned Judge himself added that it was not necessary to express any decided opinion upon that point. And in *Sitab Chandra Nahar v. Hyder Molla* (7), Banerjee and Rampini, JJ., applied the principle of the cases decided upon analogous questions relating to execution of decrees for money payable by instalments (rather the balance of authority in this Court upon the question before them) to a case coming under Art. 132. We think that in the absence of any provision in Art. 132, with respect to cases of waiver, and of any direct authority on the point, we may apply the principle indicated in Art. 75 in determining "when the money sued for becomes due" within the meaning of Art. 132.

Applying that principle, and having regard to the weight of authority in connection with cases under Art. 75 and instalment decrees, we think that the payment and acceptance of overdue instalments in the present case constitute a waiver, and that the Plaintiff is entitled to recover the subsequent instalments.

It is contended, however, on behalf of the Appellants that there was no waiver, because the acceptance of interest on the overdue instalments shows that penalty by way of interest was realized and there was therefore no waiver. But the penalty, referred to in the decisions, does not refer to penalty by way of interest, but the penalty by way of suing for all the instalments. Reliance was placed upon the case of *Mohesh Chandra Banerjee v. Pro-*

sanna Lal Singh (4) to show that payment and receipt of interest cannot amount to waiver. The learned Judges in that case referred to *Naniappa v. Naniappa* (8). In the latter case the bond provided for interest at 9 per cent., and on default at 15 per cent. The creditor accepted interest at a rate a little higher than 9 per cent. on default and it was held that he had not waived any right under the bond by accepting payment on account of interest. That decision therefore does not throw much light upon the question before us. Besides payment and acceptance of interest alone cannot constitute waiver of default of an overdue instalment. In *Mohesh Chandra Banerjee's* case (4) there was payment of interest and part payment of overdue instalments. In the present case the entire overdue instalment together with interest thereon was paid and accepted by the creditor though out of time, and no authority has been shown to us that in such a case it would not constitute waiver.

On the whole, we are of opinion that the decree of the Court below is right and the appeal is accordingly dismissed with costs.

J N R

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 881 of 1920.

RICHARDSON, J
SUHRAWARDY, J.
1922,

Heard, 23 and
25, May.
Judgment, 10, July.

SARAT CHANDRA DAS
alias SACHCHIDANANDA
DAS, Defendant,
Appellant,
v.
SM. SARAJINI
RUDRAJA, Plaintiff,
Respondent.

Registration Act (XVI of 1908), sec. 17, sub-sec. (2) (vi), petition of compromise on which a decree

(4) I. L. R. 31 Cal. 83 (88); a. c. 8 C. W. N. 66 (1908).

(8) I. L. R. 12 Mad. 161 (1899).

(6) 25 W. R. 278 (1878).

(7) I. L. R. 24 Cal. 281 (1896).

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is based, if requires registration, when the petition operates as a lease within the meaning of sub-sec (1) (d)—Sec 49, the unregistered petition if admissible in evidence at least as an admission.

In a certain suit a petition of compromise was filed by which the Defendant admitted the Plaintiff's patni right and the suit was decreed incorporating the petition in the decree. In a subsequent suit by the said Plaintiff's successor-in-interest for arrears of rent against the said Defendant's heir, the latter denied relationship of landlord and tenant. The Plaintiff relied on the above-mentioned petition of compromise in which the Defendant of that suit admitted the relationship:

Held—That the compromise agreement operated as a demise and under the terms of sec. 17 such an agreement, not being within the exception contained in sub-sec. (2), cl. (vi), should have been registered. Not having been registered it was *prima facie* inadmissible in evidence as a lease.

PRANAL ANNEE v LAKSHMI ANNEE (2) distinguished.

HEMANTA KUMARI DEVI v MIDNAPUR ZEMINDARI COMPANY (3) followed.

MAHOMED MUSA v. AGHORE KUMAR GANGULI (1) and other cases referred to.

Held further—That the agreement was admissible in evidence so far as it contained an express admission by the Defendant in the previous suit of the title of the Plaintiffs in that suit as landlords, patnidars. In respect of such admission, the agreement, if it came at all within sec 17 of the Registration Act, would fall

within cl (b) or (c), so that the exception in sub-sec (2) (vi) would apply to it. The Defendant was therefore bound to pay rent to the Plaintiff at the compromise rate.

AMJER ALI v YAKUB ALI KHAN (6) followed.

This was an appeal preferred on the 6th of April 1920, against the decree of Babu Jnanendra M. Das, Additional Sub-ordinate Judge of Zillah Sylhet, dated the 15th of January 1920 affirming the decree of Babu Jagat Nath Basu Roy, Munsif, 3rd Court at Habiganj, dated the 28th of June 1919.

The facts are briefly as follows—Plaintiff's predecessor-in-interest granted a patni of certain lands to one Sachu Ram who went into possession. In a suit by the grantor's heirs against Sachu Ram a petition of compromise was filed in which the latter admitted the former as his landlords, and agreed to hold the lands as then tenant at an annual rent of Rs 12-8 as. The suit was decreed in terms of the compromise. Plaintiff brought the present suit for arrears of rent at the compromise rate. The claim was resisted by Sachu Ram's son mainly on the ground that the relationship of landlord and tenant between the parties had not been established, and that the agreement relied on by the Plaintiff being unregistered was inadmissible in evidence. The lower Courts rejected the defence and decreed the suit at the compromise rate. The Defendant thereupon preferred the present second appeal to the High Court.

Dr. Sarat Chandra Basak and Babu Gopal Chandra Das for the Appellant.

Babus Mahendra Nath Roy and Bhupendra Chandra Guha for the Respondent.

(1) L. R. 42 I. A. 1; s. c. I. L. R. 42 Cal. 801; 19 C. W. N. 250 (1914).

(2) L. R. 26 I. A. 101; s. c. 3 C. W. N. 485 (1899).

(3) L. R. 46 I. A. 240; s. c. I. L. R. 47 Cal. 485; 24 C. W. N. 177 (1919).

(6) I. L. R. 41, Cal. 347. s. c. 19 C. L. J. 429 (1913).

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THE JUDGMENT OF THE COURT was as follows :—

SUHRAWARDY, J.—The facts of this case may be shortly stated.

The owner of Taluk Kalun Raja granted a *patni* of certain lands in the taluk to Sachu Ram who went into possession. In 1905 Ichamoyi, the mother, and Mandakini, the daughter, of the talukdar brought a suit against Sachu Ram, alleging in effect that the grant nominally made to him was for their benefit and praying for an account of the profits of the *patni*. The suit ended in a compromise, dated 16th December 1905, under which Sachu Ram admitted that the *patni* right was in the Plaintiffs and agreed to hold possession of the lands as their tenant at an annual rent of Rs. 42-8. Provision was also made for the payment of arrears of rent at that rate. A copy of the petition of compromise is on the present record, but no copy of the decree in the suit of 1905 has been filed, the record of that suit having, it is said, been destroyed by fire. The Courts below have referred, however, to an entry in the general Register of suits showing that the suit was decreed in accordance with the petition of compromise and are of opinion that the petition was incorporated in the decree. Regard being had to the usual practice in such cases, I see no reason to dissent from that opinion.

The Plaintiff in the present suit has purchased Mandakini's share in the *patni* and claims arrears of rent at the compromise rate for the years 1322-1324 and part of 1325 (roughly 1915-1918). The representatives of Ichamoyi are impleaded as Defendants. The claim was resisted by the principal Defendant (Sachu Ram's son and successor) on several grounds, the main defence being that the relationship of landlord and tenant

between the parties had not been established. The Courts below have rejected the defence set up and given the Plaintiff a decree for his share of the rent at the rate claimed. The Appellant before us is the principal Defendant, or the Defendant, as I shall now call him.

The only other fact requiring mention is that the lower Courts have found that rent was paid by the Defendant or his father at the compromise rate up to the year 1318 (1911).

The argument turned on the legal effect of the unregistered petition of compromise and the decree based thereon. For the Plaintiff it is not disputed that the petition embodies an agreement operating as a demise and is therefore a lease within the meaning of the Registration Law. Being a lease reserving a yearly rent, it should have been registered under sec. 17, cl. (d) of the Registration Act of 1877. Under sec. 19 "no document required by sec. 17 to be registered shall," if not registered, affect any immovable property comprised therein "or be received as evidence of any transaction affecting such property."

The Defendant has throughout maintained that the agreement on which the Plaintiff founds being inadmissible there is no evidence on which the Courts below could hold that he was a tenant under the Plaintiff holding on the terms of that agreement.

For the Plaintiff it was argued, firstly, that an agreement incorporated in a decree does not require registration, and secondly that the Courts below were right in holding on the authority of their Lordships' decision in *Mahomed Musa v. Aghore Kumar Ganguli* (1) that the Plaintiff was entitled in equity to the rent

(1) L. R. 42 I. A. 1: s. c. I. L. R. 42 Cal. 801, 19 C. W. N. 250 (1914).

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which he claims on the footing that the agreement, if not formally implemented, had been carried out and acted upon

In reference to the first contention, *Pranal Annee v Lakshmi Annee* (2) was cited for the Plaintiff and *Hemanta Kumari Devi v. Midnapur Zemindari Company* (3) for the Defendant

In my opinion, the question is now concluded by the reasoning of their Lordships in *Hemanta Kumari's* case (3). In *Pranal Annee's* case (2), then Lordships were not dealing with the case of a decree incorporating an agreement by way of lease which under cl. (d) of sec. 17 and sec. 49 of the Act of 1877 and the present Act would not be admissible in evidence unless registered. Under the terms of sec. 17 as it stands in both those Acts such an agreement is not within the exception now contained in sub-sec. (2) cl. (vi) which says that nothing in cls. (b) and (c) of sec. 17 [omitting therefore cls. (a) and (d)] applies to any decree or order of a Court

The compromise agreement in the present case operated as a demise and should have been registered. Not having been registered it is *prima facie* inadmissible in evidence as a lease

The decision of the Courts below in the Plaintiff's favour purports, as I have said, to be based on the equitable doctrine to which their Lordships adverted in *Mahomed Musa v. Aghore Kumar Ganquli* (1) and *Malraju Lakshmi Venkayyama v. Venkata Narasimha Appa Rao* (4). In this appeal reliance was placed on the De-

fendant's behalf on the recent decision of Rankin, J., in *Sanjib Chandra Sanyal v. Santosh Kumar Lahiri* (5).

If the present case, however, admits of a decision in the Plaintiff's favour even on the assumption that the agreement in the suit of 1905 is not admissible either as a lease or as evidence of an oral agreement to the same effect, it is unnecessary to discuss the debated questions or to express any opinion in regard to them.

Here if the agreement in question is inadmissible as a lease, it is still, in my opinion, admissible in evidence so far as it contains an express admission by the Defendant in the suit of 1905 of the title of the Plaintiffs in that suit as *patnidars*. In respect of such admission, the agreement, if it comes at all within sec. 17 of the Registration Act, would fall within cl. (b) or cl. (c) and the exception in sub-sec. (2) (vi) would apply to it. The Courts below have found that rent at the rate now claimed was paid for a number of years to the Plaintiffs in the suit by the present Defendant or his father. It is true that there was no change of possession. The Defendant was in possession before the suit and he continued in possession after the suit, but he attorned to the Plaintiffs, one of whom is the predecessor of the present Plaintiff.

These being the facts, the case of *Ameer Ali v. Yakub Ali Khan* (6) which was not referred to in the argument but to which my attention has since been called, would seem to be authority for saying that the relationship of landlord and tenant between the parties is established and that the rent due is that which the Defendant has been paying.

I may add that I do not know whether

(1) L. R. 42 I. A. 1; s. c. I. L. R. 42 Cal. 801; 19 C. W. N. 250 (1914).

(2) L. R. 26 I. A. 101; s. c. 3 C. W. N. 485 (1899).

(3) L. R. 46 I. A. 240; s. c. I. L. R. 47 Cal. 485; 24 C. W. N. 177 (1919).

(4) L. R. 43 I. A. 138; s. c. I. L. R. 39 Mad. 509; 20 C. W. N. 1054 (1916).

(5) 26 C. W. N. 329 (1921).

(6) I. L. R. 51 Cal. 347; s. c. 19 C. L. J. 429 (1918).

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the Defendant appreciates his position. In view of the admission made in the agreement in the suit of 1905, if he is not a tenant, he would appear to be a mere trespasser liable as such to be ejected.

Without endorsing all the reasons given in the judgments of the Courts below, I am not satisfied that the conclusion which those Courts have reached is erroneous and in my opinion therefore the appeal should be dismissed with costs.

The cross-objection of the Plaintiff is not pressed and is therefore dismissed without costs.

RICHARDSON, J.—I agree

J. N. R. Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD BUCKMASTER.

LORD PLYMOUTH.

JOHN EDGE.

LORD SALVESBURY.

1922,

Heard, 31, October,

and 3, November

Judgment,

4, December.

SAHDEO NARAIN

Deo and ors,

Appellants,

v.

KUSUM KUMARI,

Respondent.

Hindu law—Conversion to Hinduism, ancient, how far abrogates non-Hindu tribal customs—Survival of such custom, onus of proof as to—Custom of non-adoption—Primogeniture, custom of, prevalence of, if indicative of non-adoption of Hindu social usages and law.

In regard to ancient conversions to Hinduism of non-Hindu Indian tribes, the Judicial Committee have admitted the possibility that they might carry with them abrogation of former customs, though some such custom may continue as survivals along with the general Hindu law by which they may come to be governed.

On the evidence, the Judicial Committee agreed with the conclusions of the

High Court in this case, that the clan in question, even supposing its origin to be not Hindu, had adopted in general not only Hindu religion and Hindu social usages, but also the Hindu law regulating the succession of landed property, and this though there were still some relics of non-Hinduism.

The Judicial Committee also affirmed the finding of the High Court that a custom of non-adoption did not survive the general adoption of Hindu religion, social usages and law which took place about a hundred years ago.

The custom of primogeniture is usually found to exist where the estate belongs to a King or independent Chief or even a semi-independent Chief of sufficient importance. The custom in such a case affords no indicia whereby to determine that a family does not follow Hindu law as a whole, merely because in Hindu law an estate only becomes impartible by custom and that custom has in each case to be proved.

This was an appeal from a decree of the High Court at Patna, dated the 26th March 1918, affirming a decree of the Additional Subordinate Judge of Bhagalpur, dated the 29th February 1916.

The suit was instituted by the Appellants as reversionary heirs of Thakur Lalit Naram Deo for a declaration of title to and recovery of possession of the Lachmipur Raj from the widow and adopted son of Lalit Naram.

The present Respondent was the widow of the adopted son.

Lalit Naram died in 1871 having by Will bequeathed his estate to his widow Makhum Kumari and authorised her to adopt a son.

In pursuance of this authority she adopted Protap Naram and relinquished

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her estate in his favour in 1898. The Court of Wards took charge of the estate on behalf of Protap until he came of age in 1901 when he was publicly installed as proprietor of the Raj.

In their plaint the Appellants impeached the validity of the Will and of the adoption and further contended that there was a family or clan custom which invalidated the adoption.

The Subordinate Judge of Bhagalpur who tried the suit found 'that even assuming that the Lachmipur gaddais were originally non-Hindus, yet the pleadings and the evidence showed that long before the institution of the suit they had become out and out Hindus, and that there was among them "no family or clannish custom which forbids and bars inheritance by adoption," and he dismissed the suit with costs.

The High Court (Chapman and Atkinson, JJ) after hearing further evidence as to the origin of the estate found that the origin of the community was lost in obscurity there was reason to believe that it was non-Hindu in origin. In the result, however, they affirmed the decree of the trial Court.

Messrs L. DeGruyther, K C, A. M. Dunne, K C and B. Dubé for the Appellants—The Lachmipur Raj are not Hindus. For hundreds of years during which the Raj has been in existence there never has been an adoption and they have retained the custom of impartible lineal succession. They have only recently become Hindus and still retain many non-Hindu customs.

Inasmuch as they were not Hindus, as each question arises you must enquire what is the family custom applicable.

The enquiry here is whether there is a power to adopt so as to have legal conse-

quences, and does an adopted son succeed to the gadi.

[LORD PHILLIMORE refers to:—*Palaniappa Chettiar v Alayan Chetti* (3).]

My contention is that in the case of a family originally non-Hindu the onus is on the person who innovates. Originally there was no adoption among these people and the onus is on the Respondent to show when and how far it was accepted.

[LORD BUCKMASTER—If the High Court's view be right that there was such an assimilation of Hindu custom that *prima facie* the assimilation of adoption may be presumed, the onus is on you. Furthermore the onus of proof of custom was admitted by you in the lower Court.]

The Lachmipur family are non-Hindu and even assuming that adoption is possible, a collateral heir cannot be ousted by an adopted son. The Hindu custom of succession by adoption has been asserted by the Respondent and the onus of proving it is on her.

Fanindra Deb Raihat v Rajeswar Dass (1).

Sir George Lowndes, K C, Messrs Kenworthy Brown and G. Douglas McNair for the Respondent—The Lachmipur family are on a different footing to the Baikuntpur family in *Fanindra Deb Raihat v Rajeswar Dass* (1).

In that case the Privy Council say that if the family is "generally governed by Hindu law" the onus of proving a family custom would be on the claimant.

There is abundant evidence that this family is so "generally governed."

It is expressly admitted in the pleadings.

It has been recognised by the judgments

(1) L. R. 12 I. A. 72 s. c. I. L. R. 11 Cal. 463 (1894).

(3) L. R. 48 I. A. 539 at p. 543 s. c. I. L. R. 44 Mad. 740; 26 C. W. N. 417 (1921).

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of the Courts since 1793. The adoption was performed with Hindu rites and was attended by orthodox Hindus and the evidence generally shows the observance of Hindu customs. Further in the census reports even Bhumias have been classed as Hindus.

The onus of proof being on the appellants it was incumbent on them to prove the alleged custom by clear and unambiguous evidence and thus they have failed to do.

Abdul Hussain Khan v. Sona Dero (1) and *Mr Ibrahim Rowther v. Shaikh I Rowther* (2)

[They were stopped.]

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The question to be decided in this case is whether the succession to an impartible estate, called the Lachmipur Raj, devolved upon the adopted son of the last owner, or upon his nearest collateral blood relation. The action was brought by two half-brothers, claiming in the alternative that one or other was entitled to succeed according to the rule of primogeniture established for this property (with a third Plaintiff, the assignee for value of part of their claims), to recover possession from the Defendant who alleged that he was the adopted son of the last holder. Various points were raised as to the fact and regularity of the adoption, but these were disposed of in the course of the case in favour of the Defendant. The Plaintiffs' main case, however, was that there was a "family or clan custom which forbids and bars inheritance

by adoption," or, as Counsel for the Plaintiffs has invited their Lordships to look at the matter, that the succession to this estate is not regulated in any sense by Hindu law, but wholly by custom, which custom has no place in it for adoption, or, alternately, for the succession of an adopted son.

The Lachmipur Raj is situated in N. W. Bengal in the District of Bhagalpur, part of it extending into the Santhal Parganas. A point was raised in the case that by reason of Reg. 3 of 1872, relating to these Parganas, the Court of the Subordinate Judge at Bhagalpur had no jurisdiction to try it, even though the Plaintiffs abandoned that part of their claim which related to the portion in the Santhal Parganas.

This view was taken in the High Court, and, if it be correct, is at once fatal to the case of the Plaintiffs. It seemed, however, to their Lordships not so plain, on first impression, that this decision was correct, and Counsel for the Respondent desiring to have the matter tried upon the merits, their Lordships have heard the argument upon the merits without further discussion of the preliminary question of jurisdiction, and as upon the merits they have come to a conclusion, in accordance with that of both Courts below, that the Plaintiffs have failed to make out their case, they do not deem it necessary to enquire further into the question of jurisdiction.

The Lachmipur estate appears to be one of several which are comprised under the term, the 84 gadis called Chowrasis—apparently a form of the vernacular word for 84. The holders of these gadis all claim to be Surjabansi Rajputs, and, as such, high-caste Hindus. They differ, however, in some customs, social and

(2) L. R. 40 I. A. 123; a. c. I. L. R. 45 Mad. 308; 26 C. W. N. 793 (1922).

(4) L. R. 45 I. A. 10; a. c. I. L. R. 45 Cal. 450; 22 C. W. N. 853 (1917).

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otherwise, from ordinary high-caste Hindus, and it is now said of them by the Plaintiffs that they are really descendants of an aboriginal tribe called Bhuiyas, who have assimilated the manners of Hindus for many generations, and, having had fictitious pedigrees made out for them by Brahmins, now claim to be Rajputs. Certainly the bulk of the inhabitants in the District are Bhuiyas, and, though it is possible that these particular gadi-holders may be lineal descendants of Rajput invaders and conquerors, the High Court has proceeded on the footing that they are by descent Bhuiyas. Their Lordships, without pronouncing upon the anthropological question, will assume, as the assumption is favourable to the Plaintiffs, that this clan or collection of families, and in particular the family in which this estate has been held, are aboriginal Bhuiyas. The question then will be whether in matters of succession they have retained their aboriginal customs, or have adopted Hindu law, in whole or in part, and specifically whether by law or custom the succession of an adopted son is admitted.

Upon this point the Plaintiffs have the decision of both Courts in India against them, and if the point to be decided is to be regarded as a question of pure fact, this would in an ordinary case be enough to dispose of the appeal. But it is said that the Subordinate Judge disqualified himself from coming to a correct conclusion, because he omitted all consideration of the origin of the family, and that both he and the High Court erred in law in putting the burden upon the Plaintiffs, whereas it ought to have been put and put strongly upon the Defendant. This latter argument depends upon a consideration of the decision of this Board in the case of *Famindra Deb Raikat v.*

Rajeswar Dass (1), and as it is upon this case that the appeal is founded, it is desirable to deal with it *in limine*. It turned upon the question whether the custom of adoption and succession by adoption was admitted in a family of the Koch tribe, who had begun to designate themselves as Rajbansis, and for social purposes affected to be Hindus. This Board came to the conclusion that, though they affected to be Hindus, they were not generally governed by Hindu law, but had retained and were governed by family custom, which, as regards some matters, was at variance with the Hindu law, and this Board held that the High Court had been wrong in holding that the question was "whether the general Hindu law was modified by a family custom forbidding adoption," and that the real question was "whether with respect to inheritance the family is governed by Hindu law or by customs which did not allow an adopted son to inherit." Having thus stated the question, their Lordships came to a conclusion upon the evidence agreeing in this respect with the Judge of first instance, and disagreeing with the High Court, that without regarding the burden of proof the facts showed that no succession by way of adoption was admissible. They summed up their judgment by saying —

"Whether, if the Baikunthpur family were shown to have become Hindus out and out saving only special customs, such evidence would be sufficient to prove a special custom need not be discussed here. The family is in a totally different position. And their Lordships have no hesitation in holding that whatever Hindu customs may have been introduced into it, the custom of succession by adoption has not been introduced."

(1) L. R. 12 I. A. 72. s. c. I. L. R. 11 Cal. 403 (1884).

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The effect of this decision is stated in *Mahamed Ibrahim Rowther v Shaikh Ibrahim Rowther* (2), where their Lordships express themselves as follows —

"The question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus they would have been governed by Hindu law, and there would have been this power. But though they affected to be Hindu, that in fact was not their status, the utmost that could be said was that, though the family had introduced many Hindu customs, they in fact were governed by family customs. Of such a family it was manifestly appropriate to remark that 'the question is not whether the general law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit'."

Upon the principle thus laid down, the proper enquiry is whether this family can be said to have become so far Hindu as to throw the burden of proof upon the Plaintiffs, or whether the opposite conclusion should be come to, which would throw the burden upon the Defendant.

A great mass of evidence was given in the case, mostly on the specific question of the custom of adoption, but, incidentally, with regard to the other customs of the family or clan of Chowrasī gadis. But before coming to this evidence their Lordships would wish to begin at the beginning, and see the account which the Plaintiffs, other than the assignee, give of themselves. Then plaintiff, filed on the 18th September 1907, said that either of the claimants was "a Hindu governed by the Benares school of Hindu law"; that the Lachampur estate was an impartible Raj, the succession to which was governed by a family custom or *kulachar*; that it was one of 84 gadis "owned and pos-

(2) L. R. 40 I. A. 123; s. c. I. L. R. 45 Mad 308; 26 C. W. N. 793 (1922).

sessed by Surjabansi Rajputs of the same clan" as the deceased, which went by the collective name of Chowrasī, and that among the holders of these gadis there was a "family or clannish custom which forbids and bars inheritance by adoption and the succession to these gadis by blood relations cannot be defeated by adoption." This allegation made in para 5 is repeated in para 11. It should be added that in para 3, when dealing with the rights of a widow who came into the line of succession, she is said to have come into possession "with the limited rights of a Hindu widow succeeding to the property of her deceased husband under the Benares school of Hindu law."

In accordance with this contention, the issue framed in respect of this matter was stated as follows — "Is the Lachampur estate one of the alleged 84 gadis called Chowrasī, as stated in para 5 of the plaint, and governed by a family or clannish custom by which adoption is forbidden and which bars inheritance by an adopted son? Is such a custom valid?" And upon that a large part of the evidence had been given when, on the 26th July 1915, an application was made by a petition presented on behalf of the Plaintiffs of which the following passages are important —

"1 That the Plaintiffs have within the last week come to know from a very authoritative source that the ancestors of the late Thakur Lahit Naram Deo were originally non-Hindus, and in course of time adopted only certain rules of Hindu law and called themselves Hindus."

"2 That this fact was never known to the Plaintiffs heretofore until one of them was shown an extract from the report of the Settlement Operations, Sonthal Parganas, by H. McPherson, Esq., a true copy of which is annexed herewith."

"3 That on account of the fact mentioned in para 1 of this petition it is essentially

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necessary that the plaint should be amended at certain places which are more fully stated below

"4 That the Plaintiffs, therefore, pray that the following amendments may be made in the plaint, namely, that (1) in para 1 the words 'who was a Hindu governed by the Benares School of Hindu Law' after describing Thakur Lalit Narain Deo of Lachampur be omitted and struck off

"(a) In paragraph 3 the words 'under the Benares school of Hindu law' at the end of the paragraph, be struck off

"(b) That after paragraph 1 the following paragraph may be inserted 'and added as paragraph 1 (a) —

" 'That the ancestors of the said Thakur Lalit Narain Deo belonged to a tribe called the Bhuiyas and were originally non-Hindus who in course of time adopted certain customs and practices in vogue amongst Hindus after they settled down in that part of the country where the estate Lachampur is situate "

Then followed certain consequential alterations which were also said to be important. This petition was supported by an affidavit, but it is remarkable that the affidavit was only made by the assignee, and it may well be doubted whether any inducement would have led the original claimants to commit themselves by oath to the statements in para 1 of the petition. The application made in this petition was refused by the Subordinate Judge, and his action was approved by the High Court, and, in their Lordships' view, rightly, and thus puts the Plaintiffs into a great difficulty. But the Judges in the High Court thought that nevertheless it was possible for the Plaintiffs to go into the question of the origin of their community, and, as already stated, they held that indications pointed to the holders of these gads being as a group originally indigenous, and having, at some time not known, accepted Hinduism. The High Court Judges place this accept-

ance somewhere near the beginning of the nineteenth century. At any rate, there are many decisions which unquestionably proceed upon the footing that Hindu law, according to the school of Benares—that is, the Mitakshara—was of general application to these Chowrasigads. Their Lordships listened to an analysis of such of these cases as Counsel for the Appellants thought could be scrutinised usefully, and they see no reason to qualify the conclusions of the High Court .

To sum up this part of the case, the combination of the Plaintiffs' own statement, the oral evidence and the judgments in former cases is, in their Lordships' opinion, sufficient to justify the conclusion of the High Court that this clan, even supposing its origin to be not Hindu, had adopted in general, not only Hindu religion and Hindu social usages, but also the Hindu law regulating the succession of landed property, and this though, as the Judges held, "there were still some relics of non-Hinduism "

It was suggested for the Appellants that this conclusion was not enough, that if it could be proved that there was a customary law of succession before these people became converted to Hinduism, that custom could not be abrogated by conversion.

Now this case does not deal with modern conversion, but with a conversion which is at least 100 years old, and the Indian Courts and this Board have with regard to these ancient conversions admitted the possibility that they might carry with them abrogation of former customs. Thus, in the case of *Fanindra Deb Raikat v Rajeswar Dass* (1), already cited, it was an accepted matter that the

(1) L. R. 12 I. A. 72: s. c. I. L. R. 11 Cal. 463 (1884).

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family was of non-Hindu origin, but their Lordships nevertheless embarked upon the enquiry whether they had become Hindus "out and out", and in the recent judgment of this Board in *Palaniappa Chettiar v. Alayan Chetti* (3), it was accepted as an explanation of the custom of Putrabhaga, according to which the sons of each wife formed a class, and the classes divided the inheritance, instead of the individual sons, that it was probably due to the Dravidian origin of the people in question, who had retained some of their non-Hindu customs, though they had become Hindus and were governed by general Hindu law. In that case authority was cited for considering a mass of tribes in Southern India as having become Hinduised and subject to the law of the Smritis in most respects, though still adhering to particular customs.

The High Court, therefore, was right in treating it as a thing possible in law that this clan on the assumption that it was originally non-Hindu, had become sufficiently Hindu to make succession by adoption, even if non-existent in non-Hindu times, come in with the rest of Hindu law, though the custom of non-adoption might be a survival, as in *Palaniappa Chettiar v. Alayan Chetti* (3).

The High Court, however, without applying any principle as to the burden of proof, leaving that question open, came to a decision unfavourable to the Appellants, and, after giving due weight to the criticism of the judgment of the Subordinate Judge, which Counsel for the Appellants has administered, their Lordships see no reason why the two judgments should not be treated as concurrent findings of fact, or why they should not stand. But as the case is important, they will

go with some detail into the reasons which lead them independently to the same conclusion.

It is said for the Appellants that there were a great number of cases where, if adoption had been the custom, it would have taken place, and they support this argument by saying that weight was given to a similar argument in *Fanundra Deb v. Rajeswar* (1). There is force in this contention, though there are counter observations to be made. But in the case of *Fanundra Deb v. Rajeswar* (1), there was no single instance of adoption carrying succession, whereas in the case now before the Board there were certainly some instances, though not very many, proved. And more remarkable still, the Defendant was adopted with much publicity and solemnity as far back as 1885, and was installed on the gadi with considerable pomp in February 1902, and no protest or objection appears to have been raised. Moreover, later on he was with almost equal solemnity outcasted, in February 1907, because he consorted with another outcaste, and in the document recording his sentence he is described every time, his name is mentioned as "the adopted son Pratap Narain Deo". This document is signed by nearly all the great men of the clan. After this, it is not altogether surprising that the very eminent Counsel who appeared for the Appellants in the High Court felt himself, as it were, driven from his other arguments, and took up the position that adoption might indeed be permissible, but that succession to the estate did not follow from the adoption. It was open to him to take this point without abandoning his other contentions, but the position would be so unusual, and so contrary to Hindu ideas, that if the

(3) L. R. 48 I. A. 539: s. c. I. L. R. 44 Mad. 740; 26 C. W. N. 417 (1921).

(1) L. R. 12 I. A. 72: s. c. I. L. R. 11 Cal. 463 (1884).

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Appellants were driven to this their chance of success was small

It was urged that there was here a plain departure from Hindu law inasmuch as the estate, instead of descending to all the sons of a previous holder, was impartible. It is true that an estate only becomes impartible by custom, and that the custom has in each case to be proved. But it is a custom which is usually found to exist where the estate belongs to a King or independent Chief, or even a semi-independent Chief of sufficient importance.

The Prince, to use a neutral term, regards the whole estate which his predecessor had as necessary for the support of his dignity or gadi, and he takes it of his princely power and keeps it, giving appanages or maintenance to the junior members of the family. The custom of impartibility in such a case affords no indicium whereby to determine that a family does not follow Hindu law as a whole. Reg. 10 of 1800 points to the frequency of this custom among Hindus in parts of Bengal.

It was further argued that where estates are impartible they usually descend to the nearest of kin and not in lineal primogeniture, and that here again was a departure from Hindu usage. This was disputed, and their Lordships were not invited to make any profound search into the question. Again, however, the case originally made by the Plaintiffs appears to get in the way of and trip up their later arguments, for in the plaint (para 2) it is stated that the family custom is "governed by the ordinary rule of lineal primogeniture," the only departure suggested being that a junior son by a senior wife is preferred, and this latter assertion was held not to be proved.

Upon the whole, their Lordships, after giving full attention to the very interest-

ing argument of Counsel for the Appellants, have come to the conclusion that there is no reason to interfere with the decision arrived at in the Courts below, and they will humbly recommend His Majesty that this appeal should be dismissed with costs.

Solicitors Messrs Pugh & Co. for the Appellants

Solicitors: Messrs Morgan, Price, Gordon and Morley for the Respondent.
G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL ORDERS

No. 151 of 1923

AND

Nos. 25 AND 26 of 1923.

SANDERSON, C. J.]

RICHARDSON, J.

1923,

Heard, 14 and

15, March.

Judgment,

15, March.

GOVIND DAS PITY

v.

JARDINE SKINNER &
Co.

Presidency Towns Insolvency Act (III of 1909),
sec. 38 (2)—Application by a creditor against
guarantor under a composition scheme, if lies under
sec. 30 (2)—Court's jurisdiction to vacate an order.

On the 31st August 1910 B. R and B were adjudicated insolvents. On the 10th December 1910 a deed of composition was entered into between the insolvents and several creditors whereby G guaranteed payment as guarantor for the amounts which the insolvents were to pay and he assumed the position of a trustee for the purpose of collecting the assets and the effects of the insolvents. On the 14th September 1911 the composition was approved by the Court and adjudication was annulled.

On the 29th July 1922 J. S. & Co. made an application under sec. 30 (2) of the Presidency Towns Insolvency Act,

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for (i) an order that the debtors and the trustee G do pay the sum due to them under the composition deed, and that in default they be committed for contempt and (ii) an order that the debtors be re-adjudged insolvents. On the 31st August 1922 the Court directed G to pay as guarantor and so far as the debtors were concerned the said application was allowed to stand over.

G failed to pay and on the 21st November 1922 the debtors B. R and B were re-adjudged insolvents and it was further ordered that that order be not drawn up or completed for a period of a fortnight in order to enable G or the insolvents to pay. The fortnight expired, and G and the debtors did not pay. The order was settled but it was not drawn up. On the 6th February 1923, on the application of J. S. & Co. the order dated the 21st November 1922 was vacated and on the 7th February 1923 the Court directed a writ of attachment to be issued against G inasmuch as he had failed to comply with the order of payment made on the 31st August 1922.

G appealed from the orders :

Held—That on the 21st November 1922 when the debtors were re-adjudged insolvents there was an end of the composition and the Appellant G's liability under the covenant came to an end.

Held also—That G was a guarantor in the real sense of the word.

Quære :—Whether the learned Judge had jurisdiction under sec. 30 (2) of the Presidency Towns Insolvency Act to deal with the personal liability of the Appellant as a mere guarantor of the amounts which the debtors had covenanted to pay.

EX PARTE MIRABITA : IN RE DALE (1).

Held, further—That in view of the long

period which had elapsed before J. S. & Co. applied to enforce the covenant and the fact that the order of the 21st November 1922 which had the effect of discharging G from liability under the covenant was made at their instance, the order should not have been vacated, assuming that the Judge had jurisdiction to vacate it.

Semle :—If the application was to be regarded as an application by a creditor against the trustee under the composition deed as such trustee, then the learned Judge had jurisdiction under sec. 30 (2) of the Presidency Towns Insolvency Act to deal with the application.

The reasoning laid down in EX PARTE MIRABITA IN RE DALE (1) was applicable to the construction of sec. 30 (2) of the Presidency Towns Insolvency Act.

These appeals were preferred against the orders made by Mr Justice Greaves, in Insolvency Proceedings, dated respectively the 31st August 1922, 6th and 7th February 1923.

The facts of the case will appear from the judgment.

Mr I N Chaudhuri (with Mr. B. Basu) for the Appellant.

Mr. John Langford James (with Mr. K. P. Khaitan) for the Respondents J. S. & Co.

Mr. A. N. Chaudhuri contended that the effect of the order, dated the 21st November 1922 was to put an end to the composition deed and consequently the Appellant's liability under the covenant therein contained ceased. The learned Judge had no jurisdiction to re-hear the matter on the application of the person at whose instance and in whose favour the order was made and to vacate the said order.

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Or. 47 does not apply to such a case.

The effect of the order of the 21st November was to vest the property of the insolvents in the Official Assignee and the vesting took place immediately the order was made. The surety was thereby discharged and the Court could not by vacating the order make the surety liable once again.

Mr. K. P. Khaitan contended, on behalf of the Respondents J S & Co, that the Court had inherent jurisdiction to re-hear a matter before the order had been perfected and to vacate the order before the order was drawn up and completed.

Bartley v. Thomas (2), *Padmabati v Rasik Lal* (3), *Preston Banking Co. v. Wilham Allsup & Sons* (4) and *Amarendra Krishna v. Monimunjary* (5)

The Insolvency Court has jurisdiction to review under sec 8 of the Presidency Towns Insolvency Act

He further contended that sec 30 (2) of the Presidency Towns Insolvency Act was the proper section to deal with the Appellant in his capacity as trustee and guarantor.

Mr. B Basu, in reply, said that the Court had no jurisdiction to entertain an application under sec. 30 (2) against a guarantor and the order for committal for contempt under the said section was bad and without jurisdiction. Cites *Ex parte Mirabita : In re Dale* (1).

Secondly, that even if the Appellant could be dealt with under that section as trustee of the composition deed, the Court must first find that the trustee had funds of the insolvents in his hands. In the absence of such a finding the Court could

not make the order against a trustee under that section.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this matter there are three appeals, Nos. 151 of 1922, 25 of 1923 and 26 of 1923. Appeal No. 151 of 1922 is against an order made by my learned brother Mr. Justice Greaves on the 31st of August 1922, whereby he directed the Appellant Govind Das Pity to pay the sum of Rs 3,750 to Messrs Jardine Skinner & Co, on or before the 13th of November 1922

The next appeal, No. 25 of 1923, is against an order made by the learned Judge on the 6th of February 1923, whereby the learned Judge directed that a previous order, which he had made on the 21st of November 1922, should be vacated, and the third appeal, No 26 of 1923, is against an order which the learned Judge made on the 7th of February 1923, directing that a writ of attachment should issue against the person of the Appellant to the Sheriff of Calcutta authorizing him to attach the person of the Appellant and bring him up before the Court to be dealt with according to law for having failed to comply with the order, dated the 31st August 1922.

The facts of this case are, to say the least, unusual: It appears that certain persons, Bhimraj Ramprotap and Bangadhar, carrying on business in co-partnership in piece goods in Calcutta, were adjudicated insolvents on the 31st of October 1910. On the 10th December 1910, a deed of composition was entered into by the insolvents of the first part, the Appellant Seth Govind Das Pity, referred to therein as "Guarantor" of the second part, and the several creditors whose names were entered in the second column

[1] L. R. 20 Eq. 772 (1875).

(2) [1911] 2 Ch. 389.

(3) L. R. 37 Cal. 259 (1909).

(4) [1895] 1 Ch. 141 (1894).

(5) L. R. 48 Cal. 985 (1921).

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of the schedule to the deed, who had executed that deed, of the third part. It recited the insolvency, that the estate of the insolvents had vested in the Official Assignee, that the debtors had proposed to pay a composition to their creditors on their debts set forth in the schedule of six annas in the rupee payable at the time and in the manner mentioned in the deed and, then there was this recited : "Whereas the said guarantor has agreed to join in these presents for the purpose of guaranteeing to the creditors the due payment of the said composition, this indenture witnesseth as follows : 1st. That the debtors and the guarantor jointly and severally covenant with the creditors and each of them to pay to the said creditors and each of them a composition of six annas in the rupee upon the amounts of their respective debts fixed and settled at sums mentioned in the said schedule, such payment to be made within a month from the date of the order revoking, annulling or setting aside the aforesaid adjudication order or determining, dismissing or putting an end to the aforesaid insolvency proceedings now pending in the said High Court of Judicature at Fort William in Bengal in its Insolvency Jurisdiction." Then there was the ordinary covenant by the creditors that they should abstain from bringing actions in the events provided for. Cl. 3 provided : "If and when the said composition shall have been duly paid to the creditors respectively then the debtors and their heirs, executors, administrators, representatives and their estate and effects shall be released and discharged from the several debts and liabilities now owing from or incurred by the debtors to the creditors respectively and from all actions, claims or demands in respect or on account thereof." Cl. 5 provided : "The

guarantor will be considered as the trustee of the settlement and is hereby empowered and authorised by the debtors to take over the estate of the said insolvents from the Official Assignee of Calcutta or from any other person or persons who has or have or may hereafter have any of the properties, estate or effects of the debtors or any of them and also to demand, realise, recover, sue for and have all debts and outstandings which the debtors or any of them or which the said Official Assignee by virtue of the aforesaid vesting order is now entitled to and also to give all effectual receipts and discharges " Cl. 7 provided : "The debtors and each of them will see and take steps to have all their properties and estate and effects now vested in the Official Assignee vested in the guarantor and will execute all deeds and documents that may from time to time be required by the guarantor in that behalf " The last clause, cl. 9, provided : "If the debtors and the guarantor make default in payment of the composition or the costs in accordance with their covenants in that behalf hereinbefore respectively contained or if the adjudication or insolvency proceedings aforesaid be not set aside, annulled, quashed, dismissed or determined by the end of February one thousand nine hundred and eleven, the foregoing release shall be void and of no effect and the creditors and each of them respectively shall be remitted to and be entitled to exercise as regards their respective debts all such rights, and remedies as they and such of them would have been entitled to exercise if these presents had never been executed but without prejudice in any way to the rights of the creditors against the guarantor or to his liability under the covenant by him hereinbefore contained."

By an order of the 14th September

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1911, the composition was approved by the Court, and a copy of the deed was attached to the order, and marked "A."

It is to be noted that the deed of composition provided not only that the Appellant should be the guarantor of the payment, which the debtors had undertaken to make in pursuance of the composition, but also that the guarantor was to be the trustee of the settlement, and therefore he assumed a dual capacity.

In the first place, the Appellant was a guarantor or surety for the amounts, which the insolvents were to pay: and in the second place, he assumed the position of a trustee for the purpose of collecting the assets and the effects of the insolvents from the Official Assignee, or from any other person or persons who might have any effects of the insolvents in his or their possession and, in my opinion, the form, in which this deed of composition was made, has given rise to a considerable amount of difficulty in this case.

The facts which are necessary for me to state are as follows.—The adjudication according to the terms of the deed ought to have been set aside by the end of February 1911, but it was not in fact annulled until the 14th of September 1911, when the Court by an order of that date annulled the adjudication made on the 31st of October 1910, directed the Official Assignee to make over the assets belonging to the estate of the debtors to the trustee named in the deed, upon the trustee furnishing security to the extent of the amount of the assets to be made over to him, to the satisfaction of the Registrar of this Court: so that on the 14th of September 1911 the adjudication in insolvency was annulled. The Appellant gave security to the satisfaction of the Registrar in September 1911. As far as the Respondents are concerned, no

steps were taken by them to enforce the provisions of the composition deed until the 29th of July 1922. Then an application was made to my learned brother Mr. Justice Greaves under sec. 30 (2) of the Presidency Towns Insolvency Act: and, the application was for an order that "the debtors and the trustee aforesaid (i.e., the Appellant) should pay to Messrs. Jardine Skinner & Co., the sum of Rs. 3,750 with interest within three days from the date of the order to be made on the application, and in default thereof the said debtors and trustee should be committed for contempt." The second part of the application was for an order that "the debtors should be re-adjudged insolvents and the annulment of the adjudication order should be set aside and the order for composition should be set aside and that such further or other orders might be made as to the Court might appear proper."

The learned Judge dealt with the first part of that application on the 31st of August 1922, and he made an order, as I have already said, that the Appellant should pay the sum of Rs. 3,750 to Messrs. Jardine Skinner & Co. As far as the debtors were concerned, the learned Judge allowed the application to stand over to see what the effect of the order, as far as the guarantor was concerned, would be. The sum was not paid; and, the matter was brought before the learned Judge on the 21st of November 1922. Thereupon, the learned Judge dealt with the second part of the application which I have already read, and he made an order as follows: "It is ordered that the order made herein and dated the 14th September 1911 approving the composition therein mentioned be and the same is hereby vacated and it is hereby further ordered that an adjudication order be

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made against the said Bhimraj Rampro-tap and Bangsidhar: and it is further ordered that this order be not drawn up or completed for a period of a fortnight from the date hereof in order to enable the said Govind Das Pity or the said insolvents in the meantime to pay to the said creditors Jardine Skinner & Co. the sum of Rs. 3,750 pursuant to the said order dated the 31st day of August last and in the event of the said sum of Rs. 3,750 being paid within the time aforesaid the order of adjudication of the said insolvents hereby made do stand vacated." The result of that was that the order was not to be drawn up for a fortnight if the sum of Rs. 3,750 was paid within the fortnight the order of the 21st of November was to be vacated. If that sum was not paid, then the effect of the learned Judge's order was that the composition, which had been approved, should be set aside and the debtors would be adjudicated insolvents. The money was not paid within the fortnight. The result was, in my judgment, that but for what happened afterwards, there was an end of the composition deed and the debtors were adjudged insolvents.

The fortnight's time, which was prescribed by the learned Judge, expired on or about the 6th of December 1922. On the 19th of January 1923, Messrs. Jardine Skinner & Co. gave notice that they would apply for an order that "the time given for payment by the order of the 21st of November 1922 should be extended and that the order might not be drawn up or come into effect *sine die* till the proceedings against the trustee Govind Das Pity taken by the applicant be completed and thereafter till further orders: and that in the alternative the said order be vacated, and for such further and other orders or directions as to the Court might

seem fit, and that the debtors and the trustee should pay to the applicant the costs of and incidental to the application." That came before the learned Judge on the 6th February 1923, and the learned Judge came to the conclusion that inasmuch as his order of the 21st November 1922 had not been drawn up, although in fact it had been settled, he had jurisdiction to alter the order which he had made on the 21st of November, with the result that he directed that the order of the 21st of November 1922 should be vacated. The ground of his decision was that, as the Appellant had made himself personally liable under the deed of composition, the learned Judge thought that he ought not to allow him to escape from that liability inasmuch as there was no doubt that the order of the 21st November 1922 was made so far as the applicants (*i.e.* to say, Messrs. Jardine Skinner & Co.) were concerned under a misapprehension of what the effect of that order would be with regard to the Appellant: in other words, Messrs. Jardine Skinner & Co. had discovered that the result of their application to the learned Judge on the 21st of November 1922 and of the order which the learned Judge made upon it was that the composition deed was at an end, and that the liability of the Appellant was at an end: and, having discovered that, they applied to the learned Judge to vacate the order, which he had previously made, at the instance of Messrs. Jardine Skinner & Co. There is one other fact which I have to mention before I deal with the merits of these appeals. Having set aside the order of the 21st of November 1922, the learned Judge, on the 7th February 1923, directed that a writ of attachment should issue against the Appellant inasmuch as he had failed to comply with the order of payment made on the 31st of August 1922.

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The first point that was taken in this case was that the learned Judge had no jurisdiction to make an order for payment against the Appellant on the 31st of August 1922.

The learned Judge came to the conclusion that he had jurisdiction. He said: "In my opinion he is a trustee for the reasons indicated above and he is a trustee for all the creditors who signed the deed. Then so far as the question of suit is concerned it seems to me that having regard to the provisions of r. 124 of the rules under the Presidency Towns Insolvency Act, the creditors are expressly precluded from proceeding by suit and it seems to me that the words of that rule are quite clear and can bear no other interpretation. I think therefore that so far as the trustee is concerned the only remedy of the creditor is by proceedings under sec. 30." Then he proceeded to discuss whether the trustee had received any assets of the estate: and then he said: "To my mind that is not material if you have regard to the express terms of the covenant under cl. 1 of the composition."

I agree with the learned Judge that if this application is to be regarded as an application by a creditor against the trustee under the composition deed as such trustee, then the procedure, which was adopted, namely, of applying to the learned Judge under sec. 30 (2) of the Presidency Towns Insolvency Act was correct, and the learned Judge had jurisdiction to deal with the application. But I have already mentioned that in this particular case the Appellant was in the first place a guarantor in the real sense of the word, having entered into a personal liability to pay the amount specified in the composition deed: and, in the next place, he was constituted a trustee to

collect the assets. Now, there is no finding by the learned Judge that the Appellant had received any assets of the estate and had not distributed them according to the deed of composition. There was an allegation on the one hand that he had received such assets: and there was a denial on the other hand that he had received any assets, but there is no finding by the learned Judge either one way or the other. The learned Judge held that the Appellant was liable by reason of his personal covenant under cl. 1 of the deed of composition. I need not read that clause again. (1) 1 of the deed is the clause which constitutes the Appellant's personal liability as a guarantor. By that clause he made himself personally liable to the creditors and to each of them, "to pay to the said creditors and each of them a composition of six annas in the rupee, . . . such payment to be made within a month from the date of the order annulling the adjudication." The learned Judge, therefore, in my judgment, held the Appellant to be liable in his capacity as guarantor and by virtue of the personal covenant into which he had entered as such guarantor and the Appellant was not held liable in his capacity of trustee, inasmuch as the learned Judge considered it immaterial to decide whether he had received any assets of the debtor's estate. Now, under those circumstances, in my judgment, it is, to say the least, doubtful whether the learned Judge had jurisdiction under sec. 30 (2) of the Presidency Towns Insolvency Act to deal with the alleged personal liability of the Appellant as a mere guarantor of the amounts, which the debtors had covenanted to pay in the composition deed.

There is a case in English Courts, *Ex parte Mirabita: In re Dale* (1). It is a

(1) L. R. 20 Eq. 772 (1875).

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judgment by the Chief Judge of the Court of Bankruptcy, Sir James Bacon, with reference to sec. 126 of the Bankruptcy Act of 1869, which is, in material respects, similar to sec. 30 (2) of the Presidency Towns Insolvency Act. That section runs as follows — "The provisions of any composition made in pursuance of this section may be enforced by the Court on a motion made in a summary manner by any person interested, and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of Court." In that case the learned Judge was considering an application which was made by a creditor against a person called Fenwick, who had joined in the deed of composition as a surety and, the learned Judge said this — "The Court has power to enforce the payment of the composition by the debtor, and by the trustee if he has in his hands the money with which to pay it, though of course he cannot be compelled to pay it out of his own pocket. If the composition is not paid when it becomes due, it is his duty to sue the surety at law upon his covenant. Application should be made to the trustee to do this, and if he refuses, the Court can compel him to discharge his duty." The *ratio decidendi* was stated as follows — "I think that the application against the surety is wholly without authority and entirely contrary to principle. A man who becomes surety for his friend for the payment of a composition does not by so doing make himself subject to the jurisdiction of the Court of Bankruptcy. There is no necessity for resorting to this extraordinary proceeding." That reasoning, in my judgment, is applicable to the construction of sec. 30, sub-sec. (2) of the Presidency Towns Insolvency Act. It is to be noticed that the sanction provided by the

section is a drastic one; because if an order is made under sec. 30 (2), and any disobedience of that order occurs, that disobedience may be dealt with as a contempt of Court.

It is a novel proposition, in my experience, that a person who has made himself liable as a guarantor for the payment of a composition in insolvency, should be subject to the insolvency jurisdiction so as to be liable to be dealt with for contempt of Court, if he does not carry out any order made under such jurisdiction. I have already stated that it appears to me that the learned Judge did not hold the Appellant liable as a trustee by reason of his having assets of the estate in his hands, but on the ground that he had entered into a personal covenant as guarantor. I have serious doubt whether the learned Judge had any jurisdiction in a proceeding under sec. 30 (2) of the Presidency Towns Insolvency Act to make the order of the 31st August 1922, on that ground.

In any event, having regard to the facts of this case, assuming for the sake of my judgment that the learned Judge had jurisdiction, in my opinion the order ought not to have been made. I need not re-capitulate all the facts which lead me to this conclusion, I have stated them at the beginning of my judgment: the scheme of composition was made so long ago as the 10th of December 1910. By its terms the composition was to be paid within a month from the date of the order annulling the adjudication order. The adjudication was annulled on the 14th September 1911; and it was not until the 29th July 1922 that the Respondents applied for the covenant to be enforced against the Appellant. The learned Judge held that this long delay was not explained. Under these circum-

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stances, in my judgment, the peculiar jurisdiction under sec. 30 (2) of the Presidency Towns Insolvency Act should not be exercised against the Appellant, in his capacity as guarantor, even assuming that the Court has jurisdiction to deal with such a matter under that section.

The matter, however, does not rest there. The Respondents, Messrs Jardine Skinner & Co., applied to the learned Judge to set aside the deed of composition and to re-adjudge the debtors insolvents, and the learned Judge proceeded to do so on the 21st November 1922. Consequently the Appellant's liability under the covenant came to an end. Then without any further facts but merely because it was alleged that the Respondents had misconceived the effects of the order, for which they had applied, the learned Judge vacated the order of the 21st of November 1922 and revived the liability of the Appellant Mr Pity, and on the next day he issued a writ of attachment on the ground that he had failed to comply with the order of the 31st of August.

It was argued that the learned Judge had no jurisdiction to vacate or alter the order, which he had made on the 21st November 1922. It is not necessary for me in this appeal to decide that question, and I assume for the purpose of my judgment that he had jurisdiction to vacate the previous order inasmuch as the order had not been completed or perfected, but with much respect to the learned Judge, I cannot think that the order of the 21st November 1922 ought to have been vacated, having regard to the circumstances of this case. The order of the 21st of November 1922 had been made upon the application of the Respondents themselves, and having regard to the fact that such a long period had elapsed since the deed of composition was entered into and

approved by the Court, during which no steps had been taken to enforce the covenant against the Appellant, I see no sufficient ground for setting aside the order which the Respondents themselves had applied for.

For these reasons in my judgment these appeals ought to be allowed, and the orders of my learned brother, dated the 31st of August 1922, the 6th of February 1923 and the 7th of February 1923, should be set aside.

As regards costs, it seems to me that if the Appellant had complied with the learned Judge's order of the 31st of August 1922, subject to his right of appeal to this Court, a large part of these proceedings would have been unnecessary. Having regard to the circumstances of this case we are of opinion that the proper order to make in this matter is that the parties must bear his and their own costs both of the proceedings in this Court and in the Court of first instance.

RICHARDSON, J.—I agree that the appeals should succeed.

Messrs. Chaudhuri & Chaudhuri,
Solicitors for the Appellant

Messrs. Khaitan & Co. and Messrs.
Manuel, Agarwalla & Co., Solicitors for the
Respondents

P. K. C.

[INSOLVENCY JURISDICTION.]

No. 107 of 1923.

GREAVES, J.
1923,
12, June.

Re : MEGHRAJ PUROHIT.

Presidency Towns Insolvency Act (III of 1909), sec. 41, jurisdiction of the Registrar in the Insolvency to annul an adjudication under r. 142B of the Calcutta Insolvency Rules—Sec 8, Court, if can review order passed by the Registrar.

Where the Registrar in Insolvency annulled an adjudication order under the

Re : MEGHRAJ PUROHIT.

provisions of sec. 41 of the Presidency Towns Insolvency Act as the insolvent had not applied for his discharge within the time fixed by r. 142A of the Insolvency Rules :

Held—That the Registrar had jurisdiction to make the order annulling the adjudication. Sec. 6 of the Act authorises delegation to an officer of the matters set out in sub-cl. (2), which includes matters to be dealt with in chambers and applications for annulment can be heard and determined in chambers.

Held further—That under sec. 8 of the Act the Court can review its orders, but as the order was passed by the Registrar he was the person to whom the application for review must be made (see Or. 47, C. P. C.).

These were two applications for setting aside an order annulling a previous adjudication and for a fresh order of adjudication.

The facts are briefly as follows :—One Meghraj was adjudicated an insolvent at the instance of a creditor. Subsequently the Registrar in Insolvency at the instance of a creditor annulled the adjudication order under the provisions of sec. 41 of the Presidency Towns Insolvency Act. The present applications were made by another creditor on the ground that the Registrar had no jurisdiction to make the order annulling the adjudication.

Mr. S. N. Banerjee for the Insolvent.

Mr. P. N. Chatterjee for the Creditor
Bombay Holland Trading Co

The JUDGMENT OF THE COURT was as follows :—

GRAVES, J.—Two petitions are before me in this matter both filed by a creditor, one Nandlal Acharya.

By the first petition, filed on the 7th May, the creditor seeks to set aside an order of the 27th April 1923 annulling a previous adjudication and by the second petition a fresh order of adjudication is sought

The facts are as follows :—Meghraj Purohit was adjudicated an insolvent on the 29th August 1921 at the instance of a creditor. On the 27th April 1923 the Registrar in Insolvency at the instance of a creditor, the Bombay Holland Trading Company, Ltd., annulled the adjudication order under the provisions of sec. 41 of the Presidency Towns Insolvency Act as the insolvent had not applied for his discharge within the time fixed by r. 142A of the Insolvency Rules. The application was made upon notice to the insolvent and to the Official Assignee and it was advertised in the Calcutta Gazette as provided by r. 142B.

Now it is urged that the Registrar had no jurisdiction to make the order annulling the adjudication but I do not think that this contention is well founded. Sec. 6 of the Act authorises the delegation to an officer of the matters set out in sub-cl. (2) which includes (c) matters to be dealt with in chambers. Now applications for annulment do not require to be dealt with in Court (see r. 5) and can therefore be heard and determined in chambers. I think, therefore, that the Registrar had jurisdiction to make the order of annulment. Now under sec. 8 of the Act the Court can review its orders, but as the order was passed by the Registrar he is the person to whom the application for review must be made (see Or. 47, C. P. C.) and I cannot entertain an application for review.

An appeal of course lies to me from the order of the Registrar [see sec. 8 (2) (a)] but that must be made within 20 days

Re · MEGHRAJ PUROHIT.

(see sec. 101) which has not been done and if I have power to extend the time under sec 90 (5) I see no reason for doing so in this case. The application therefore to set aside the annulment fails

I now come to the 2nd application, namely, that for adjudication. The circumstances are suspicious and before deciding whether I should grant or refuse an order I should desire to have an opportunity of testing the truth of the allegations in the petition and I accordingly direct the Petitioner and Meghraj to attend for oral examination before me on Tuesday, June 19th.

The Official Assignee should, in the meantime, retain the sum in his possession until further order.

Messrs Manucl Agarwalla & Co.
Solicitors for the Applicant

Messrs. Khaitan & Co and S C Ghosh,
Solicitors for the Opposite Party.

J. N. R.

(CIVIL REVISIONAL JURISDICTION.)

RULE No. 15 (S) OF 1922.

	SM SAILA BALA DEI and
SANDERSON, C. J.	anr., (Plaintiffs, Appel-
RICHARDSON, J.	lants), Petitioners,
	v.
1922,	GADADHAR HAZRA and
10, February	ors., (Respondents),
	Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XLI, r. 11 and Or. XLVII, r. 1—Review—Second appeal, dismissed at the preliminary hearing—Discovery of new material, if ground for review.

The High Court has no authority to review an order dismissing a second appeal under Or. 41, r. 11, on the ground of alleged discovery of new and important evidence subsequent to the passing of the order.

RAJANI KANTA DAS v. KALI PROSONNA

MUKHERJEE (1), BHYRUB NATH v KALLY CHUNDER (2) and PANCHANAN MUKERJEE v RADHA NATH MUKERJEE (3) followed.

This was a Rule issued on an application for review of the judgment of this Court dated the 19th July 1921, passed in appeal from Appellate Decree No. 1107 of 1921, being an appeal from the decree of the District Judge of Midnapur, passed in Title Appeal No 429 of 1919, and dated the 10th December 1920, affirming the decree of the Munsif, 4th Court, Tamlook, passed in Title Suit No 574 of 1918, and dated the 22nd September 1919

This rule was obtained by the Plaintiffs, Sm Saila Bala Dei and another

The Plaintiffs brought a suit in the 4th Munsif's Court at Tamlook in the District of Midnapur for a declaration that certain lands belonged to them and for recovery of the same from the Defendants. This suit was dismissed by the Munsif on 22nd September 1919, which decree was confirmed on appeal to the District Judge on the 10th December 1920. Thereupon the Plaintiffs filed a second appeal to the Hon'ble High Court but the said appeal was dismissed on hearing under Or 41, r. 11 of the Code of Civil Procedure on the 19th July 1921. Subsequent to this dismissal, the Plaintiffs, discovered an important document, which, if discovered earlier, would have been a material and important piece of evidence against the Defendants. Thereupon the Plaintiffs applied for a review of the order passed by the Hon'ble Court on the 19th July 1921 on the ground of the discovery of new and important evidence in their suit and obtained this Rule upon the Defendants to show cause why the appeal should not be re-heard.

(1) I. L. R. 41 Cal. 809 (1914).

(2) 16 W. R. 112 (1871).

(3) 4 B. L. R. (A. C. J.) 312 (1870)

SM. SAILA BALA DEI v. GADADHAR HAZRA.

Babu Haradhan Chatterjee for the Petitioners.

Babu Santosh Kumar Pal for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows.—

SANDERSON, C. J.—This was a Rule calling upon the Opposite Party to show cause why the judgment of this Court, dated the 19th of July 1921, should not be reviewed as prayed. The judgment of this Court of the 19th of July was a judgment of my learned brother and myself whereby the appeal was dismissed under Or. 41, r. 11, C. P. C.

The Plaintiff failed in the first Court and in the lower Appellate Court. He then appealed by way of special appeal to this Court and after hearing the appeal my learned brother and I dismissed it as I have already said. Then application for review was made on the ground that after the dismissal of the appeal under Or. 41, r. 11, C. P. C., a document was discovered by the Plaintiff, which document, he said, could not have been discovered earlier by the exercise of reasonable diligence, that it was an important document and, as was alleged in the petition, it would throw light upon the case. We granted him a Rule for the purpose of having this point argued.

Now that our attention has been drawn to the cases which have been decided by this Court, in my judgment this Rule must be discharged.

In the case of *Rajani Kanta Das v. Kali Prosonna Mukherjee* (1), it was decided that the High Court has no authority merely on the ground of alleged discovery of new and important evidence to review an order dismissing an application for the admission of a second appeal under Or.

(1) I. L. R. 41 Cal. 809 (1914).

41, r. 11 of the Code of Civil Procedure, a decision which is directly in point on the question now before us. It is true that that was a decision of a single judge of this Court, Mr. Justice Cox; but the learned Judge based his decision on the case of *Bhyrub Nath v. Kally Chunder* (2) heard by Mr. Justice Loch and Mr. Justice Bayley, and they decided as follows—“Under any circumstances, it appears to us that this Court cannot admit a review of a judgment passed in special appeal merely on the ground that new evidence to prove a fact has been discovered, and under this view of the law we think this application should be rejected with costs.”

A further case, to which my learned brother drew my attention during the course of the argument, *Panchanan Mukherjee v. Radha Nath Mukherjee* (3), is to the same effect. That was a case decided by Mr. Justice Loch and Mr. Justice Mitter in the year 1870, and having regard to the settled state of law on this point since 1870 in my judgment it is not possible for us to do otherwise than to discharge this Rule with costs, hearing-fee, one gold mohur.

RICHARDSON, J.—I agree.

H. D. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV No 317 OF 1923.

C. C. GHOSH, J.	H. K. BHEDWAR,
CUMING, J.	Complainant, Petitioner,
1923,	v.
Heard, 8, May.	RAO SHAHAT C. S. R.
Judgment,	RAO. Accused, Opposite
22, May.	Party.

Indian Penal Code (Act XLV of 1860), sec. 415
—Paying cheques knowing that they would be dishonoured and thereby inducing a race book-maker to allow bets on credit, if constitutes cheating—

(2) 16 W. R. 112 (1871).

(3) 4 B. L. R. (A. O. J.) 213 (1870).

H. K. BHEDWAR v. RAO SHAHAT C. S. R. RAO.

Allowing racing bets on credit, whether is an act which causes loss or damage to the book-maker.

A licensed book-maker of the Royal Calcutta Turf Club, on the assurance of the Opposite Party that he would pay up his losses, if any, punctually on the settling day, allowed the latter to take bets on credit. The Opposite Party failed to pay his debts and on different dates paid cheques to the Petitioner and induced him to accept further bets on credit:

Held—That although it is clear that the Petitioner was deceived and thereby induced to take bets on credit from the Opposite Party, it cannot be said that the act which the Petitioner was induced to do by reason of such deception had caused or was likely to cause damage or harm to him in body, mind, reputation or property. It did not follow that if the Petitioner had refused to take bets on credit, the Opposite Party would of a certainty have had to offer bets by paying cash. The Opposite Party might not have offered any bets at all. Therefore the offence of cheating cannot be said to have been committed.

This was a Rule granted on the 16th April 1923 against the order of dismissal of a complaint under sec. 417, I. P. C., made by the Chief Presidency Magistrate of Calcutta (D. Swinhoe, Esq.), under sec. 203, I. P. C., dated the 5th March 1923.

The facts are fully set out in the judgments.

Babus Manmatha Nath Mukherjee and Narain Chunder Kar for the Petitioner.

No one appeared for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

C. C. GHOSE, J.—In this case a Rule was issued, calling upon the Chief Presidency Magistrate of Calcutta to show cause why the order dismissing the Peti-

tioner's complaint should not be set aside and why further enquiry into the said complaint should not be made and process issued against the Opposite Party under sec. 417, I. P. C., or such other or further order made as to this Court might seem fit and proper.

The facts giving rise to the application, on which the Rule was issued, are as follows:—The Petitioner is a licensed book-maker of the Royal Calcutta Turf Club and has a permanent book for the season 1922-1923 within the first enclosure of the Calcutta Race Course. On the assurance of the Opposite Party, who is a Deputy Director of Commercial Intelligence, employed under the Government of India, that he would pay up his losses, if any, punctually on the settling day, the Petitioner allowed the Opposite Party to take bets on credit on the 9th of December 1922. The debts due to the Petitioner by and from the Opposite Party in respect of debts on credit amounted to a sum of Rs. 1,591. The Opposite Party failed to pay the said sum of Rs. 1,591 on the then following settling day and accordingly the Petitioner decided not to allow to the Opposite Party any more credit until the said sum was paid off in full. Thereupon the Opposite Party sent to the Petitioner, on the 15th December 1922, a crossed cheque for Rs. 1,591 on the Indian Industrial Bank. The said cheque was sent in the evening after banking hours. The Opposite Party assured the Petitioner that the said cheque would be paid on presentation and on such assurance the Petitioner allowed the Opposite Party to take bets with him on credit on the 16th December 1922, and in respect of such bets taken on credit on the 16th December 1922, the Opposite Party became indebted to the Petitioner to the extent of Rs. 3,450. The cheque referred to above

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was presented for payment on the 18th December 1922, when it was dishonoured. The Opposite Party was thereupon communicated with and he gave a fresh cheque for Rs. 5,041 to cover his losses on the 9th and 16th of December and assured the Petitioner that there would be no difficulty whatsoever in getting the said cheque cashed. It appears that the Petitioner relied on the assurance of the Opposite Party and allowed him to take further bets on credit on the 23rd and 26th December 1922. The Opposite Party became indebted to the Petitioner in a further sum of Rs. 752. Meanwhile the said cheque for Rs. 5,041 was presented for payment on the 28th December 1922, when it was dishonoured. The Petitioner thereafter made various efforts to obtain payment of the two sums of Rs. 5,041 and 752, but without success. Eventually on the 1st March 1923, the Petitioner applied to the Chief Presidency Magistrate of Calcutta for process against the Opposite Party under sec. 417, I. P. C., for having cheated him in respect of the said cheques. The learned Magistrate came to the conclusion that on the facts no case of cheating had been made out and accordingly dismissed the Petitioner's application under sec. 203, Cr. P. C.

On behalf of the Petitioner it has been contended before us that the Opposite Party by representing to him that the cheques in question would be honoured and thereby the dues up to the 16th of December would be satisfied, induced the Petitioner to accept his bets on credit, i.e., bets which the Opposite Party would otherwise have had to pay in cash, and that the Petitioner by accepting such bets on credit lost a sum of Rs. 752, which would otherwise have come to his till. It is argued, therefore, that the Opposite

Party has deceived the Petitioner and has fraudulently or dishonestly induced the Petitioner to take bets on credit from him, which he (the Petitioner) would not have done, if he were not so deceived, and which act has caused him a loss of Rs. 752.

In my opinion although it is quite clear that the Petitioner was deceived and thereby induced to take bets on credit from the Opposite Party, I am unable to say that the act which the Petitioner was induced to do by reason of such deception has caused or was likely to cause damage or harm to him in body, mind, reputation or property. It does not follow that if the Petitioner had refused to take bets on credit from the Opposite Party, the latter would of a certainty have had to offer bets by paying cash. The Opposite Party might not have offered any bets at all. In order to bring home the offence of cheating against the Opposite Party, the Petitioner would have to show that his case comes within the four corners of sec. 415, I. P. C., and in this I think the Petitioner has failed. The analogy suggested on behalf of the Petitioner about a person obtaining goods or money by means of a cheque, which he knows will not be paid, and thereby being guilty of the offence of cheating, does not in my opinion hold good in this case.

I would accordingly discharge this Rule.

CUMING, J.—The facts of the case out of which this application for revision has arisen are these.—

The Petitioner, Mr. H. K. Bhedwar, is a licensed book-maker of the Royal Calcutta Turf Club and operates in the first enclosure. The Opposite Party is a Deputy Director of Commercial Intelligence. The Petitioner allowed the Opposite Party to bet with him on the 9th December and as a result of this the Opposite Party lost Rs. 1,591. The

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Opposite Party did not meet his obligations on settling day and so the Petitioner refused to allow him to bet on credit

The Opposite Party then gave Petitioner a cheque for Rs. 1,591 on December 15th. In consideration of receiving the cheque the Petitioner allowed the Opposite Party to bet with him on credit on December 16th. The Petitioner allowed this on the understanding that the cheque for Rs 1,591 would be met on presentation. The Opposite Party lost on the 16th December a further sum of Rs. 3,450. On the 18th December, the Petitioner presented the cheque for Rs 1,591, payment of which was refused, there being no funds to meet it. The Opposite Party represented to the Petitioner that he had put his account in order and gave him on the 22nd December a fresh cheque for Rs 5,041 to cover his losses on the 9th and 16th. The cheque was made over to the Petitioner on the 22nd December after Banking hours. On the strength of the cheque the Petitioner allowed the Opposite Party to bet with him on credit on the 23rd and 26th December when the Opposite Party lost a further sum of Rs 752. This cheque also was dishonoured on presentation.

The Petitioner's case is that the Opposite Party has cheated him. That the Opposite Party knew quite well when he issued the cheques he did that they would not be met and that by giving these cheques to the Petitioner which he knew would not be honoured he deceived the Petitioner, as the result of which deception loss was caused to the Petitioner. The Petitioner laid a complaint against the Opposite Party charging him under sec. 417, I. P. C., with cheating. The learned Chief Presidency Magistrate dismissed the complaint on the ground that no criminal offence was disclosed. The

point to be decided here is whether accepting the facts as alleged by the Petitioner and holding that the Opposite Party knew quite well that the cheque would not be met the offence of cheating has been committed. Obviously if the facts are true the Opposite Party did deceive the Petitioner and by so doing induced him to do an act which he would not otherwise have done, namely, allowed him to bet with him on credit. The question then to be decided is whether the allowing of the Opposite Party to bet on credit is an act which caused or was likely to cause damage or harm to the Petitioner in mind, body or reputation. Mr. Mukherjee contends that it has cost the Petitioner the loss of Rs. 752 which the Opposite Party lost to the Petitioner on the 23rd and 26th of December. His argument is that if the Opposite Party had not been allowed to bet on credit he would have wagered the same amount in cash, that hence the Petitioner would have received Rs 752 in cash and he had lost that amount and so has suffered loss. I do not think, however, we are entitled to assume for one moment that if the Opposite Party had not been allowed to bet on credit he would have made the same wagers in cash. It is at the most a possibility and I should say, on the facts, hardly a probability. It cannot be said that the Petitioner is any the worse off than he was before because the Opposite Party as the result of the deceit lost Rs. 752 to him and has not yet paid it. It has been suggested in argument that the Petitioner might as the result of bets on one horse give longer odds on some other horse and so suffered loss. In the petition there is no suggestion of this and it seems at the best a remote contingency hardly capable of proof.

The question is not free from difficulty

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but after a careful consideration I am of opinion that it cannot be said that allowing the Opposite Party to bet on credit was an act which caused loss or damage to the Petitioner

The learned Presidency Magistrate was therefore right in the view he took that no criminal offence had been disclosed and I would discharge this Rule

J. N. R. Rule discharged

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 576 OF 1923.

NEWBOULD, J.
C. C. GHOSE, J
1923,
19, July.

NATABAR KHAN,
Accused, Petitioner,
v.
THE KING-EMPEROR,
Opposite Party.

Criminal Procedure Code (Act V of 1897), secs. 243, 252, 262, 263—Trial of a warrant case as a summons case, effect of—Plea of accused—Warrant case—Summary trial—Procedure—Framing of charge

Where a Magistrate in trying a warrant case in a summary way did not adopt the course prescribed by sec 252 of the Criminal Procedure Code, but convicted the accused on his own admission without taking evidence and without framing a formal charge, and passed an appealable sentence:

Held—That the conviction was illegal, and the case was directed to be retried according to law

Sec 263 of the Criminal Procedure Code applies to cases in which no appeal lies and exempts the Magistrate from framing a formal charge in such cases. But there is no exemption in a case tried summarily in which, as in the present case, the sentence passed is appealable.

One of the distinguishing points between a summons and a warrant case is that in a warrant case sufficient evidence to support the charge must be recorded

before a charge can be framed and the accused called on to plead.

This was a Rule granted on the 11th June 1923 against an order of the Sessions Judge of Midnapur (Mr A. Henderson), dated the 4th June 1923, affirming the order of the Additional District Magistrate of Midnapur (Mr J. Peddie), dated the 9th May 1923, convicting the Petitioner under sec 379, I. P. C. and sentencing him to a fine of Rs 25 and one month's rigorous imprisonment, in default to three more weeks' rigorous imprisonment

The facts of the case material to this report are as follows—The Petitioner was tried summarily by the Additional District Magistrate of Midnapur for an offence of committing theft of wood worth 20 or 24 rupees from the Midnapur Zemindary Company's jungles. The Magistrate without examining the complainant or any witnesses for the prosecution, and without framing a charge against the Petitioner, convicted him under sec 379, I. P. C. on his own plea, "guilty of theft of about 10 or 12 cart loads of wood from the said jungles," and passed the following sentence "Fine Rs 25 plus one month's rigorous imprisonment, in default of fine three more weeks' rigorous imprisonment." The Magistrate did not record anything under the heading "Summary and Reasons"

The Petitioner appealed to the learned Sessions Judge of Midnapur, and in the said appeal an affidavit sworn by the Petitioner's brother was filed to the effect that he was present in the Court of the trying Magistrate during trial, that the learned Magistrate only asked the accused "Have you cut the trees of the jungle?" To this his brother answered "yes" only; that the Petitioner did not plead guilty of the offence but only stated that he cut the trees and that he was not

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given an opportunity to state the whole of what he had to say, that he cut the trees by virtue of the rights given to him by the finally published record-of-rights in Khatian No. 117, and that the settlement record was shewn to the learned Sessions Judge.

The learned Sessions Judge dismissed the appeal by his judgment, dated the 4th June 1923, which was as follows:—

“It is argued on behalf of the Appellant that the trial has been vitiated because the learned Magistrate failed to follow the procedure prescribed in sec. 262, Cr. P. C. In the first place there is nothing to shew that the Court procedure was not followed, in the second place, as the conviction was by a Magistrate of the first class on a plea of guilty, the appeal is limited to the legality and the extent of the sentence. There is nothing illegal in it. As regards severity it does not appear that the offence was of a technical character. The appeal is dismissed.”

The Petitioner then moved the High Court and obtained the present Rule. On behalf of the Petitioner reliance was placed on the decision in *Emperor v Chinnapayan* (1).

The material portion of the explanation submitted by the District Magistrate of Midnapur is as follows:—“The record shews that the accused pleaded guilty of theft and he was convicted on his own plea. It should be assumed that the nature of his admission was properly explained to the accused by the trying Magistrate. The summary procedure does not necessitate other than a bald description of the plea.” The remaining portion of the explanation dealt with the question of sentence.

Babu Phanindra Nath Das for the Petitioner.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner in this case has been convicted of theft and sentenced to one month's rigorous imprisonment and to pay a fine of Rs. 25. From the record and the explanation submitted it would appear that the Petitioner pleaded guilty. But the trying Magistrate and the learned Sessions Judge who heard the appeal appear to have overlooked the fact that this was a case in which an appealable sentence was passed. Sec. 263 applies to cases in which no appeal lies and exempts the Magistrate from framing a formal charge in such cases. But there is no such exemption in a case tried summarily in which, as in the present case, the sentence passed is appealable. Further under sec. 262, Cr. P. C., it is necessary that in a summary trial the procedure prescribed for warrant cases shall be followed in warrant cases with certain exceptions. One of the distinguishing points between a summons and a warrant case is that in a warrant case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called on to plead. This apparently was not done in the present case.

That being so we must hold that the conviction of the Petitioner was illegal. We accordingly set aside the conviction and sentence passed on the Petitioner and direct that he be tried according to law. The fine, if paid, will be refunded.

H. C. S. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD ATKINSON.

LORD CARSON.

SIR JOHN ELLERRE.

MR. AMEER ALI.

1922,

Heard, 28, April and 1
and 2, May.

Judgment, 7, July.

JAGDEO NARAIN

SINGH and ors.,

Appellants,

v.

BALDEO SINGH

and ors.,

Respondents.

Thakbast maps and thak registers, value of entries in, as evidence—Owner, when bound by adverse entries in thak register—Bengal Tenancy Act (VIII of 1885), sec 10 (b)—Record-of-rights entry in, of occupier as holding rent free—Land proved to be within zemindari mahal—Presumption of correctness of entry, if rebutted thereby—Onus of proof in such a case—Continuous non-payment of rent by tenant, if creates rent-free title, when land held in thak—Adverse possession—"Jaith rayat," meaning of—Second appeal—Question of fact, depending for decision upon inference from documents—High Court, if may interfere.

The thakbast maps prepared by Amins prior to a regular survey, were rough maps which laid down the locality without any guarantee of scientific accuracy, and the thak khasras were rough registers in which the Amin entered particulars regarding the plots gathered from people who collected to watch his measurements. The statements entered in these registers have by themselves no evidentiary value.

Statements to the detriment of the actual owner recorded in such registers unless knowingly acquiesced in by the owner cannot be used as evidence against him.

Once the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or mahal, it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old

grant recognised by Government. It follows that the presumption arising under sec. 103 (B) of the Bengal Tenancy Act in favour of the correctness of an entry in the record-of-rights that certain lands were by the occupiers thereof held rent-free would stand rebutted upon proof that the lands lay within the estate or mahal of the zemindar, the onus shifting on those who claimed to hold the land rent-free.

RAJAH SAHIB PERSHAD SEIN v. DOORGA-PERSHAD TEWARREE (1) referred to.

When a mahal had been held continuously in thika, the failure of the thikadar to collect the rent from any individual tenant would not create adverse possession against the proprietor. Besides mere non-payment of rent or discontinuance of payment of rent has not, by itself, been held in India to create adverse possession.

PRASANNA KUMAR MOOKERJEE v. SRIKANTA ROY (2) approved.

A "jaith rayat" may be either a head rayat or a tenure-holder.

Where in an appeal before the Board it was objected that the High Court had no jurisdiction to set aside on second appeal a decision of the District Judge on questions of fact, the Judicial Committee, in view of the fact that the decision depended on inferences derivable from documents produced in the case, preferred to decide the appeal on the merits.

These were consolidated appeals from seven decrees of the High Court of Patna which reversed seven decrees of the Court of the Subordinate Judge of Patna.

In August 1839, the lands in suit were settled with a lady named Umatuz Zohra at an annual rent of Rs. 225-11-0. The Plaintiffs-Appellants derived their title through Umatuz Zohra.

(1) 12 M. I. A. 286, 331 (1869).

(2) I. L. R. 40 Cal. 173; s. c. 17 C. W. N. 137 (1912).

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The property was let to *thikadars* at a fixed rental.

The Respondents claimed to have acquired the rights of rent-free tenure-holders or *malikanadars*.

The Appellants instituted the suits claiming declarations that they held the proprietary rights and that the Respondents were merely cultivating tenants.

The facts of the case and the findings of the lower Courts are fully dealt with in the judgment of the Judicial Committee.

Messrs DeGruyther, K C and *J K Roy* for the Appellants contended that the first and second Courts had found in their favour on a question of fact and such finding could not be disturbed on second appeal. *M Durga Choudhuran v Jawahir Singh Choudhri* (3). They further urged that the mere non-payment of rent by the Respondents was not sufficient to justify a finding of adverse possession.

Prasanna Kumar Mookerjee v Srihanta Rout (2).

Messrs Dunne, K C, and *Dubé* for the Respondents.

Then LORDSHIPS JUDGMENT was delivered by

MR AMEER ALI, J --These seven consolidated appeals from seven decrees of the High Court of Patna arise out of the same number of suits brought by the Plaintiffs in the Court of the first Subordinate Judge of Patna on the 8th February 1913, under the following circumstances.

The Plaintiffs are part proprietors of a *nahal* paying revenue to Government consisting of one Mouza named Amarpu

Jabar, which bears on the Collector's register No 9/4377, and is assessed with a *jama* of Rs 225 odd annas. The *pro forma* Defendants in the several suits are the co-sharers of the Plaintiffs, and own the remaining share of the *nahal*. The contesting Defendants in the suits hold separate lands within the Mouza, which in the aggregate amount to a considerable part of the village. In respect of these lands the Defendants claim to have acquired either proprietary right by adverse possession, or the right of rent-free tenure-holders, who are known in Behar as *malikanadars*. Sometime before these suits were brought, there appears to have been a cadastral survey under Chap X of the Bengal Tenancy Act (V of 1885), and, on the contention of the Defendants, they were entered in the Survey Register as *malikanadars*. The Plaintiffs seek in these suits to have it declared that the entry is erroneous, and that the Defendants are not entitled to hold the lands in their possession and occupation, free of the obligation of paying rent. The Subordinate Judge, upon a careful review of the evidence, came to the conclusion that the Defendants were mere tenants, and were liable to pay rent for the lands they hold and accordingly decreed the suits. His decrees were upheld on appeal by the District Judge, but on second appeal, they have been reversed by the High Court of Patna and the suits dismissed. The appeals to this Board are from the decrees of the High Court dismissing the suits. One of the objections to the view taken by the High Court is based on the ground that the learned Judges in entertaining the second appeals had no jurisdiction to set aside the decision of the District Judge on questions of fact, in respect of which he concurred with the Court of first instance. This objection is not without

(3) L. R. 17 I. A. 122 (127). s. c. I. L. R. 18 Cal. 23 (1890).

(2) I. L. R. 40 Cal. 173; s. c. 17 C. W. N. 137 (1912).

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force but, in view of the fact that the learned Judges of the High Court have differed from the lower Courts, not only in the estimate of the evidence, but also with regard to the inferences derivable from documents produced in the case, and other circumstances, then Lordships deem it expedient to deal with the appeals on their merits.

It is proved beyond doubt that the village of Amarpur Jabai, together with some other villages which were considered as its *dakhili* (appurtenant hamlets), were granted free of revenue in the early part of the reign of the Emperor Aurangzeb, surnamed Alamgir, to one, Asadulla Chisti, whose name indicates that he belonged to a holy family. They were afterwards confirmed in favour of other members of the family. The villages in question came subsequently into the possession by purchase of one Khadim Husain Khan and he and his successors held the property without question or assertion of right by anybody else until 1838. In that year the East India Company's Government instituted proceedings under Reg. II of 1819, for its "resumption", in other words, to assess and impose revenue upon it. The documents in connection with the resumption proceedings show that the investigation conducted at the time was thorough and covered not only the examination of the title of the possessor of the estate to hold the village revenue-free, but included an investigation into the titles of all persons occupying lands on the allegation that they were not liable to the payment of rent. One was the natural corollary of the other, as the Government claimed the right to assess revenue upon every bigha of land from which the owner derived an income, it was necessary for the purposes of a fair assessment to examine the title of every one

who claimed to hold any land within the Mouza free of rent.

In 1838, when proceedings were taken for the summary settlement of this village, the admitted owner of the property was a lady of the name of Umatuz Zohra, and the area of the land was recorded as 765 bighas, but this measurement was subsequently amended, and the total area was found to be 463 bighas. No person other than Umatuz Zohra had put forward at that time a claim to the summary settlement. Later on, the matter came before the Deputy Collector for confirmation of the temporary settlement, and on the 18th January 1839, a formal order was recorded to the effect that the person with whom the permanent settlement should be made was Musamat Umatuz Zohra, who was in possession. The measurement in connection with this settlement was tested by the officer in charge in the presence of two men, who are thus described in the order then made, which runs thus —

"I tested the measurement of the under-mentioned plots in the presence of the measurement staff and many other persons of the village and of its vicinity and Girwar Singh, *gomashita* and Sheo Dayal Singh, cultivator."

Girwar Singh and Sheo Dayal Singh are the ancestors of the contesting Defendants, through whom they claim to have derived their *malikanadari* right. Before the Settlement Officer who was engaged in the assessment of the revenue on the village and the enquiry for that purpose into its assets, no person put forward any claim that he held any land within the Mouza adversely to the owner, or had any right therein which absolved him from the obligation of paying rent for the lands in his occupation. Girwar Singh is stated to have been only a servant and *gomashita* of the owner, and Sheo

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Dayal Singh, a cultivator. No other right is mentioned.

Subsequent proceedings throw further light on the character of the settlement. The property is situated in the District of Patna, the owner lived in the District of Monghyr. It had consequently been let out in farm to one Asmani Singh and another. It also appears that originally it consisted of three Mouzas, *i.e.*, Amar-pore Jabar, Amar-pore Roop and Jabar-pore Khas, and that they were amalgamated under the settlement of 1839, and named Amar-pore Jabar. The settlement with Umatuz Zohra is re-affirmed in accordance with the details given in the *rubakan* of the 12th August 1839. It is stated —

“In view of the Aima being a Badshahi grant, this permanent settlement is made with the said possessor from 1247 Fash at a jama fixed with regard to the fullest crop of the land.”

And regarding the measurement it is again stated —

“When the possessors arrived, the measurement was made from 22nd to 29th May of the said year in the presence of Tilak-dhari Lal, Patwari, Asmani Singh, *thikadar*, Girwar Singh and Sheo Dayal Singh, Amlas of the possessors, Doma and Gur Dayal Gorait.”

The Gorait is the village watchman.

Then comes the following statement —

“In spite of notification being issued, no one has raised any objection until now [up to this time] with regard to the boundary limits.”

In the same proceedings there is a statement to the effect that nobody within this Mouza claimed “jaith raiyat” right. A jaith raiyat might be either a head raiyat or a tenure-holder. Some lands are stated to be dedicated to pious purposes, but there is nothing to give colour to the suggestion that *malikana* rights were claimed,

far less held, by anybody. The conclusion is given thus :—

“Besides that, nobody came forward to claim Minhaj and Milkiat rights from that time up to this day, notwithstanding the issue of Notification, etc., during the pendency of the case, and in the *Moffasil* Mussammat Umatuz Zohra was found to be in possession. For the above reasons the said Mussammat is found entitled to settlement in exclusion of the *Malikana* right on the ground that she alone was the possessor of the Milkiat and Minhaj land.”

The settlement was thus made with the owner, Umatuz Zohra, after a thorough enquiry, in the presence of the *thikadars*, in respect of the whole Mouza, including the non-assessable lands, on the basis of the rent that they paid to her.

The owner, as stated already, was a non-resident landlord; the property was let to *thikadars* upon a fixed rental. The landlord had no direct communication with the tenants or raiyats, the actual collection being left to the *thikadars*. At the time of the settlement of 1839, the rent payable by the *thikadars* was Rs. 351. The Deputy Collector, in his anxiety to assess as high a revenue as possible upon the Mouza, considered that 10 per cent out of this Rs. 351, being the usual allowance or *malikana* to which proprietors were entitled, was sufficient remuneration for the zemindar and he accordingly fixed Rs. 316, which represented Rs. 351 less the 10 per cent *malikana*, as the revenue payable by Umatuz Zohra.

With regard to the plea of the lady that some allowance should be made to her for what is called *saranjami* expenses, in other words, the expenses incurred by the landlord in the management of the property, the Deputy Collector was of opinion that the *saranjami* expenses were included in the *thika* rent, and he accordingly rejected her prayer. This settlement

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was confirmed by the Collector. It then went up to the Board of Revenue and was finally confirmed, but the *jama* or revenue payable by the landlord was reduced to a more moderate amount, viz, the revenue it now bears, Rs 225. On the basis of this reduction, an ingenious argument was put forward on the side of the Respondents. It was suggested that the revenue was reduced from Rs 316 to Rs 225, because there existed in the village these *malikanadari* rights. It is enough to observe that throughout the proceedings there is not the faintest reference to such a ground. The Government's order confirming the assessment with the reduction appears to have been made a year later. The following entry in the Mouzawar Register of Amarpur Jabar explains exactly the final settlement with Umatuz Zohra —

"This Mouza is Aima, Madad Mash (grant) with the recorded area of 765 (?) It was resumed and entered in the list of Khas Mahal as bearing No 1225, and was permanently settled on the 25th May 1839, A D, with effect from 1247 F S, at an annual rental of Rs 316 in the name of Musammat Umatuz Zohra. Thereafter, on the 6th October 1840 A D, it was, with the sanction of the Government, entered in the Rent Roll as paying a Revenue of Rs 225. The land of this Mouza is joint with the land of Mohiuddin Nagar bearing No 3082. Accordingly *thakbast* and survey measurements were effected and numbered as Halka No. 17 in Persian, and the area thereof was found to be 489 Bighas 10 Cottas according to Khatiauni."

As already observed, the investigation under Act II of 1819 was carried out with extreme thoroughness in respect of details, three Registers were prepared, named, respectively, *Mahalwar*, *Mouzahwar* and *Assamwar*. In the last the names of all persons holding land within the ambit of the village are set out, in-

cluding dedications to pious purposes, but there is nowhere any trace of lands held under *malikanadari* right.

It appears that in 1840 the regular survey of the District in which the Mouza is situated was taken in hand. As is well-known, these surveys are preceded by a preliminary measurement by an Amin, who lays down on a rough map the locality, without any guarantee of scientific accuracy, and enters in a register particulars regarding the plots gathered from people who collect to watch the proceedings. The map is called the *thakbast* map, and the register the *thak khasra*. The Amin's measurements are afterwards tested by expert surveyors.

The *khasra*, as its name implies, is a rough register, and statements entered in it have by themselves no evidentiary value. During the *thak* measurements connected with Amarpur Jabar, a statement appears to have been made before the Amin to the effect that within the Mouza in question there were certain persons who held *malikanadari* rights, and this officer is said to have made an entry in his register to that effect. The *thak* register was apparently produced in the Courts below. The District Judge refers to it, and the Judges of the High Court say they have looked into it themselves, but, strangely enough, neither the entry has been printed nor the register produced before their Lordships, and they are, therefore, unable to express any opinion on it, and must accept the statements contained in the judgments of the Courts in India that such an entry exists in the *thak khasra*. But, as already observed, by itself it proves nothing. Assuming that a claim of *malikanadari* right was put forward by some person or persons with regard to certain lands, it was one to the detriment of the actual owner of the pro-

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perty, and there is nothing to show that it was brought to her notice, or that she had an opportunity to controvert it. The property as it stood belonged to Umatuz Zohra, with whom the settlement was made in 1839 as owner and proprietor, and who has always paid the revenue assessed thereon, and until it can be proved that she knowingly acquiesced in the assertion made before the Amin, it would be absurd to treat it as evidence to support the present claim. The Subordinate Judge was of opinion that the Amin was fraudulently induced to make the entry having regard to what took place at the resumption proceedings their Lordships do not think his surmise was unwarranted. In 1876 the Bengal Land Registration Act (VII of 1876) came into force. The preamble of the Act runs as follows:—

“Whereas it is expedient to make better provision for the preparation and maintenance of Registers of revenue-paying and revenue-free land, and of the proprietors and managers thereof, and of certain mortgages of revenue-paying lands. It is hereby enacted as follows:—

Then follows the provision relating to such registration

For the first time in 1877, a claim is put forward, before the revenue authorities, in an application, dated the 31st May 1877, made under Act VII of 1876, for the registration of the names of the Defendants' ancestors in respect of a share of Mouza Amarpore Roop as part proprietors. The claim is with respect to lands lying in Mouza Amarpore Roop which, as already stated, had been incorporated with Amarpur Jabar in 1839, and an area of 226 bighas is claimed within that Mouza, although it is stated distinctly in the application that Umatuz Zohra stands registered as owner in the revenue records. This application was opposed in explicit terms by the pro-

prietors: they denied the existence of Mouza Amarpur Roop as a separate Mouza or that the applicants had any share in it. They stated further that had Mouza Amarpore Roop been a separate Mouza, or a dependency of any other Mouza, the applicants would have paid its Government revenue and road-cess. The application for the registration of the names of the Defendants' ancestors was dismissed by the Deputy Collector on the 7th December 1878, with the following remark:—

“On perusal of the report submitted by the Record-keeper it appears that Mouza Amarpore Jabar stands recorded on the mutation register, that there is no Mouza known by the name of Amarpore Roop entered therein, and that the names of the ancestors of the applicants in respect of Amarpore Jabar save and except the names of the ancestors of Nawab Ali Khan and Musammât Umdunnissa, do not stand recorded therein. From the evidence of the Patwaris and Gomashita, it appears that Mouza Amarpore Jabarpore is in the possession and occupation of Nawab Ali Khan and Musammât Umdunnissa and that Bal Mukund Singh and others, the applicants, have no connection with the registration of the name in respect of the said Mouza. Hence the objection of Nawab Ali Khan is allowed, and the application of Bal Mukund Singh and others, applicants, is rejected.”

From 1878, after the dismissal of this application, the Defendants have taken no action whatsoever for the assertion of the rights they claimed, until the matter came for the purpose of the cadastral survey under Act VIII of 1885. Sec. 103 (b) declares that “every entry in or record-of-rights prepared and published under the provisions of Chap. X shall be presumed to be correct until the contrary is proved.” Considerable stress has been laid on this presumption on behalf of the Respondents. Once, however, the landlord has proved that the land which is

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sought to be held rent-free lies within his regularly assessed estate or *mahal*, the onus is shifted. In the present case, the lands in dispute lie within the ambit of the estate, which admittedly belongs to the Plaintiffs and the *pro forma* Defendants, and for which they pay the revenue assessed on the Mouza. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognised by Government. This rule was pronounced as long ago as 1869, in a judgment by Sir James Colville, in the appeal of *Rajah Sahib Pershad Sen v. Doorgapershad Tewarice* (1) --

"The Appellant is the *Zemindar*, as such he has a *prima facie* title to the gross collections from all the *mouzas* within his *Zemindary*. It lay upon the Respondents to defeat that right by proving the grant of an intermediate tenure."

The Defendants have relied on two distinct facts in the assertion of the right they claim, viz., first, the statement in the *thakbast khasra*, and secondly, the non-payment of rent. It is clear upon the evidence that the property has all along been in the hands of *thikadars*. The *thikadar*, or lessee, pays the proprietor a fixed rental, and he is the person who collects the rent from the individual raiyats. The proprietor has no responsibility so far as actual collections are concerned. The collections are thus entirely in the hands of the *thikadar*. There can be little doubt that at the time of the settlement of 1839 the *thika* was held, if not by members of the family, certainly by members of the clan who held these lands. The evidence of Mukh Lal Singh, who has lands in his cultivation in Amarपुर Jabar, and who was a *gomashita* in that village for many

years, and whose father was before him *gomashita*, shows the actual character of this village --

"The landlords' share of the produce of these lands were always taken by the *thikadars* and *Katkinadars* under the landlords. I was *gomashita* under the *Katkinadars*, and collected their share of the produce for thirteen years. I worked with my father for three years. Collection papers were given by *gomashitas* and *Patwaris* to Dildar Ali Khan Malik. Dildar Ali Khan's share was in *thika* to Mozrul Huq. Mozrul Huq *Katkinadars* lease to Lolit Singh (*sic*) Mouza Amarपुर Jabar was never in Seer possession of the Maliks."

The evidence of non-payment of rent rests upon the testimony of one of the Defendants, Parsidh Narain Singh. He knows nothing of how they came into the possession of the property. He simply stated that "we were in adverse possession of these lands for the last seventy or eighty years," and can give no material for the conclusion he wishes the Courts to draw regarding his right to the lands. His evidence in cross-examination deserves notice --

"My father died in 1315 F S. I am looking to our affairs for last thirty or thirty-five years. At present Plaintiffs Dildar Ali Khan and Bakhar Ali Khan are the Maliks of Mouzah Amarपुर Jabar. We, Defendants, have *Milkiat* in Amarपुर Jabar also. I cannot say what are our shares in Amarपुर Jabar. I have no papers to show how we acquired *Milkiat* in Amarपुर Jabar. The statement made in my written statement that Amarपुर Jabar was the *Milkiat* of Musammam Um-mothur Zohura is correct. She was in exclusive possession of the lands of Amarपुर Jabar. The vendors of the Plaintiffs and Dildar Ali Khan and Bakar Ali Khan are the heirs and representatives of Musammam Um-mothur Zohura. The only evidence which we have of the statement that Mouzah Amarपुर Jabar was the *Milkiat* of Girwar Singh and Sheodayal Singh,

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our ancestors, and of Ummothur Zohura consists of the *thakbast* paper and the *dakhl kharij* proceedings”

Upon this evidence the Subordinate Judge came to the conclusion that the claim put forward by the Defendants was illusory. He considered the entry in the *thakbast* *lhasra* as having been made in fraud of the owner, and that the withholding of the rent, under circumstances which he detailed, did not create an estoppel or destroy the relationship of landlord and tenant.

The District Judge, as already stated, substantially came to the same conclusion.

The Judges of the High Court seem to have misunderstood the position. One learned Judge considers the Defendants' claim to be one of joint proprietorship with Umatuz Zohra. He says as follows —

“In the present case what is the evidence of fraud. The learned Subordinate Judge, in our opinion, has given no reason whatsoever upon which fraud can be established. He suspects fraud on the ground that there is inconsistency between the papers of 1839 and 1842. As a matter of fact, we do not think there was any inconsistency, because it is quite possible that Girwar and Sheodayal were both proprietors or claiming to be proprietors, and that one or the other of them was holding as tenant. The fact that Sheodayal was shown in 1839 as tenant of a plot would not in itself prove that the entry of 1842 showing them as proprietors of that land was fraudulent. Again, what is the evidence of fraud by the Patwar, Sheodayal, Girwar and the *thikadar*. There is no finding, nor is there any evidence that in 1842 either Sheodayal or Girwar were the servants of the *thikadar*. There is no finding that there was any sort of conspiracy between the *thikadar*, the Patwar, Girwar and Sheodayal. In these circumstances, to record a finding of fraud is, in our opinion, merely to proceed on suspicion, and if that is so, the finding is liable to be challenged, in second appeal.”

Their Lordships regret to observe that they do not follow the reasoning upon which this conclusion is based. The other learned Judge proceeds upon certain assumptions for which there does not appear to be any warrant on the record. He states —

“There is nothing to show that prior to 1838 there was any relationship of landlord and tenant between the predecessors of the Plaintiffs and those of the Defendants and that the lands were rent-paying at all. On the other hand, no revenue was paid for these lands to Government before the resumption of the lands in 1838, as the persons in possession of the lands claimed to hold them as revenue-free lands. Presumably the Defendants' ancestors held the lands in suit without payment of any rent or revenue.”

How he comes to draw the conclusion that “presumably the Defendants' ancestors held the lands without payment of rent or revenue” is difficult to understand.

Mr Justice Mullick says —

“From the Glossary, published by the Settlement Authorities, we are satisfied that the meaning of the word is that the Defendants are rent-free tenure-holders by arrangement with the Maliks. It denotes that the lands belong to an estate which was resumed under the Regulation II of 1819 and in which there were persons in possession who, although not taking settlement from the Collector, received by private arrangement with the settlement holder some lands in recognition of their former proprietary rights either on the footing of a rent-free tenure or on a promise to pay the proportionate Government revenue.”

The Glossary itself shows that the *mahikanadari* right could only come into existence by arrangement. Their Lordships can find no trace of evidence of any arrangement of the character assumed by the learned Judges.

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With regard to the claim by adverse possession, as already observed, the *mahal* had all along been held in *thika*; the lessee collected the rents and paid a fixed sum to the proprietor. If the *thikadar* failed to collect the rent from any individual tenant it would not create adverse possession against the proprietor.

Again, mere non-payment of rent or discontinuance of payment of rent has not, by itself, been held in India to create adverse possession. The identical question came for decision before the Calcutta High Court in the case of *Prasanna Kumar Mookerjee v. Srihanta Rout* (2), where Mr. Justice Mookerjee affirmed the proposition in clear terms.

On the whole, their Lordships are of opinion that the view taken by the High Court is erroneous, that their decrees in the several appeals should be discharged, and that the decrees of the District Judge should be restored. The Appellants will be entitled to their costs of these appeals, and in the High Court, and then Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs W. W. Box & Co* for the Appellants.

Solicitors: *Messrs. Watkins & Hunter* for the Respondents.

G. D. M.

(2) I. L. R. 40 Cal. 173; s. c. 17 C. W. N. 137 (1912).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 106 of 1922.

MOOKERJEE, J. BHOWANIDAS RAM-
RANKIN, J. GOBIND
1923, v.
24, April HARSUKHDAS BALKIS-
 HENDAS

Interest on award after date of award, if may be allowed by arbitrators—Ex parte award, when may be set aside by Court, on the ground that no special notice of intention to proceed ex parte, if party failed to appear, given—Prejudice.

There is no inflexible rule of law that arbitrators have no authority to allow interest on the amount awarded after the date of the award.

SEWIDUTRAI NARSARIA v. TATA SONS, LTD (4) dissented from.

UTTAMCHAND SALIGRAM v. MAHMOOD JEWANAMOOH (5) referred to.

IN RE MORPHETT (6) distinguished

IN RE BADGER (7) referred to

The failure of the arbitrators to give special notice to a party that they intended to proceed ex parte if he did not appear, is no ground for setting aside the award which they made in his absence where it appears that he would not have appeared in spite of such warning—the true test of the validity of such ex parte awards being whether the party complaining was prejudiced by the omission of the arbitrators to serve special notice on him.

UDAICHAND v. DEBIBUX (3) referred to

This was an appeal preferred on the 7th August 1922 against the judgment of Mr. Justice Buckland, dated the 18th July 1922.

(3) I. L. R. 47 Cal. 951 (1920).

(4) 27 C. W. N. 494 (1921).

(5) 23 C. W. N. 704 (1919).

(6) 2 D. & L. 967; 69 R. R. 868; 14 L. J. Q. B. 259 (1815).

(7) 2 B. & A. 691; 21 R. R. 456 (1819).

BHOWANIDAS RAMGOBIND *v* HARSUKHDAS BALKISHENDAS.

The facts of the case will appear from the judgment.

Mr. B. L. Mitter and Mr. M. N. Basu for the Appellant

Sir Binod Mitter and Mr. H. C. Mazumdar for the Respondent

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiffs from the judgment of Mr. Justice Buckland in a suit to set aside an arbitration award made by the tribunal of the Bengal Chamber of Commerce

The contract contained an arbitration clause in the following terms —“ Any disputes to be settled by arbitration under the rules of the Bengal Chamber of Commerce, or at the option of the sellers by the arbitration of two European Sugar Importers of Calcutta, one to be appointed by the sellers and one by the buyers, with power to appoint a European Merchant as Umpire. The decision of the Chamber, Arbitrators or Umpire shall be final and binding on both parties, either of whom may make the same a rule or order of Court. If the buyers shall fail to join in such arbitration or to appoint an arbitrator within three days after being required to do so, the arbitration may at the option of the sellers, proceed *ex parte*, and the award thereon shall be binding on the buyers, and the sellers may make the same a rule or order of the Court.”

On the 1st September 1920, the buyers made a reference to the Chamber. Thereupon correspondence followed. On the 4th October 1920, the Registrar of the Chamber intimated to the sellers that the reference had been received and requested them to send their papers on or before the 12th October, failing which arbitration would be proceeded with in their absence. On the same date the sellers stated that

they wanted time for a fortnight after which they would be able to send their statement and papers. On the 12th October, the Registrar sent an intimation that unless the statement and the papers were received, on or before the 30th October, the arbitration would be proceeded with *ex parte*. It was also intimated that no further extension would be granted under any circumstances whatever. On the 13th October, time was extended till the 11th November 1920. There was later a further extension till the 10th December 1920. It does not appear that the sellers took any steps whatever to join in the reference and to assist the arbitrators. On the other hand, on the 13th December 1920, they intimated that they would not submit to the jurisdiction of the tribunal of arbitrators, as the tribunal could not possibly have any jurisdiction over the matter. The result was that the arbitrators proceeded *ex parte*, and on the 23rd December 1920, an award was made. The sellers thereupon instituted the present suit to have the award set aside, on the ground amongst others, that it had been made without jurisdiction. Mr. Justice Buckland overruled this contention, investigated the other objections against the award, and dismissed the suit in view of the terms of cl. 17 of the contract. We agree with Mr. Justice Buckland that the sellers had the option to make a reference to the arbitration of two European Sugar Importers of Calcutta, but they never exercised that right. Consequently, the objection to arbitration by the Bengal Chamber of Commerce is futile and the award must be regarded as made with jurisdiction. In these circumstances, the contention of the Appellant has been limited to two grounds, namely, first, that the award should be set aside as proper notices were not given,* and, secondly, that the

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arbitrators had no authority to allow interest after the date of the award

As regards the first point it need not be disputed that arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear, *Crompton v. Mohan Lal* (1), *Sukhamal v. Babulal* (2) and *Udaichand v. Debibux* (3). But it is plain that the complainant has not been prejudiced in any manner by the failure of the arbitrators to give such notice, as was stated in *Udaichand v. Debibux* (3), the true test is, has the complainant who has taken exception to the validity of the award, been, in fact, prejudiced by the omission of the arbitrators to serve the special notice on him? If it is established that notwithstanding such warning, he would not have appeared before the arbitrators, he has really no grievance and cannot invite the Court to set aside the award on the ground of the alleged defect in procedure. In the present case, there can be no doubt that the Appellants had no intention to appear before the arbitrators. Indeed, up to the 13th December, they had taken no steps whatever to appear before the arbitrators. They might, on that date, have formulated their objections to the jurisdiction of the arbitrators and, under protest, filed their statements. This course they did not adopt, and we agree with Mr. Justice Buckland that the Appellants have not been prejudiced by the course taken by the arbitrators.

As regards the second point, reference has been made to the decision of Mr. Justice Greaves in the case of *Sewdutra Narsaria v. Tata Sons, Ltd.* (4) as an authority for the proposition that the arbi-

trators exceeded their authority when they allowed interest after the date of the award. If Mr. Justice Greaves intended to lay this down as an inflexible rule of law, we are not prepared to follow his ruling. On the other hand, we find that in *Uttamchand Saligram v. Mahmood Jewa Mamooji* (5) interest was allowed as has been done by the arbitrators in this case. The decision in *In re Morphett* (6) proceeded upon its special facts, and *In re Badger* (7), shows that the arbitrators have authority to make a decree for such damages as might have been assessed by the Court, see also *Edwards v. G. W. Ry. Co* (8), *Sherry v. Oke* (9) and *Beahan v. Wolfe* (10). In the case before us, there is no controversy that if the matter in dispute went to trial, the Court would in ordinary course have allowed interest as has been awarded by the arbitrators. The second point fails equally with the first.

The result is that the judgment of Mr. Justice Buckland is affirmed and this appeal dismissed with costs.

Messrs Pugh & Co, Solicitors for the Appellant

Messrs B. N. Basu & Co, Solicitors for the Respondent.

P. K. C.

(5) 23 C. W. N. 704 (1919)

(6) 2 D. & L. 967, 69 R. R. 888, 14 L. J. Q. B. 259 (1845).

(7) 2 B. & A. 691, 21 R. R. 455 (1819).

(8) 11 C. B. 588 (1851).

(9) 3 Dow. 349, 1 H. & W. 119 (1885).

(10) [1832] 1 Al. & N. 233.

(1) I. L. R. 41 Cal. 313 (1918).

(2) I. L. R. 42 All. 525 (1920).

(3) I. L. R. 47 Cal. 951 (1920).

(4) 27 C. W. N. 494 (1921).

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM APPELLATE DECREES

Nos. 992 AND 1022 OF 1920.

RASH BEHARI GUHA,
Principal Defendant,
v.
RICHARDSON, J. Appellant,
SUHRAWARDY, J.
1922,
v.
Heard, 1, June. DWARKA NATH
Judgment, 10, July. BANDOPADHYA, Plain-
tiff, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 115, scope and effect of—Sec. 115, if excludes presumption under sec 50 as to fixity of rent in support of entry in the record-of-rights—Presumption as to grounds on which an entry has been made.

An entry in a finally published record-of-rights described a certain holding as a holding at a fixed rent (*kaim karsha*). The landlord sued for recovery of its possession from the heirs of the purchaser of the interest of the original tenant. The lower Appellate Court held that to make the holding transferable the tenant would have to prove uniformity of rent since the Permanent Settlement, as the presumption under sec. 50 of the Bengal Tenancy Act would not be available to him under sec. 115 in consequence of the framing of the record-of-rights.

Held—That sec. 115 of the Bengal Tenancy Act does not exclude evidence of uniform payment of rent for the statutory period in support of an entry of fixity of rent in the record-of-rights, such entry being presumably based on the evidence of such uniform payment. The tenant, if denied liberty to prove this, would be deprived of the presumption under sec. 50, not only "after" the particulars under sec. 102 (b) of the Act have been recorded, but also in respect of the period prior to its publication.

PRITHICHAND LAL CHOUDHURY v. BASARAT ALI (1), SECRETARY OF STATE v. KAJI-

MUDDI (2) and HARIHAR PERSAD BAJPAI v. AJUB MISIR (3) distinguished.

This was an appeal preferred on the 26th April 1920 against a decree of the Additional Subordinate Judge of Zillah Backergunge (Babu Jatindra Ch. Lahiri), dated the 19th January 1920, reversing a decree of the Munsif, 1st Court at Barisal (Babu Satish Ch. Basu), dated the 15th January 1919.

The facts of the case are briefly as follows—Plaintiff-Respondent brought the suit out of which this appeal arose to recover possession of certain plots of land from the successors of the purchaser at a sale in execution of a money decree against the original tenant Nasaruddi. The trial Court dismissed the suit in toto. On appeal, the Subordinate Judge, differing from the Munsif, held that the Plaintiff was entitled to actual possession of a certain share. The question whether the Plaintiff was entitled to actual possession of any part turned on the transferability or otherwise of the holding in the hands of the original tenant Nasaruddi. The entry in the settlement record-of-rights was that the holding was a *kaim karsha* holding, i.e., a holding at a fixed rent. The Munsif held that the holding was transferable. The Subordinate Judge held that in order that the incident of transferability might attach to the holding, the tenant would have to prove uniformity of rent since the Permanent Settlement and the presumption of sec. 50 of the Bengal Tenancy Act would not be available to him under sec. 115, in consequence of the framing of the record-of-rights. He accordingly held that the holding was non-transferable, and therefore the Plaintiff was entitled to recover possession of a part of the holding according to his share. The tenant thereupon

(1) I. L. R. 37 Cal. 30; s. c. 13 C. W. N. 1149 (F. B.) (1903).

(2) I. L. R. 26 Cal. 617 (1899).

(3) I. L. R. 45 Cal. 930 (1913).

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preferred the present second appeal to the High Court.

Babus Mohendra Nath Roy and Sisir Kumar Ghosal for the Appellant in Appeal No. 1022

Babus Baranasibasi Mukherjee, Sibrum Mukherjee and Biraj Mohon Majumdar for the Respondent in Appeal No. 1022

Babus Baranasibasi Mukherjee and Sibrum Mukherjee for the Appellant in Appeal No. 992

Babus Mohendra Nath Roy and Ramendra Mohan Mazumdar for the Respondent in Appeal No. 992

The JUDGMENT OF THE COURT was as follows :—

S A No 1022 of 1920

RICHARDSON, J.—This is a second appeal preferred by the Defendant No. 1. The suit was brought by the Plaintiff to recover possession of certain plots of land to the extent of his share in a certain *taluk* and to the extent of the share to which he claimed title as purchaser in 1910 of the holding comprising those plots at a sale in execution of a decree for arrears of rent obtained by him against the Defendants Nos. 5 and 6 as raiyats.

The Plaintiff's share in the *taluk* as *talukdar* and *minas ijaradar* amounts to 10 as. 5 gandas. The share he claimed, of the raiyati holding was 9 annas 15 gandas. His claim is thus stated by the learned Munsif: "The Plaintiff prays for ejectment of the principal Defendants from the 10½ annas share or in the alternative for ejectment from ½ anna share corresponding to his subsequently acquired share in the *taluk*, and for a declaration of his right to receive from the principal Defendants the rents which Defendants Nos. 5 and 6 agreed to pay in respect of 9½ annas share, and also prays for mesne profits." The description of the ½ anna

share as corresponding to a subsequently acquired share in the *taluk* is apparently due to a misapprehension. The half-anna share is the difference between the *talukdari* share of 10 annas 5 gandas and the raiyati share of 9 annas 15 gandas (see prayer *kha* of the plaint).

The original tenant of the holding was one Nasaruddi Akan whose rights were purchased in 1904 by the Defendant No. 1's mother at a sale in execution of a money decree against him.

The trial Court dismissed the suit *in toto*.

In appeal the learned Subordinate Judge affirmed the dismissal as regards the share of the raiyati holding in the view that the dealings of the Plaintiff with the Defendants Nos. 5 and 6 were collusive and not binding on the Defendant No. 1. That finally disposes of the claim to the raiyati share with which we are no longer concerned.

As regards the *talukdari* share, the learned Subordinate Judge, differing from the Munsif, held that the Plaintiff was entitled to actual possession of the half-anna share referred to by the Munsif.

The question of the extent to which the Plaintiff is entitled to actual possession, if at all, is the subject of Appeal No. 992, preferred by him.

The question whether he is entitled to actual possession of any part is the subject of the present Appeal (No. 1022) and turns on the transferability or otherwise of the holding in the hands of the original tenant Nasaruddi. The Munsif found that it was transferable, the Subordinate Judge that it was not transferable. At first sight the question would seem to be one of fact but a point of some importance arises on the construction of sec. 115 of the Bengal Tenancy Act.

The learned Subordinate Judge states

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his opinion as follows.—“The learned Munsif did not decide whether the tenancy was a tenure or a holding but found that it was transferable. He based his finding mainly on the record-of-rights which described the tenancy as a *kaim karsha* permanent tenure, the various instances of transfers from time to time, the presumption of fixity of rent to be derived from uniform payment of rent since 1282 B. S., and the recitals contained in a mortgage-bond executed in favour of the Plaintiff's brother. A quite contrary state of things was found in several other documents with which Nasaruddi was concerned as also in a road-cess return, but the learned Munsif did not consider them as leading to any definite conclusion. Though he considered it possible that the tenancy was originally a mere *karsha* holding not transferable without a custom, he came to the conclusion that the assertion of a superior right and the fixity of rent for practical purposes due to uniform payment since 1282, invested it with the incident of transferability. I regret I am unable to accept his conclusions. If a holding be a non-transferable occupancy tenancy in its origin, the mere omission on the part of the landlord to enhance the rent within a certain period may in some cases disentitle him to claim any enhancement at any subsequent time but that does not convert the ordinary status to that of a raiyat at fixed rates as defined in sec. 5 of the Bengal Tenancy Act. The tenancy in question was never held at any rent fixed in perpetuity and consequently the incident of transferability does not attach to it. Moreover, it is not known if for practical purposes, even as observed by the Court below, the rent of Rs. 25 is not liable to be enhanced. If the landlords were now to institute an enhancement suit, the tenants in order to

avoid enhancement would have to prove uniformity of rent since the Permanent Settlement. The presumption of sec. 50 of the Bengal Tenancy Act will not be available to them under sec. 115, Bengal Tenancy Act, in consequence of the framing of the record-of-rights.”

The difficulty is created partly by the statement that when under the provisions of sec. 50 of the Bengal Tenancy Act, an occupancy holding is presumed to have been held at a uniform rent from the time of the Permanent Settlement, the status of the tenant may still differ from that of a raiyat holding at a fixed rent, but more especially by the opinion expressed in the learned Subordinate Judge's last sentence.

The entry in the record-of-rights, to which a presumption of correctness attaches under sec. 105B of the Bengal Tenancy Act, describes the holding as a *kaim karsha* permanent tenure. The term *kaim karsha* is explained by the learned Munsif “The word *karsha*,” he says, “literally means a cultivating interest and the term ‘*kaim karsha*’ would mean only a permanent or fixed *karsha*, i.e., in its literal meaning it would be only a holding at a fixed rent.” He goes on to remark that at the present day an occupancy holding at a fixed rent is in many cases not easily distinguishable from a tenure.

The result of the learned Subordinate Judge's view is this. The entry in the record-of-rights imports at least fixity of rent. Assume that the holding is not a tenure but a raiyat holding. Before the record-of-rights was prepared it was a holding to which sec. 50 of the Act would have been applicable if uniformity of rent for twenty years could be proved. It may well be that the description “*kaim karsha*” was adopted for the very reason that the facts raised the statutory pre-

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sumption We have it from another part of the learned Munsif's judgment that before the record-of-rights was finally published, the Plaintiff unsuccessfully attempted to get rid of the word "*kaim*" by means of an objection lodged under sec. 103A. After the publication of the record no attempt seems to have been made by him to dispute the accuracy of the description under sec. 106.

Nevertheless, in the opinion of the learned Subordinate Judge, if the correctness of the record is now disputed, sec. 115 of the Act precludes any reference to sec. 50 and the tenant must do the best he can without assistance from that section. Such a result would appear to be absurd and unjust but if that is the law we must of course accept it.

In the argument before us, reliance was placed for the Plaintiff on the decision of the Full Bench in *Prithuchand Lal Choudhary v Basarat Ali* (1). The present point, however, did not come before the Full Bench for decision.

Sec. 115 enacts that "when the particulars mentioned in sec. 102, cl. (b) have been recorded under this chapter in respect of any tenancy, the presumption under sec. 50 shall not thereafter apply to that tenancy." The word "thereafter" points to the period after the particulars mentioned have been recorded, but the question whether the recording of the particulars ended with the final publication of the record or with the further proceedings which might be taken under sec. 105 or sec. 106 had given rise to some difference of opinion. All that the Full Bench decided was that in proceedings under sec. 105 of the Act (to which sec. 105A must now be added) for the settlement of

a fair rent, the tenant was entitled to the benefit of the presumption under sec. 50.

It is true that towards the close of the judgment of the majority of the Full Bench, some observations were made dissenting from the view taken in *Secretary of State v Kaymuddi* (2) that a tenant whose rent had been entered in a record-of-rights as liable to enhancement might claim the benefit of sec. 50 in a suit instituted by him under sec. 111 to contest the correctness of the entry. "There can be no doubt," said the learned Judges, "that a suit of the nature brought there would lie as being within the contemplation of sec. 111, but after the tenant had omitted to appeal to the special Judge or to take proceedings under sec. 106 he could not be heard to complain that he had been deprived of a cherished right, when his claim for the benefit of the presumption under sec. 50 was confronted by the provisions of sec. 115."

So too in *Harihar Persad Bappai v. Ajub Miah* (3), the tenants having been recorded as occupancy raiyats and not as raiyats holding at fixed rents it was held that in a subsequent suit brought by the landlord in the Civil Court to enhance their rent they were not entitled to fall back on the presumption under sec. 50.

But the present case is very different. Here the holding was recorded as a holding at a fixed rent. It was the landlord who took no steps under sec. 105 or sec. 106 to challenge the correctness of this entry but now endeavours to go behind it. It will certainly go far to deprive the tenant of a cherished right, if in such a case as the present, he is told that he cannot support the entry by reference to the very presumption in virtue of which the entry may have been made.

(1) I. L. R. 37 Cal. 80; 13 C. W. N. 1149 (F. B.) (1909).

(2) I. L. R. 26 Cal. 617 (1899).

(3) I. L. R. 45 Cal. 930 (1918).

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In my opinion we are not obliged to construe sec. 115 in the way contended for. The rent having been entered as a fixed rent, the tenant is not "thereafter" applying the presumption under sec. 50 when he seeks to establish that the entry was founded on the presumption. In such a case the hypothesis is that the presumption has already been applied and all that the tenant asks is liberty to support and defend the entry on the grounds on which it was made. If that liberty is denied him he will be deprived of the benefit of the presumption not only "thereafter" but also in respect of the period prior to the publication of the record. He will be sadly crippled in his defence and in the result he will be doubly deprived first of the benefit of the presumption under sec. 50 and then of the benefit of presumption under sec. 115.

On the other hand, where the rent is entered as variable in a record made and completed under Chap. X, the raiyat does "thereafter" apply the presumption if he seeks aid from it by way of attack in a suit under sec. 111 or by way of defence in a suit by the landlord for enhancement of rent.

It may be said that the Revenue Officer leaves no record of his reasons for making any particular entry. But in such a case as the present, where the terms of the tenancy have to be gathered not from a written instrument but from the conduct of the parties, it is difficult to suppose that the Revenue Officer was not guided at any rate in part by the provisions of sec. 50. In any case I should be of opinion that an entry should be taken to have been made on all the grounds on which it might have been made.

The whole reasoning of the learned Subordinate Judge is coloured by his view as to the effect of sec. 115. He refers himself

without question or dissent to the "uniform payment of rent since 1282 B. S." found by the Munsif. He laid some stress on a cess return in which this holding is entered under the general head of raiyati holdings. An examination of the return, however, shows that it makes no distinction between raiyati holdings at fixed rates and other raiyati holdings. He appears to suggest, as I have already indicated, that even if the presumption under sec. 50 was applicable when the record-of-rights was under preparation, the tenant would not become by force of the presumption a raiyat at a fixed rent, a view from which I disagree. His conclusions that "the tenancy in question was never held at any rent fixed in perpetuity and consequently the incident of transferability does not attach to it," and his later findings "that the entry of *harm karsha* as made in the record-of-rights was not correct and that the presumption in its favour is sufficiently rebutted," are all due to the fact that he misapplied the law to the facts with which he had to deal.

I have no doubt that if the learned Subordinate Judge had not misdirected himself in law, he would have come to the same conclusion as the learned Munsif.

In the result therefore I would set aside the judgment and decree of the Subordinate Judge and restore the decree of the Munsif dismissing the suit in its entirety. The Defendant No. 1 is entitled to his costs of this Court and of the lower Appellate Court.

S. A. No. 1022 of 1920.

SUHRAWARDY, J.—I agree. As I read sec. 115, Bengal Tenancy Act, it provides against clashing of presumptions. It will not permit the presumption under sec. 50 of the Act to override that raised from the record of the particulars under Chap. X. The marginal note against the section

RASH BEHARI GUHA v. DWARKA NATH BANDOPADHYA.

lends support to this view. It will not be reasonable to suppose that the legislature intended by enacting sec 115 to preclude evidence of uniform payment of rent for the statutory period in support of the entry of fixity of rent in the record-of-rights where such entry is presumably based on the evidence of such uniform payment. It will be shutting out a very valuable piece of evidence in favour of a comparatively weak one. If the tenant succeeds in proving uniform payment of rent from the time of Permanent Settlement, the rent shall not be liable to be increased whereas the presumption of the correctness of an entry in the record-of-rights though based on such uniform payment is only a rebuttable one.

I fully concur in the reasonings adopted by my learned brother and the conclusion at which he has arrived.

Appeal No. 992.

In view of the judgment which we have delivered in Appeal No. 1022, this appeal No. 922 must be dismissed. In this case we make no order as to costs.

J. N. R. Appeal decreed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE.

No. 1804 OF 1920.

<p>(C. C. GHOSE, J.) PANTON, J. 1922, Heard, 23, November. 1923, Judgment, 21, February.</p>	<p>SM. ABEDUNNISSA BIBI and ors., Plaintiffs, Appellants, v. ISUF ALI KHAN, Defendant No. 1, Respondent.</p>
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Limitation Act (IX of 1908), Sch. I, Arts. 62, 120, 123—Succession certificate taken out by one heir—Suit by other heirs to recover shares of moneys collected by former—Limitation—Suit whether for accounts.

A suit by some of the heirs of a deceased

person to realise their share of moneys collected by another heir on the strength of a succession certificate taken out by the latter is governed by Art. 62 and not by Art. 120 or Art. 123 of the Limitation Act.

ABDUL GHAFAR v. NUR JAHAN (1) *re-
lied on.*

This was an appeal preferred on the 12th July 1920 against a decree of the District Judge of Hooghly (S. C. Mallik, Esq.), dated the 6th April 1920, reversing a decree of the Subordinate Judge of that District (Babu Kedar Nath Chandhuri), dated the 31st July 1917.

The facts of the case will appear from the judgment.

Dr. Sarat Ch. Basak and Babu Prakas Chunder Pakrashi and Mr. A. K. Fuzlul Huq for the Appellants.

Babu Sarat Ch. Roy Chaudhury and Mr. I. S. M. Ikram for the Respondent.

The JUDGMENT OF THE COURT was as follows.

The facts which have given rise to this appeal, shortly stated, are as follows—One Azmatullah Khan carried on business as a hatter in Calcutta. On the death of Azmatullah the Defendant No. 1, who is a son of the deceased by his wife, the Defendant No. 4, obtained a certificate under the Succession Certificate Act for the collection of debts due to the estate of the deceased. It is alleged on behalf of the Plaintiffs, who are the sons of the deceased by his wife, the Plaintiff No. 4, and also by the latter that the Defendant No. 1 realised all the debts due to the estate of the deceased but has not accounted for the moneys so realised and has not paid to the Plaintiffs their share of the same. The Plaintiffs therefore prayed for an account of these moneys and for recovery of their share thereof, it

(1) I. L. R. 37 ALL. 481 (1915).

SM ABEDUNNISSA BIBI v. ISUF ALI KHAN.

being alleged that the Plaintiffs are entitled to a nine annas share in the said moneys. The Defendants alleged that accounts had already been rendered to the Plaintiffs once in 1313 B. S. and again in 1316 and that as the Plaintiffs had themselves realised some of the debts due to Azmatullah and had already got more than what was due to them, there was nothing due to the Plaintiffs by the Defendant No 1. It was also alleged that in any event the suit was barred by limitation.

The Subordinate Judge who tried the case in the first instance held that the share of the Plaintiffs was annas nine as claimed by them and that the Plaintiffs had not realised anything and that the Defendant No 1 had not rendered any accounts. He also found that the suit had been instituted within time and accordingly ordered the taking of accounts. On appeal, the lower Appellate Court found that the share of the Plaintiffs was only eight annas and not annas nine as claimed by them. It was further found that there had been no submission of accounts to the Plaintiffs as alleged by the Defendant No 1. On the question of limitation, the lower Appellate Court held that Art 62 of the second schedule of the Limitation Act applied to the facts of the present case and not Art. 120 and in that view of the matter held that the suit was barred by limitation.

The Plaintiffs have appealed against the judgment of the lower Appellate Court and on their behalf it has been contended that the suit was not barred by limitation. Under Art. 62 of the Limitation Act a Plaintiff in a suit for money payable by the Defendant to the Plaintiff for money received by the Defendant for the Plaintiff's use has a period of three years from the date when the

money is received to institute a suit for the same. In the present case the lower Appellate Court found that the moneys in question were last collected by the Defendant No. 1 in December 1909 and that inasmuch as the present suit was not instituted till the 29th July 1916, it was contended on behalf of the Appellants that Art 62 is the proper article applicable to the facts of this case. It is, however, contended on behalf of the Appellants that inasmuch as the present suit was one for accounts, the Plaintiffs had six years' time under Art 120 to institute their suit and that time ran against the Plaintiffs from the date when there was a definite refusal on the part of the Defendant No. 1 to render accounts. Under Art. 120 time runs from the date when the right to sue accrues and as pointed out by the lower Appellate Court, if in a suit for accounts, time is made to run from the date when the Defendant refuses to comply with the Plaintiff's demand for accounts, there would practically be no limitation in a suit for accounts, for the Plaintiff in such a case may choose to wait as long as he likes and all that he would have to do to save limitation even under Art 120 is to send a letter of demand to the Defendant and to institute a suit within six years of the refusal thereof. From the dates mentioned above, it would clearly appear that if the Plaintiffs' suit were held to be governed by Art 62, it was out of time, and even if Art. 120 were made applicable, it was still out of time. It was next contended on behalf of the Plaintiffs, as was also contended in the Court below, that the suit was really one under Art. 123 of the Limitation Act, it being one for a distributive share of the property of an intestate. The debts in question were collected by the Defendant No. 1 by

SM. ABEDUNNISSA BIBI v. ISUF ALI KHAN.

virtue of the certificate under the Succession Certificate Act and the Defendant No. 1 could not be described to be a person, who either as an executor or an administrator represented the estate of the deceased, and he was not under any obligation to distribute the shares in the property of the deceased to those entitled to them. In our opinion, therefore, Arts. 123 and 120 had no application to the facts of the present case. We think this case is covered by the decision of the Allahabad High Court in the case of *Abdul Ghaffar v. Nur Jahan* (1) and that Art. 62 applied to it. The result, therefore, is that we agree with the view taken by the learned District Judge on the question of limitation and that this appeal fails and must be dismissed with costs.

N. G.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE

No. 156 OF 1920

GREAVES, J.

B. B. GHOSH, J.

1922,

Heard, 27 and

28, February.

Judgment,

28, February.

SARODA PRASAD

BANERJI, Defendant;

Appellant,

v.

GOSTO BEHARI HAZRA,

Plaintiff, Respondent.

Hindu law—One member mortgaging joint family property on representation of his competence, if can afterwards invoke the title of another member in order to defeat the mortgagee or his representatives—*Estoppel*—Share of another member subsequently inherited by said mortgagor if bound by the mortgage—*Burden of proof* as to knowledge of true facts, whether an mortgagor or mortgagee—*Assignee with notice from person without notice, position of.*

Two members of a joint Hindu family, for family necessities, mortgaged some of the joint family properties, representing that they were entitled to deal with the

whole interest. One of them inherited the shares of the other members, and after the properties were sold in execution of the mortgage decree, he brought a suit for the recovery of the shares of the member who had not joined in the mortgage.

Held—That having regard to the representation made in that mortgage by the Plaintiff, he must be bound by the estoppel created by the statement and it was not open to him to assert that the share of the member who had not joined in the mortgage was not bound by the mortgage.

RANGA RAU v. BHAVANNI (1) distinguished

That in view of the representation as to the competence of the mortgagor to deal with the share of a member who was not joining in the mortgage, the burden shifted on the mortgagor and those claiming under him to show the mortgagee's knowledge of the true facts. If the original mortgagee did not know, the mere fact that the person claiming through him may have known, does not prevent the latter getting a good title to the properties and relying on the estoppel which the original mortgagee could have set up against any claim by the Plaintiff in any suit.

This was an appeal preferred on the 9th January 1920 against a decree of the Subordinate Judge of Midnapore (Babu Banwari Lal Banerji), dated the 20th September 1919, modifying a decree of the Munsif at Garbeta (Babu Bejoy Gopal Chatterji), dated the 25th January 1918.

The facts are briefly as follows.—One Shyama Charan died leaving three sons; Sridhar, Srinath and Saroda. Srinath died leaving a daughter Kusum Kumari

SARODA PRASAD BANERJI v. GOSTO BEHARI HAZRA.

and Saroda died leaving a widow Sasimukhi. The joint family formed by these persons was in straitened circumstances and Sridhar and Sasimukhi joined in borrowing on mortgage a sum of money, for family necessities, from one Kali Prosad and they executed in favour of Kali Prosad an usufructuary mortgage representing that they, *i.e.*, Sridhar and Sasimukhi were entitled to deal with the whole interest. A decree was obtained on the mortgage. Kali Prosad after partially executing the decree assigned his interest to another person, and the mortgaged properties were again sold by the said assignee of Kali Prosad. Sridhar, on the deaths of Kusum Kumari and of Sasimukhi, inherited the shares of Srinath and Saroda, and in respect of these shares brought a suit for recovery of possession of the properties sold. The Munsif held that the Plaintiff Sridhar could not invoke the title of Kusum Kumari, and that as the mortgage was executed in respect of liabilities which were binding on the whole family it was not open to the Plaintiff who purported with Sasimukhi to deal with the whole interest to now come forward and set up a claim founded on the fact that by reason of Kusum Kumari's death he could claim the share of Srinath. On appeal the Subordinate Judge reversed that decision. The representatives of the original mortgagees thereupon preferred the present second appeal to the High Court.

Dr. D. N. Mitter (with *Babu Parash Nath Mookerji*) for the Appellant.

Babus Brojo Lal Chakravarty and *Santimoy Majumdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

In this appeal the Defendants Nos. 1, 2, 3 and 4 are the Appellants and the ap

peal is directed against a decision of the Subordinate Judge of Midnapore modifying a decision of the Munsif. The suit was commenced by one Sridhar for possession of 20 plots in Sch. Ka and for confirmation of possession of 11 plots in Sch. Ga. One Shyama Charan was the owner of 1/5th share of the plots comprised in Sch. Ka. He was also entitled to a similar share of the plots comprised in Sch. Ga. Shyama Charan died leaving three sons, Sridhar, Srinath and Saroda. Srinath died leaving a daughter Kusum Kumari and Saroda died leaving a widow Sasimukhi. The joint family formed by these persons was in straitened circumstances and Sridhar and Sasimukhi joined in borrowing on mortgage a sum of money, as both Courts have found, for family necessities from one Kali Prosad and they executed in favour of Kali Prosad a usufructuary mortgage in the year 1898 of plots Nos. 1 to 6 in Sch. Ka, representing that they, that is to say, Sridhar and Sasimukhi were entitled to deal with the whole interest. A decree was obtained against Sridhar and Sasimukhi and on the 14th April 1900, Sridhar and Sasimukhi borrowed money to pay off this decree by mortgaging plots Nos. 7 to 10, plot No. 12, plot No. 13 and plots Nos. 17 to 20 of Sch. Ka and in the year 1901 Kali Prosad obtained a decree against Sridhar and Sasimukhi in respect of the mortgage. The plots were sold on the 16th July 1920, that is to say, the plots comprised in the mortgage and they were purchased by the mortgagee Kali Prosad with the exception of plots Nos. 18 to 20 which were bought by the first Defendant in the present suit. The sale did not realise sufficient to pay off the mortgage debt and on the 7th February 1905 Kali Prosad assigned his interest in plots Nos. 7 to 10 and plots

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Nos. 12, 13 and 17 to Defendant No. 4 who was a *benamdar* of Defendant No. 3. Sridhar in 1905 obtained a lease of the plots Nos. 18 to 20 from Defendant No. 1. As I already stated the mortgage sale did not realise sufficient to pay off the mortgage debt and accordingly Defendant No. 3, the assignee of Kali Prasad, took steps under sec 90 to realise the balance of the decretal amount due under the mortgage and on the 3rd November 1905, the equity of redemption in plots Nos 1 to 6 and in plot No. 15 of Sch. Ka and plots Nos 4, 8 and 9 to 11 of Sch. Ga were sold to pay off the balance of the mortgage debt. On the 15th November 1905, plots Nos 2 and 3 of Sch. Ka were sold for arrears of rent and on the 16th March 1906 plots Nos 5 and 6 of the same schedule were similarly sold for arrears of rent. Sridhar in the events which had happened, namely, the deaths of Kusum Kumari and of Sasimukhi inherited the shares of Srinath and Saroda and it is in respect of these shares that this present suit is brought. Now, the Munsif has found that with respect to the Plaintiff's title to one-half of *dags* Nos. 2 and 3 and *dags* Nos. 5 and 6, the Plaintiff's title has become extinguished by the sales in execution of the rent decrees and with regard to *dags* Nos. 1 to 6, he found that the Plaintiff cannot invoke the title of Kusum Kumari and he arrives at a similar finding with respect to *dags* Nos. 7 to 10, 12 and 13 and 17 to 20. He arrives at a similar finding with regard to *dags* Nos. 14, 15 and 16 and the only relief that he gave to the Plaintiff is in respect of plots Nos. 4, 8, 9 and 11 of Sch. Ga. What in effect he holds is that the mortgage or rather the mortgages were executed in respect of liabilities which were binding on the whole family and that it is not open to the Plaintiff who purported

with Sasimukhi to deal with the whole interest to now come forward and set up a claim founded on the fact that by reason of Kusum Kumari's death he can claim the share of Srinath.

On appeal the Subordinate Judge has given to the Plaintiff $\frac{1}{2}$ in plots Nos. 7 to 10 and similar portions in plots Nos. 12, 13 and 17 to 20 of Sch. Ka. He also gives $\frac{2}{3}$ ids in plots Nos. 1, 2, 3 and 4 on certain conditions and he gives him $\frac{2}{3}$ ids of plot No. 15 and also a share in plots Nos. 1, 8, 9 and 11 of Sch. Ga. He dismissed the suit as far as plot No. 16 of Sch. Ka and as far as plots Nos. 5 and 6 of Sch. Ka are concerned. Now, so far as plots Nos. 7 to 10 and plots Nos. 12, 13, 17, 18, 19 and 20 are concerned, it is argued on behalf of the Appellant that they were comprised in the mortgage of 1901 whereby the Plaintiff Sridhar and Sasimukhi purported to transfer the entire interest including the interest of Srinath, and it is urged on behalf of the Appellant that having regard to the representation made in that mortgage by Sridhar it is not now open to him to assert that the share of Srinath was not bound by the mortgage. It is not necessary to refer to the case which has been cited before us, and clearly, as the learned Vakil for the Appellant has pointed out, the case upon which the Subordinate Judge apparently relied, namely, the case of *Ranga Rau v Bhavayanni* (1) has no application and the Subordinate Judge seems to have misconceived, if I may say so, the principles upon which it was based. In that case the claimant was not the person who had made the representation but it was another person who claimed in another right entirely, that is, in the right of his maternal grandfather and accordingly he was not bound by any

(1) I. L. B. 17 Mad. 473 (1894).

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representation which may have been made by another person through whom he did not claim and also in respect of another's interest, namely, that of the paternal grandfather. So far as the other plots are concerned, plots Nos. 14 and 15, and plots Nos. 1, 2, 3 and which were sold in the sec. 90 proceedings and plots Nos. 4, 8, 9 and 11 of Sch. Ga, it is urged except as regards plots No. 15 and plots Nos. 9 and 11 of Sch. Ka that the decision of the lower Court is wrong with regard to the 2/3rds of these plots which were given to the Plaintiff having regard to the fact that on the findings of both Courts Sasimukhi's share must have passed as the debt was not a personal debt of hers but was one for the necessity of the family as a whole, and the Appellant contests the decision of the Subordinate Judge with regard to the 1/3rd share of Kusum Kumari because he says that it was by reason of the representation contained in the mortgage that these shares were brought to sale.

On behalf of the Respondent it is said that no question of estoppel arises having regard to the finding of the lower Appellate Court which is binding upon us. Now, those findings can be found at pp. 26 and 27 of the paper-book and what the Judge says is this, that the Defendants who are the mortgagees or their representatives ought to have proved that Kali Prosad, the mortgagee, did not know of the existence of Kusum Kumari and that as proof of this fact was not given it is not open to the Defendants to rely on the doctrine of estoppel. Now, it seems to us that the learned Judge has wrongly laid the burden of proof, so far as this question is concerned; as soon as the mortgage deed was produced which contained a representation with regard to Kusum Kumari's share, it seems to us that the

burden was no longer on the mortgagees to establish that Kali Prosad did not know the true position but the burden of proof shifted on the mortgagors and those claiming under them to show Kali Prosad's knowledge of the true facts. This being so, it does not seem to us that there is any finding of the lower Court which precludes us from holding that the Plaintiff Sridhar is bound by the estoppel created by the statement. Then so far as Defendant No. 1 is concerned what the Judge says is this: that he would hold that Defendant No. 1 knew of the existence of Kusum Kumari. But it seems to us that their knowledge is really of no consequence. If Kali Prosad did not know then the mere fact that Defendant No. 1 who claims through Kali Prosad may have known this fact does not prevent his getting a good title to the properties and relying on the estoppel which Kali Prosad could have set up against any claim by Sridhar in any suit. It seems to us therefore that the Munsif is right in the view which he took and that he correctly stated the law so far as estoppel is concerned for the purpose of this case. Accordingly what in effect we are doing is to restore the decision of the Munsif except that we think that the Plaintiff is entitled to 1/3rd share of plot No. 15 of Sch. Ka, that is to say, the share of Kusum Kumari which was not mortgaged and in respect of which no estoppel arises. We accordingly with these alterations restore the decree of the Munsif and reverse the decision of the Subordinate Judge except as regards the one-third of plot No. 15 of Sch. Ka.

The Appellant will be entitled to get three-fourths of the costs in all the Courts.

J. N. R.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No 323 OF 1923.

NEWBOULD, J.
SUHRAWARDY, J.
1923,
30, July.

RADHA RAMAN
KUNDU, Petitioner,
v.
GOPAL CHANDER
SINHA, Opposite
Party.

Succession Certificate Act (VII of 1889), secs 10 (1), 19; 26 (2)—Order refusing extension of certificate, if appealable.

An order made under sec 10 (1) of Act VII of 1889, refusing an application to extend the certificate to any debt or debts not originally specified therein is appealable under sec. 19 of the Act

VENKATESWARULU v. BRAHMARAVUTU RAJA KRISTNAJI (1) distinguished.

This was a Rule obtained against the order of R. F. Lodge, Esq., District Judge of Munshidabad, dated the 8th March 1923, confirming that of Babu A. K. Guha, Munsif, 1st Court, Kandi, dated the 18th December 1922.

The facts will appear from the judgment.

Dr Jadu Nath Kanplal and Babu Binode Lal Mukherjee for the Petitioner
Babu Mohesh Chunder Banerjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows.—

The Petitioner in this case obtained a certificate of succession under Act VII of 1889 to collect certain debts of one Gour Sunder Kundu. Subsequently he applied for extension of the certificate under sec. 10 of the Act to collect other debts. That application was refused by the Munsif who was empowered to deal with applications under this Act. An appeal against his order was preferred to the District Judge and he on the authority of the Madras High Court, *Venkateswarulu v.*

(1) I. L. R. 25 Mad. 684 (1901)

Brahmaravutu Raja Kristnaji (1) held that no appeal lay. We are unable to accept the view of the learned District Judge. He has overlooked the fact that there is a marked difference between the facts of the present case and those of the case on which he relied. In the Madras case the appeal was preferred against an order granting an application under sec. 10 for extension. Here the appeal is against an order refusing such an extension. Sec 19 read with the proviso to cl. (2) of sec. 26 of the Act lays down what are appealable orders under this Act, and they are orders granting, refusing or revoking certificates. We think an order refusing certificate as to some of the debts alleged to be due to the deceased comes within the terms of sec. 19.

We accordingly make this rule absolute. We set aside the order of the lower Court and direct that he do re-hear the appeal according to law. Costs of this Rule will abide the result, and assess hearing fee at one gold mohur

H C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV No. 378 OF 1923.

C. C. GHOSE, J.
CUMING, J.
1923,
21, May.

BANSI MIRDHA and
ors., Petitioners,
v.
BROJESWAR DUTT,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 423—Appellate Court—Power to dismiss appeal for non-appearance of Appellant.

When after the presentation of an appeal the records are called for and the date of hearing is fixed, the Court of Appeal cannot dismiss the appeal merely for the non-appearance of the Appellant's pleader without complying with the provisions of sec. 423, Cr. P. C.

This was a Rule granted against an

(1) I. L. R. 25 Mad. 684 (1901).

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order of the District Magistrate of Rajshahye, dated the 2nd March 1923, dismissing summarily an appeal preferred by the accused against the conviction and sentence passed upon them by the Honorary Magistrate of Nowgong on the 31st July 1923.

The facts relating to this case are briefly as follows :—

The Petitioners Bansi Mirdha and three others were convicted under sec 341, Cr P. C. and sentenced to pay a fine of Rs 50 each or in default to undergo simple imprisonment for 15 days, by the Honorary Magistrate of Nowgong having second class powers by his judgment and order, dated the 31st January 1923. Against the said conviction and sentence the Petitioner preferred an appeal in the Court of the District Magistrate of Rajshahye whereupon the District Magistrate called for the records of the case and fixed the 2nd March 1923 as the date for the hearing of the said appeal. Neither the Petitioners nor their Vakils appeared on the said date of hearing whereupon the Magistrate made the following order :—“ No one appears for the Appellant and no application is filed. It is now 12-30 P.M. The appeal is dismissed ” Against the said order the Petitioners moved this Court and obtained the present Rule.

Babu Phannindra Lal Maitra for the Petitioners—Sec. 419, Cr P. C., lays down what documents shall accompany the petition of appeal. In the present case the copy of the judgment appealed against was filed along with the petition of appeal under sec 421, Cr P. C. The Appellate Court can only dismiss the appeal summarily upon perusal of the petition of appeal and also of the judgment appealed against. If the Court, however, does not dismiss the appeal summarily under sec. 421, it shall cause

notice under sec 422 to be given to the Appellant or his pleader of the time when and the place at which such appeal will be heard and then it shall send for the records of the case. The Appellate Court only after perusal of such records on their arrival and after hearing the Appellant or his pleader, if he appears, may dismiss the appeal if it considers that there is no sufficient ground for interfering. It follows from the above sections that the Appellate Court cannot dismiss the appeal merely for the non-appearance of the Appellant or his pleader. The Appellate Court must and shall comply with the provisions of sec 423 before dismissing the appeal [References to *Raj Kumar Sinha v Tincouri* (1), *Ramtahal v. Emperor* (2) and *Queen-Empress v Pohni* (3)].

Mr Israf Ali, Counsel (with him *Babu Durga Charan Roy Choudhury*, Vakils) for the Opposite Party did not oppose the Rule.

The JUDGMENT OF THE COURT was as follows :—

In this case it appears that after the appeal in the lower Court had been presented, the records were called for by the Magistrate. On the 2nd March 1923, after the records had arrived, it being the date of the hearing of the appeal, the appeal was taken up for hearing. On that date, no one appeared in support of the appeal on behalf of the Appellant and no application for adjournment was filed. The learned Magistrate thereupon dismissed the appeal. Under the provisions of sec 423, Cr. P. C., it was incumbent upon the learned Magistrate to go through the record and to dispose of the

1) 12 C. W. N. 248 (1907).

2) 18 C. W. N. 684 (1909).

(3) I. L. R. 13 All. 171 (F. B.) (1891)

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appeal on the merits. He could not dismiss the appeal merely because there was default in the appearance of the pleader for the Appellant.

In this view of the matter the Rule is made absolute. The matter is remitted to the learned Magistrate in order that he may re-hear the appeal and dispose of the same in accordance with the terms of sec. 423, Cr. P. C.

S. C. C.

PRIVY COUNCIL.

[APPEAL FROM THE SUPREME COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

LORD BUCKMASTER.

SIR JOHN EDGE.

THAKURAIN HAR-

SIR LAWRENCE JENKINS.

NATH KUAR,

LORD SALVESEN.

Appellant,

1922,

v.

Heard, 26 and

THAKUR INDAR

27, October.

BAHADUR SINGH,

Judgment,

Respondent.

28, November.

Oudh Estates Act (I of 1869), List II, estate of Hindu Talukdar included in, succession to - Transfer by reversionary heir during life-time of widow whether governed by Hindu law - Interest, an expectancy and not transferable - Decree in his favour against widow, declaring him entitled to succeed after her death, if confers vested interest in estate - Transfer of spes successionis for consideration - Suit to recover consideration, if lies - Contract Act (IX of 1872), sec 65 - Agreement void from inception, if within section - Limitation - Time from which limitation runs, when agreement discovered to be void - Limitation Act (IX of 1908), Sch. I, Arts. 62, 97 - Pleadings, defective - Relief given upon materials on record.

Under the Oudh Estates Act, the succession to collaterals opens on the death of the widow just as under Hindu law.

Under the ordinary Hindu law, transfer by such a collateral of his expectancy to succeed to the estate on the death of the widow of the last male owner is inoperative.

The widows of the last male owner of an estate in Oudh, entered in List II attached to the Oudh Estates Act, I of 1869, having set up a Will of the deceased husband, empowering them to adopt, the then next reversionary heir expectant sued the widows and obtained against them a declaration that the Will was void and invalid and that he was entitled to succeed to the estate on the death of the last surviving widow

Held—That the decree was binding only on the widows and the Court of Wards which had taken over the estate and did not create in the Plaintiff an interest in the estate that did not otherwise exist.

Held therefore—That a purchaser of the estate from the Plaintiff in the suit, in the life-time of the widows, was not entitled to recover possession on the strength of his purchase.

That the purchaser was entitled to recover the consideration money which he paid, under sec 65 of the Indian Contract Act, limitation for such a suit running from the date when he discovered that the sale was void.

Sec 65 of the Contract Act deals with (a) contracts which become void and (b) agreements not enforceable as contracts and therefore void from their inception. An agreement discovered to be void, within the meaning of the section, is therefore one discovered to be not enforceable by law from its inception as distinct from a contract which becomes void.

There being materials on the records justifying the Court in holding that there was a misapprehension on the part of the purchaser as to the rights of his vendor in the estate he professed to transfer and that the true nature of those rights was not discovered by him until his demand for possession was resisted, and that this

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date was well within the period of limitation, the Judicial Committee gave him a decree for recovery of the consideration money in accordance with the provisions of sec. 65 of the Contract Act, although the case, as bearing on the provisions of this section, had not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts.

This was an appeal from a decree, dated the 20th March 1918, of the Court of the Judicial Commissioner of Oudh (Lindsay and Stuart, J C), affirming a decree of the Subordinate Judge of Bara Banki, dated the 3rd August 1915

The Plaintiff-Appellant sued to recover possession of the properties specified in the plaint, under a deed of sale executed by the Defendant-Respondent on the 2nd January 1880. Both the Courts below have held that what was sold by the Respondent in 1880 was a mere right of expectancy, and that the sale thereof was absolutely null and void, and that the Appellant could not recover possession of the properties sold from the Respondent, who was admittedly the owner in possession thereof. The appeal raised questions of law relating to the construction of the terms of the sale-deed, the meaning and effect of secs. 2 and 22 of the Oudh Estates Act, 1869, and the application of the law of limitation.

The facts of the case determined concurrently by the Courts below may be shortly stated as follows:—One Bhaya Naipal Singh was the owner of two Taluqas, named Paska and Lilar, situate in the districts of Gonda and Bara Banki respectively, and both these Estates are entered in List II, attached to the Oudh Estates Act, I of 1869, that is to say, they were Estates which, according to the family custom, ordinarily “devolved upon

a single heir,” under the provisions of sec. 8 of the said Act.

The said Taluqdar died childless on the 28th October 1873, leaving two widows, namely, Thakurain Iklas Kuar and Chhoti Thakurain, him surviving, and the widows thereupon became tenants for their respective lives of the two Estates. The widows were not “heirs” of the deceased Taluqdar, for the word “heir” is defined by the Oudh Estates Act, 1869, as follows:—“‘Heir’ means a person who inherits property *otherwise than as a widow* under the special provisions of the Act.”

The Respondent claimed to be the heir of the deceased Taluqdar, and when the said widows put forward a Will of their husband, purporting to empower them to adopt a son, the Respondent instituted a suit against them in 1878, for a declaration that the Will alleged by the widows was invalid, and that the Respondent was the heir of the deceased Taluqdar, subject to the life estates of the widows. The Respondent’s claim was decreed on the 22nd October 1878, by the Deputy Commissioner of Bara Banki in terms following:—

“Such evidence, oral and documentary, as the Plaintiff produced having been heard and due consideration having been given to what was alleged by his representatives, the Court orders and decrees that the Will, dated 15th October 1873, copy of which is filed with this suit, is declared void and invalid and the Plaintiff is declared entitled to succeed to Paska and Lilar Estates on the death of the last surviving widow of the late Naipal Singh.”

In 1878 the Respondent was a poor man, and sums amounting to Rs. 20,000 were advanced to him by the Appellant’s husband, Raja Sher Bahadur Singh, for the purpose of the litigation described above and other expenses. On the 2nd January

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1880, the Respondent executed the deed of sale on which the present suit was brought by the Appellant. It was in the following terms :—

"I (i.e., Indar Bahadur Singh) have borrowed Rs. 5,000 more from Rachpal Singh, son of Raja Sher Bahadur Singh, the aforesaid Taluqdar, bringing the total to Rs. 25,000. I, in lieu of this entire amount of Rs. 25,000, and on account of the help and co-operation of the said Taluqdar which he rendered to me out of his estate at such a critical moment, do hereby absolutely sell, while in the enjoyment of sound health and unimpaired intellect, without reluctance and coercion, while in the full possession of all the five senses, with my consent and free will, half of all the villages, detailed below, in the aforesaid Taluqa, consisting of 39 villages in Pargana Dariyabad and Rudaoli, District Bara Banki, and Pargana Gwarich, District Gonda, to Rachpal Singh, occupation Taluqdari, son of Raja Sher Bahadur Singh, Thakur, Kalhans, resident and Taluqdar of Kamyar, etc., Pargana Dariyabad, District Bara Banki. I, having received the entire consideration money from the said vendee, appropriated the same and brought it to my use by spending the same in fighting out the case and for other necessities. Therefore I do hereby declare, and put it into writing, that after the death of the said ladies, or whenever I may get possession over the said Taluqa, I shall put the vendee immediately in proprietary possession of half the villages of the said Taluqa as vendee hereof. I shall also get the name of the said vendee recorded in the decree relating to the said Taluqa passed in my favour by the Civil Court, on the 22nd October 1878, to the extent of a moiety of the entire Taluqa, that in case I delay the same, the said vendee will be at liberty, on the

basis of this deed, to move the Court and take proprietary possession as purchaser of the said villages and to get the mutation of names effected by a competent Court in his favour."

The younger widow, Chhoti Thakuram, died in or about 1907, and the other widow died on the 10th May 1911, and upon her death the Respondent obtained possession of the Estates in question. The Appellant applied for mutation of her name (her husband and son having died) in respect of the villages in question, in pursuance of the terms of the said deed of sale, but the Respondent opposed her application repudiating the sale, and by an order of the 16th July 1912, her application was dismissed on the following ground :—

"Possession is clearly with the Respondent. The Appellant's obvious course is to sue in the Civil Court."

The Plaintiff thereupon filed the present suit on the 9th May 1914, in the Court of the Subordinate Judge of Bara Banki.

The Subordinate Judge found "that all the Rs. 25,000 were paid to the Defendant," and that the sale was not induced by any undue influence. But the learned Subordinate Judge found the issues of law against the Plaintiff. He held that at the time of executing the conveyance the Defendant did not possess anything more than a mere right of expectancy in the property sold by him, and that the transfer of such a right was void, under sec. 6 of the Transfer of Property Act, IV of 1882.

The Subordinate Judge further held that the alternative claim of the Plaintiff to recover the purchase money was barred by limitation, observing as follows :—

"In I. L. R. 15 Calcutta, 51, it was held that purchase money paid for a con-

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consideration which has wholly failed (as in the present case) is money received for the use of the buyer, and a suit to recover back the money is governed by Art. 62 of the Limitation Act, time having commenced to run from the date of payment of the purchase money.

I accordingly find that the suit for recovery of the money is time-barred."

In the result the Subordinate Judge made a decree dismissing the Plaintiff's suit with costs, and from that decree the Plaintiff appealed to the Court of the Judicial Commissioner of Oudh, which delivered judgment on the 20th March 1918.

The learned Judicial Commissioners affirmed the findings of the Subordinate Judge. They agreed with him in holding that the Respondent did not possess anything more than a mere right of expectancy at the time of executing the conveyance and that a "transfer by a reversioner of his expectant interest is not permitted by the Hindu law." They accordingly held that the sale was void under the Hindu law and not under sec. 6 of the Transfer of Property Act, 1882, which in their opinion was inapplicable to the sale of the 2nd January 1880, a date prior to the Act coming into operation.

They were further of opinion that the principle of English law which allows a subsequently acquired interest to feed the estoppel did not apply to conveyances in India.

The learned Judicial Commissioners therefore made a decree dismissing the Plaintiff's appeal with costs, and from that decree the Appellant appealed to His Majesty in Council.

Sir Geo. Lowndes, K. C. and *Mr. Dubé* for the Appellant.—This was not a question of "*spec. successionis*." The decree of 1873 declared the vendor to be the

"heir" and gave him a vested interest. Under later decisions of the Judicial Committee that decree may have been wrong since it has now been decided that the succession under Act I of 1869 did not open till the death of the widow, but inasmuch as the Plaintiff had been declared to have a vested interest the dictum in *Sham Sunder Lal v. Achhan Kunwar* (1) that Hindu law does not recognise the transfer of a reversionary interest is inapplicable.

In any event it was a good contract and effectual on the principle of feeding the grant by estoppel.

In *Tilakdhar Lal v. Khedan Lal* (2), the Board were unwilling to apply this doctrine to India in the absence of information as to local law, but the principle has been introduced into sec. 18 of the Specific Relief Act and sec. 43 of the Transfer of Property Act and so cannot be said to be contrary to Hindu law. To some extent *Samsuddin Goolam Hosein v. Abdul Hosein* (3) is against me but the effect of that is merely that the document did not pass the property.

[LORD BUCKMASTER.—Does equity help you if you are dealing with an interest that is not capable of transfer?]

Even if we are not entitled to recover the property we are entitled to restitution upon a total failure of consideration.

When it was "discovered that the agreement was void," a cause of action arose under sec. 65 of the Indian Contract Act.

Basso Kuar v. Dhum Singh (4).

(1) L. R. 25 I. A. 183, 189; a. c. I. L. R. All. 71; 2 O. W. N. 723 (1898).

(2) L. R. 47 I. A. 233 at p. 254; a. c. I. L. 48 Cal. 1; 25 O. W. N. 49 (1900).

(3) I. L. R. 31 Bom. 165 (1906).

(4) L. R. 15 I. A. 211; a. c. I. L. R. 11 47 (1868).

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Messrs. DeGruyther, K. G., Parikh and S. C. Chaudhuri for the Respondent.—The decree of 1873 did not decide on a consideration of Act I of 1869.

Apart from sec 6 of the Transfer of Property Act, which was not then passed, a reversionary interest cannot be transferred in Hindu law.

Sham Sunder Lal v Achhan Kunwar (1) and *Sumsuddin Goolum Hosein v Abdul Hosein* (3).

The principle is clearly laid down there and is in consonance with the nature of rights in Hindu law.

This is not a case of "Imperfect title" so that sec 18 of the Specific Relief Act is not applicable, nor is sec 43 of the Transfer of Property Act.

The agreement was not "discovered to be void" as in *Basso Kuar v Dhum Singh* (4). It was actually void at the time. There was no consideration for the payment and sec 23 of the Contract Act applied.

Sec. 65 of the Contract Act does not apply to a contract void in law when made. It applies where facts subsequently discovered show it to be void. As for instance in the illustration to sec 20. As regards limitation, Art 62 applies and not Art. 97.

Hanuman Kamat v Hanuman Mandur (5).

Sir G. Lowndes, K C in reply.

Sec 65 of the Contract Act applies to an agreement void when made irrespective of the knowledge of the contracting parties.

Gulabchand v. Fulbai (6) and *Jijibhoy v Nagji* (7)

Art 97 of the Limitation Act applies and time runs from the moment of discovery that the agreement was void.

Basso Kuar v Dhum Singh (4).

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS—This is an appeal from a decree, dated the 20th March 1918, of the Court of the Judicial Commissioner of Oudh, which affirmed a decree, dated the 3rd August 1915, of the Subordinate Judge of Bara Banki.

The suit is for the possession of the villages specified in the plaint with an alternative prayer for the payment of money. Both the lower Courts have decided adversely to the Plaintiff on each of these claims, and the suit has been dismissed with costs. From this decision the present appeal has been preferred.

The Plaintiff's claim to the villages rests on an instrument which purports to have been a transfer on sale executed on the 2nd January 1880, by the Defendant, Indar Bahadur Singh, in favour of Rachpal Singh, the Plaintiff's deceased husband.

The villages were part of two taluquas in Oudh, known as Paska and Lalar, and owned by Thakur Naipal Singh, whose name was entered in List II attached to the Oudh Estates, Act I, of 1869, as estates which, according to the custom of the family, ordinarily devolved upon a single heir.

Thakur Naipal Singh died childless on the 28th October 1873, leaving him surviving his two widows, Thakurain Iklas Kuari and Thakurain Chhoti. According to

(1) L. R. 25 I. A. 183; s. c. I. L. R. 21 All 71; 2 C. W. N. 729 (1898).

(3) I. L. R. 31 Bom. 165 (1908).

(4) L. R. 15 I. A. 211; s. c. I. L. R. 11 All. 47 (1888).

(5) L. R. 18 I. A. 158 at p. 164; s. c. I. L. R. 19 Cal. 123 (1891).

(6) L. R. 15 I. A. 211 at p. 219; s. c. I. L. R. 11 All. 47 (1888).

(6) I. L. R. 33 Bom. 411 at p. 416 (1909).

(7) 11 Bom. L. R. 693 at p. 697 (1909).

THAKURAIN HARNATH KUAR v. THAKUR INDAR BAHADUR SINGH.

Hindu law, the Defendant Indar Singh was the next reversioner. The widows set up a Will as that of their deceased husband, and claimed that it empowered them to adopt. Indar Singh thereupon instituted a suit against them and the Court of Wards, who had taken over the estates, and, by the decree of the Deputy Commissioner of Bara Banki, dated the 22nd October 1878, the alleged Will was declared void and invalid, and Indar Singh was declared "entitled to succeed to Paska and Lalar estates on the death of the last surviving widow of the late Naipal Singh."

It is the Plaintiff's case that in 1878 her husband, Rachpal Singh, advanced Rs. 20,000 for this litigation and other expenses to Indar Singh, who was a poor man, and that in 1880, on a further advance of Rs. 5,000, Indar Singh executed the instrument of transfer on which this suit is brought.

Both Courts have held that the transfer was inoperative, as Indar Singh at its date had no interest capable of transfer but merely an expectancy.

It cannot be disputed that, according to the ordinary Hindu law, this is the true view, but the Plaintiff, to escape from this predicament, contends that the rights of Indar Singh must be determined by reference to the provisions of the Oudh Estates Act and the declaration contained in the Deputy Commissioner's decree.

Whatever the view that may once have prevailed, it is now established that under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu law, and it necessarily follows that in January 1880, Indar Singh had no more than an expectancy, and so had no interest in the villages which he was competent to transfer or bind.

Nor, in their Lordships' opinion, was this position modified by the Deputy Commissioner's decree. As the suit was constituted, the Deputy Commissioner could only have made a declaration binding on the widows and the Court of Wards, and at certainly was not within his competence to make a valid declaration that would create in Indar Singh's favour an interest in the villages that did not otherwise exist. The claim for possession was, therefore, rightly rejected.

And so it becomes necessary to consider the claim for payment of money. The amount demanded is Rs. 1,28,033-4-8, and this is made up of Rs. 25,000 principal and Rs. 1,03,033-4-8 interest at Re. 1 per cent per month from the 2nd January 1880, to the 5th May 1914.

The payment of the Rs. 25,000 is established, and the Defendant's pleas that the instrument of the 2nd January 1880 was executed under undue influence and was extortionate have failed, but the claim for recovery of the money has been held to be barred by limitation.

Before this Board, the claim has been based on sec. 65 of the Contract Act. It is there provided that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it."

So framed, the Plaintiff's claim to compensation rests, not on any principle or formula of English law, but on the words of this section, and it has to be seen whether the facts of this case come within its scope. The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from sec. 2. By cl. (c), every promise and every set of promises forming the consideration for

THAKURAIN HARNATH KUAR v. THAKUR INDAR BAHADUR SINGH.

each other is an agreement, and by cl. (h) an agreement enforceable by law is a contract. Sec 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By cl. (g) an agreement not enforceable by law is said to be void.

An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated.

Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of the 2nd January 1880, and that the true nature of those rights was not discovered by the Plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation.

It was thus that the agreement was discovered to be void, and the discovery in their Lordships' view, was one within the words and the meaning of sec. 65 of the Contract Act.

The Plaintiff, therefore, though not entitled to recover possession of the villages, is entitled to recover compensation, and in assessing that compensation their Lordships consider it should include the sum

of Rs 25,000 found by both Courts to have been paid to Indar Singh, and also, in the circumstances of this case, interest, not at the rate or for the period claimed by the Plaintiff, but at 6 per cent. from the date of the institution of this suit. Their Lordships will, therefore, humbly advise His Majesty that the decree under appeal should be varied in accordance with this opinion, and that the Respondent should pay the costs of the Plaintiff in both the lower Courts. The costs of this appeal must be paid by the Respondent.

Solicitors. Messrs Barrow, Rogers and Nevill for the Appellant

Solicitors Messrs T. L. Wilson & Co. for the Respondent

G D M

ORDINARY ORIGINAL CIVIL JURISDICTION]

SUIT NO. 1534 OF 1922.

GIRIDHARILAL HANU-

GREAVES, J.

MANBUX

BUCKLAND, J.

v.

1923,

EAGLE STAR & BRITISH

15, June.

DOMINIONS INSURANCE
Co., Ltd.

Policy of insurance—Condition that if no suit is brought within three months of rejection of claim by insurance Company, benefit under the policy shall be forfeited—Such condition, if illegal—Indian Contract Act (IX of 1872), secs. 23 and 28—Indian Limitation Act (IX of 1908), Sch I, Art. 86—Practice—Chief Justice, whether may appoint Bench to try an issue or issues only in a suit.

Two policies of Insurance contained a condition to the following effect:—"If the claim be made and rejected and an action or suit be not commenced within three months after such rejection . . . all benefit under this policy shall be forfeited." The Plaintiff firm's suit for the recovery of their claim under the policies was instituted after the expiry of three months from the date of the rejection of their claim by the Insurance Company:

GIRIDHARILAL HANUMANBUX v. EAGLE STAR & BRITISH DOMINIONS INSURANCE CO., LTD.

Held—That the Plaintiff firm by reason of their failure to commence the suit within three months of the rejection of their claim by the Defendant Company had forfeited under the provisions of the said condition all benefit under the said policies and that the suit was not maintainable.

BARODA SPINNING AND WEAVING COMPANY, LTD v. SATYANARAYAN MARINE AND FIRE INSURANCE COMPANY, LTD (2) followed.

HOME INSURANCE COMPANY OF NEW YORK v. VICTORIA-MONTREAL FIRE INSURANCE COMPANY (4) referred to.

Held also—That the condition in the policies does not offend against the provisions of sec 28 of the Indian Contract Act and is not therefore an infringement of sec. 23 of the Act.

HIRABHAI v. MANUFACTURERS LIFE INSURANCE COMPANY (1) referred to.

Quære—Whether the Chief Justice can appoint a Bench for the purpose of trying an issue or issues only and not the whole suit.

The facts of the case are as follows — By two policies of insurance, dated 4th of November 1920 and 28th of February 1921 respectively, the Defendant Company insured the Plaintiff firm against loss or damage by fire to the extent of Rs. 30,000 on jute, etc., stored in their press house or godown at Kissengunge. Cl 13 of the conditions on which the policies were issued was as follows:—If the claim be made and rejected and an action or suit be not commenced within three months after such rejection or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or

arbitrators or umpire shall have made their award, all benefit under the policy shall be forfeited. The Plaintiff firm's goods were destroyed by fire on the 7th of June 1921, and on the 14th of June 1921, they submitted their claim under the policies to the Defendant Company. On the 30th of July 1921, the Defendant Company rejected the Plaintiff firm's claim. The Plaintiff firm instituted this suit sometime in May 1922. The Defendant Company in their written statement pleaded, *inter alia*, that "this suit is not maintainable and that under the conditions of the said policies respectively all benefit under the said policies has been forfeited by reason of the failure of the Plaintiff firm to institute this suit within three months after rejection as aforesaid of the said claim of the Plaintiff firm under the said policies." His Lordship the Chief Justice on the application of the parties appointed a Bench of two Judges to try the following issue — "Have the Plaintiffs by reason of their failure to commence this suit within three months of the rejection of their claim forfeited under the provisions of condition 13 of the policies all benefits under the said policies and, if so, is the suit maintainable?"

Messrs H. D. Bose and S. K. Gupta, Counsel, appeared for the Plaintiff Firm.

Messrs L. P. E. Pugh and Page, Counsel, appeared for the Defendants.

The JUDGMENT OF THE COURT was as follows —

GREAVES, J — The Plaintiffs insured with the Defendant Company under two policies, dated the 4th November 1920 and the 28th February 1921 loose jute at Kissengunge in the District of Purneah.

The insurances were effected subject to the terms and conditions endorsed or otherwise expressed on the policies.

(1) 14 Bom. L. R. 741 (1912).

(2) I. L. R. 38 Bom. 344 (1913).

(4) L. B. [1907] A. C. 59 at p. 64.

GIRIDHARILAL HANUMANBUX v. EAGLE STAR & BRITISH DOMINIONS INSURANCE CO., LD.

Both policies contained a condition (No. 13) which so far as material is to this effect :—

“If the claim be made and rejected and an action or suit be not commenced within three months after such rejection or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited.” For the purpose of these proceedings the following facts are admitted as correct by both parties to the suit. The jute insured under the policies was destroyed by fire on the 7th June 1921, the Plaintiffs submitted their claims under the policies on the 14th June 1921, the claims were rejected by the Defendant Company on the 30th July 1921, and this suit was commenced on the 5th May 1922. The following issue of law arises in the suit —

“Have the Plaintiffs by reason of their failure to commence this suit within three months of the rejection of their claim forfeited, under the provisions of condition 13 of the policies, all benefits under the said policies and, if so, is the suit maintainable?”

The Court being of opinion that the case may be disposed of on this issue of law only, it is agreed by the parties that this issue shall be tried first.

It is contended on behalf of the Plaintiffs that condition 13, as set out above, is void under the provisions of secs. 23 and 28 of the Indian Contract Act, 1872, as an attempt to curtail the period of limitation for a suit on the policies, namely, the period of three years prescribed under Art. 86 of the Limitation Act.

Sec. 23 of the Indian Contract Act provides that the consideration or object of an agreement is lawful unless, amongst

other things, it is of such a nature that, if permitted, it would defeat the provisions of any law. Sec. 28 provides, amongst other things, that every agreement which limits the time within which any party thereto may enforce his rights by the usual legal proceedings is void to that extent. The question for our decision is whether a provision in a policy of insurance that all benefit thereunder shall be forfeited if a suit is not commenced within a certain time, which falls short of the period allowed by law for the institution of such a suit, amounts to limiting the time within which a party may enforce his rights under a contract within sec. 28 and defeats the provisions of Art. 86 of the Limitation Act.

In *Hirabhai v. Manufacturers Life Insurance Company* (1), it was held that a provision in a policy which was said to amount in substance to an agreement that if no suit was brought within a year, neither party should have any rights as against the other and which was said to amount to a waiver of the rights of the respective parties if a suit was not brought within a year, did not offend against the provisions of sec. 28 of the Contract Act.

In *Baroda Spinning and Weaving Company, Ltd. v. Satyanarayan Marine and Fire Insurance Company, Ltd.* (2), it was held that a provision in a policy of insurance identical with the provision in suit did not offend against sec. 28 which was aimed only at covenants not to sue at any time or for a limited time and was not aimed at a provision extinguishing rights in certain events. Batchelor, J., at p. 356 states: “As I understand the matter, what the Plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he

(1) 14 Bom. L. R. 741 (1912)

(2) 1 L. R. 88 Bom. 311 (1913).

GIRIDHARILAL HANUMANBUX v. EAGLE STAR & BRITISH DOMINIONS INSC. Co., LD.

has done is to limit the time within which he has any rights to enforce; and that appears to me to be a very different thing," and he refers to *South British Fire and Marine Insurance Co. v. Brojo Nath Shaha* (3), where the policy in suit provided that no suit should be sustainable unless brought within six months but where this provision, although referred to, was not discussed.

It is stated in the 2nd Ed. of Sir Fd'k Pollock's book on the Indian Contract Act at p. 174 that sec. 28 merely affirms the common law. If this is correct, it is noticeable that a provision to the effect of the one in suit in insurance policies has been stated to be a reasonable provision. *Home Insurance Company of New York v. Victoria-Montreal Fire Insurance Company* (4).

In Porter's *Laws of Insurance*, 6th Ed., p. 195, it is stated that insurers may lawfully limit the time within which an action may be brought to a period less than that allowed by the statute of limitation and that the true ground on which the clause limiting the time of claim rests and is maintainable is that, by the contract of the parties, the right to indemnity in case of loss and the liability of the Company therefor do not become absolute unless the remedy is sought within the time fixed by the condition in the policy.

In view of the decisions referred to above with which I respectfully agree, I am not prepared to say that condition 13 in the policies in suit infringes the provisions of sec. 28 of the Indian Contract Act and if it does not infringe sec. 28, I do not think that it can be said to infringe sec. 23 of that Act.

I would accordingly answer the issue

in the affirmative and hold that the suit is not maintainable.

I desire to say with all respect to the Chief Justice that I do not understand his order referring the matter to this bench which he appointed to try the issue raised in paras 16 and 17 of the written statement which is substantially the issue of law which we have tried. It is of course open to him to appoint a special bench of two Judges to try a suit but having done so it is not, I think, open to him in any way to fetter the discretion of the bench as to how the suit shall be tried. It is for the bench and the bench alone to decide how the suit is to be tried, that is to say, whether issues of fact and law are to be tried together or whether the issues of law shall be tried first. This is in accordance with the provisions of Or. 11, r. 2 of the Civil Procedure Code as I understand them and it is not suggested that the matter comes before us under r. 6 of that order. I have no doubt that the Chief Justice did not desire to fetter the discretion of the bench in trying the suit but the manner in which the matter comes before us under his order is to say the least unfortunate.

The Defendants will be entitled to their costs to be taxed as of a hearing under scale No. 2.

BUCKLAND, J.—Though this Bench has been appointed to try an issue referred to in the petition praying for its appointment, at the hearing the whole case has been treated as being before us and we have been asked under Or. 14, r. 2, C. P. C., to settle and try an issue of law on which the case may be disposed of and to postpone settlement of issues of fact, and to this we have acceded.

As has already been pointed out, the decision in *Hirabhai v. Manufacturers Life*

(3) I. L. R. 36 Cal. 516 (1909).

(4) L. R. [1907]4. A. C. 59 at p. 6

GIRIDHARILAL HANUMANBUX v. EAGLE STAR & BRITISH DOMINIONS INSCE CO., LD.

Insurance Co. (1) is open to considerable doubt and the correct view was, I think, expressed by Batchelor, J, in *Baroda Spinning and Weaving Co. Ltd v. Satyanarayan Marine and Fire Insurance Co. Ltd.* (2) in the passage which my learned brother has cited. The proposition advanced on behalf of the Plaintiffs that the condition offends against the Indian Contract Act in that it curtails the period of limitation for a suit on the policy, and the argument addressed to us, exclude the proposition that what is affected by the condition are the rights of the Plaintiffs if not enforced within the time which the condition prescribes. The contention may therefore fairly be tested by assuming that the condition provides that if its terms are not complied with, a part, let us say one-half, of the benefit under the policy shall be forfeited. To such a condition the learned Counsel was unable to apply his argument which fails to meet the general test of applicability to every degree of the circumstances in which it is put forward.

The point which we have to decide was referred to in *Atlantic Shipping and Trading Co v. Louis Dreyfus & Co.* (5). It arose in connection with the commencement of arbitration proceedings within a stipulated time. In his speech Lord Dunedin observed —“Now if it were illegal to arrange that a claim should not be good unless made within a certain time I should understand the argument, but as it is admitted that it is perfectly legal to make such a stipulation—it is done, e.g., every day in insurance policies—then why should it be bad because it is tacked on to a provision for arbitration instead of to an action at law?” It has not been contended that the law in India though codi-

fied, differs from English law in this respect.

I agree that the suit is not maintainable and that it should be dismissed with costs on scale No. 2.

Messrs Chatterjee & Co., Solicitors for the Plaintiff.

Messrs Pugh & Co., Solicitors for the Defendants.

P. K. C.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE

No. 598 OF 1920.

C. C. GHOSE, J.)

PANTON, J.

1922,

Heard,

22, November.

1923,

Judgment,

21, February.

SURENDRA NATH DE

and ors., Defendants,

Appellants,

v.

ASITOSH NANDI,

Plaintiff, Respondent.

Hindu law—Succession—Disqualification of heir—Onus—Leprosy, when disqualifies

The presumption of Hindu law is against disqualification, and the burden of proof of disqualification lies on a person who seeks to exclude another who would be an heir, should no cause of exclusion be established, and where it is contended that a person is excluded from inheritance by reason of disease, the strictest proof of the disease as will disqualify him at the time the succession opened will be required.

The later Hindu law-books generally lay down that leprosy, to be a ground of exclusion, must be of the sanious or ulcerous and not of the anæsthetic type.

This was an appeal preferred on the 11th of March 1920, against the decree of the District Judge of Zillah Bankura (Girish Chandra Sen, Esq.), dated the 18th of December, 1919, affirming the de-

(1) 14 Bom. L. R. 741 (1912)

(2) I. L. R. 38 Bom. 344 (1913).

(5) [1922] App. Cas. 250.*

SURENDRA NATH DE v. ASUTOSH NANDI.

decree of the Subordinate Judge of that District (Babu Paresh Nath Roy Chaudhury), dated the 31st of July 1918.

The material facts are sufficiently stated in this judgment.

Dr. D. N. Mitter and *Babu Manindra Nath Banerjee* for the Appellants

Babu Heramba Chunder Guha for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

The facts which have given rise to this appeal have been set out at length in the judgments of the Courts below, and it is, therefore, unnecessary for us to repeat them here. The Plaintiff prayed for declaration of title to, and separate possession of, the lands in Sch. 2, for declaration of title to $\frac{1}{4}$ th share of the lands in Sch. 1 and for recovery of that share on partition, and for declaration of title to $\frac{1}{4}$ th share of the lands in Schs. 6 and 7 and for recovery of joint possession of the same and for other reliefs mentioned in the plaint. The Defendant No. 1 contended that the Plaintiff being a leper did not inherit the properties left by his maternal grandfather, one Jaggarnath, and that in any event the Plaintiff's claim was barred by limitation. The Defendants Nos. 2 and 3 pleaded that the Plaintiff had no cause of action as against them. The Defendant No. 4 supported the Defendant No. 1. The Court of first instance found that the Plaintiff was not disqualified to inherit the properties which belonged to Jaggarnath on account of his leprosy and that the suit was not barred by limitation. The lower Appellate Court, on appeal, found according to the medical evidence which had been adduced in the case that the Plaintiff had anæsthetic leprosy of the mildest kind and that it was not of a bad type and was not ulcerous and ac-

cordingly held that at the time when the succession opened, he had no leprosy of such a kind as could disqualify him from inheriting the properties which belonged to his maternal grandfather. On the question of limitation, the lower Appellate Court found that inasmuch as Jaggarnath's widow Sreemati Bhagabati was in possession of the joint properties till 1321 B. S. when she died, time began to run as against the Plaintiff only from the death of Bhagabati when the succession opened, and therefore the Plaintiff's suit was not barred by limitation. The lower Appellate Court accordingly affirmed the decree of the first Court. Against this judgment and decree of the lower Appellate Court the present appeal has been preferred by the Defendants Nos. 1 and 4 and on their behalf it has been contended before us that on the findings of the two Courts below it should have been held that the Plaintiff was excluded from inheritance, and secondly that it had not been shown what the condition of the Plaintiff was at the time when the succession opened.

Now, under the Hindu law the grounds of exclusion from inheritance fall under the following six heads :—(1) physical and mental defects, (2) incurable or agonizing diseases, (3) degradation from caste by reason of crimes or otherwise, (4) vicious, criminal or irreligious conduct, (5) becoming *Naistika Brahmachary* (perpetual student), (6) *Vanaprasthasrami* (hermit) or *sanyasi* (ascetic). The physical and mental defects expressly mentioned in the texts are impotence, dumbness, deafness, lunacy, lameness, blindness and idiocy. *Manu* has a further vague ground of exclusion, *Nirindriyatwa*, i.e., absence of limb or sense which includes according to *Sarasvati Vilasa* females as a class. Among the diseases, lunacy has

SURENDRA NATH DE v. ASUTOSH NANDI. .

already been referred to. Other diseases expressly mentioned are leprosy (*Vishnu*) and elephantiasis (*Devala*). *Yagnavalkya* has a general ground—*achikitsya roga* (incurable disease), of which consumption is given as an illustration by the *Mitakshara* and *Narada* has a similar general ground *dcergha teevra roga*—obstinate or agonizing disease. There is some difference of opinion as to some of these defects whether they should be congenital. Sir Thomas Strange distinguishes between infirmities, such as blindness, deafness, dumbness, etc., which to disqualify must be coeval with birth, and disqualifying diseases such as leprosy, etc., which the Hindu religion regards as visitations not only for sins committed in a preceding state, but also for sins committed in this life, and, therefore, such visitations are not necessarily congenital in order to disqualify.

Of the *Smṛiti* writers the only one who expressly excludes a leper is *Devala*, whose text runs as follows:—"When the father is dead, an impotent man, a leper, a madman, an idiot, a blindman, an outcast, the offspring of an outcast, and a person wearing the token (of religious mendicacy) are not competent to share the heritage." *Manu* excludes one who is a *Nirindriya*, that is, devoid of an organ, after expressly mentioning eunuchs and outcasts, one born blind or deaf, an insane, an idiot and a dumb man, but a leper is not referred to by him (see *Buhler*, Ch. IX, Sloke 201). *Apastamba* and *Vasishtha* do not exclude him. *Narada* excludes persons afflicted with a chronic or acute disease (see *Sacred Books of the East*, Vol. 33, p. 194), or, as otherwise translated, an acute or agonizing distemper. Atrophy or pulmonary consumption is instanced as a chronic and leprosy as an acute disease in the *Rutnakara*. *Yagna-*

valkya and *Vishnu* exclude persons suffering from an incurable disease. So far as leprosy is concerned, the later Hindu law books generally lay down that to be a ground of exclusion it must be of the sanious or ulcerous and not of the anæsthetic type. [See *Janardhan Pandurang v. Gopal Pandurang* (1), *Ananta v. Ramabai* (2), *Rangayyah Chetti v. Thanika-chela Mudali* (3), *Helan Dasi v. Durgadas* (4), *Mohunt Bhugaban v. Raghunandan* (5) and *Kayarohana v. Subbaraya* (6)].

The presumption of Hindu law is against disqualification and the burden of proof of disqualification lies on a person who seeks to exclude another who would be an heir, should no cause of exclusion be established. It is also settled that where it is contended that a person is excluded from inheritance by reason of disease, the strictest proof of the disease as well disqualify him at the time the succession opened will be required. On the findings arrived at by the two Courts below and on the authorities referred to, with which we are in agreement, we must hold that the Plaintiff was not disqualified from inheriting the properties which belonged to his grandfather after the death of *Sreemati Bhagabati Dasi*. In this view of the matter, the two contentions advanced on behalf of the Appellants fail and this appeal must be dismissed with costs.

N G.

(1) 5 B H C (A. C. J.) 145 (1868).

(2) I. L. R. 1 Bom. 554 (1877).

(3) I. L. R. 19 Mad. 74 (1896).

(4) 4 C L J 323 (1906).

(5) L. R. 22 I. A. 94 s. c. I. L. R. 22 Cal. 843 (1895).

(6) I. L. R. 38 Mad. 250 s. c. 25 M. L. J. 251 (1918).

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM APPELLATE DECREE****No. 1012 of 1920.**

CUMING, J.
 PANTON, J.
 1922,
 Heard, 3 and
 4, April.
 Judgment,
 24, April.]

RAJAH RESHEE KESH
Law, Plaintiff,
Appellant,
v.
CHINTAMANI DALAI,
Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), secs 30 (b) and 182, enhancement of rent of holding consisting of homestead and tank, if allowable under—Enhancement under sec. 30 (b), if depends on the use to which the holding is devoted

Where an application asked for enhancement of the rent of certain holdings consisting of homestead or homestead and tank under sec. 30 (b), Bengal Tenancy Act, and the Revenue Officer refused it on the ground that they grew no agricultural crops :

Held *per* CUMING, J. —That there is nothing in sec. 30 (b) to restrict the enhancement to the land actually used for cultivation. To attract the operation of the section it would seem to be sufficient that the land in question is a holding, held at a money rent by an occupancy ranyat. Neither would sec. 182 remove homestead lands from the operation of sec. 30. It would no doubt be open to the tenant under sec. 182 to prove that the rent of homestead land by custom or local usage is not liable to be enhanced under sec. 30 (b), but failing the proof of any such custom or usage homestead land would come within the operation of sec. 30 (b).

Per PANTON, J.—That nothing is said about "agricultural crops" in sub-sec. 30 (b) or in relation to it; and there is nothing in the wording of sec. 30 which indicates that an enhancement under sub-sec. (b) can only be made when the holding grows "agricultural crops." Such an enhancement bears no apparent relation

to the use, agricultural or otherwise, to which the particular holding is devoted.

This was an appeal preferred on the 23rd April 1920 against a decree of Paroda Kinkar Mukerjee, Additional Special Judge of Zillah Midnapur, dated the 16th July 1920, affirming a decree of Babu Jogesh Ch Mitra, Revenue Officer of that place, dated the 15th April 1918.

The facts of the case are briefly as follows —In an application under sec 105, Bengal Tenancy Act for settling fair rents of a number of holdings, the landlord asked for enhancement of rents under sec. 30 (b) in respect of two holdings, one consisting of homestead land and the other of homestead and tank. The Revenue Officer held that the land of these holdings grew no agricultural crops and so no enhancement could be allowed under sec. 30 (b). On appeal the said decision was upheld by the Special Judge on the ground that the holdings consisted of homestead and homestead and tank respectively. The landlord thereupon preferred the present second appeal to the High Court.

Babu Charu Chandra Biswas (for Babu Narendra Chandra Bose) and Babu Nalin Chandra Paul for the Appellant.

No one appeared for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

CUMING, J.—This appeal arises out of an application under sec. 105, Bengal Tenancy Act, to settle fair rents of a number of holdings and relate to two of the holdings, viz., Nos. 16 and 53. The landlord asked for an enhancement of the rent of these holdings under sec. 30 (b), Bengal Tenancy Act. With regard to both these holdings the lower Court have held that as 16 is a homestead and 53 is a homestead and tank they are not liable to enhancement under sec. 30 (b), Bengal Tenancy

RAJAH RESHEE KESH LAW v. CHINTAMANI DALAI.

Act The landlord has appealed. The tenant, unfortunately, as the question is apparently one of first impression and also of some importance, has not appeared. The decision of the question would seem to depend on the wording of sec 30 and sec 182.

Reading sec 30 there seems nothing in the section to restrict it to the land actually used for cultivation. To attract the operation of the section it would seem to be sufficient that the land in question is a holding, held at a money rent by an occupancy raiyat. The land in question is clearly a holding [sec 1 (9)].

Neither would sec 182 remove homestead lands from the operation of sec 30.

Sec 182 provides that when a raiyat holds the homestead otherwise than as part of the holding as a raiyat the incidents of the tenancy of the homestead shall be regulated by local custom and usage and subject to local custom or usage by the provisions of the Bengal Tenancy Act applicable to land held by a raiyat. It would, no doubt, be open to the tenant to prove that the rent of homestead land by custom or local usage is not liable to be enhanced under sec. 30 (b) but failing the proof of any such custom or usage, homestead land would come within the operation of sec 30 (b). As to whether in any particular case an enhancement should be granted would depend on the circumstances of the case. The appeal must therefore succeed and the case be remitted to the Court of first instance to be decided on the merits.

PANTON, J.—The reasons assigned by the Courts below for refusing an enhancement of rent under sec. 30 (b) of the Bengal Tenancy Act are thus stated: The Revenue Officer, after pointing out that the holdings in question consist respectively of homestead and a homestead and

tank, observes—"The land of these holdings grew no agricultural crop. So no enhancement under sec 30 (b) is allowed." The learned Special Judge, in agreeing with this decision, says: "The Plaintiff is not entitled to enhancement under sec. 30 (b) in respect of serial Nos. 16 and 53 as they consist of homestead and homestead and tank respectively." Now nothing is said about "agricultural crops" in sub-sec. 30 (b) or in relation to it, and the reasoning of the Courts below cannot otherwise be supported. There is nothing in the wording of sec 30 which indicates that an enhancement under sub-sec (b) can only be made when the holding grows "agricultural crops." Such an enhancement bears no apparent relation to the use to which the particular holding is devoted. In this respect there is a clear distinction between sub-sec (b) and the sub-sections which follow, namely, (c) and (d) where reference is made to the productive powers of "the land," by which the land of the particular holding is apparently meant. An enhancement under sec 30 (b) is made upon general grounds and its application does not, in my view, depend upon the use, agricultural or otherwise, to which the holding is put.

I agree therefore with the order proposed by my learned brother.

Appeal allowed;

Case remanded.

J. N. R.

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM ORIGINAL ORDERS

NOS. 330 AND 342 OF 1920.

TARAKESWAR PAL

CHOWDHURY, Plaintiff,

Appellant,

v.

[SRISH CHANDRA GHOSH

MANDAL and ors.,

Respondents.

MOOKERJEE, J.

RANKIN, J.

1922,

14, August.

Sanad—Tank—Document more than thirty years old, presumption as to—Evidence Act (I of 1872), sec 90—Proof of execution—Rent-free grant of land for excavation of tank, by lessee and officer of landlord—Question as to requisite authority of the executants—Burden of proof, if lies on landlord or grantee—Excavation of tank by grantee—Possession from generation to generation—Acquiescence by landlord—Inference from surrounding circumstances that persons making the grants on behalf of landlord had requisite authority—Putra-pontradikrame, meaning of—Perpetual grant, transferability of.

In a suit brought by the landlord in 1918 to recover possession of a tank with its banks, the Defendants claimed to have acquired title by purchase in 1906 from persons who under two rent-free grants made in favour of their predecessors in 1836 and 1849 by an *ijaradar* and a superintendent respectively of the Plaintiff's predecessor had excavated the tank and remained in possession of the same from generation to generation. The first document recited that the *ijaradar* was directed by the landlord to make the grant for excavation of a tank. The second document purported to have been granted by the landlord through the pen of a person who described himself as his superintendent, and it recited the previous grant and stated that on measurement the tank had been found to extend over a larger area and so a supplementary grant was necessary. The grants stated that the grantee was to hold *putra-pontradikrame* (from generation to generation).

The Plaintiff contended that the burden

lay upon the Defendants to establish that in respect of the first document the *ijaradar*, and in respect of the second document the superintendent, had the requisite authority to make a grant which would be operative against the landlord, and that the vendors of the Defendants had no transferable right:

Held—That the application of sec. 90 of the Evidence Act does not justify the inference that the documents which are established to be genuine were in fact executed by persons possessed of the requisite authority. It does not, however, follow that it is necessary for the grantee of the document or his successor in interest to establish by direct evidence that the executant had the requisite authority. When a grant has been in operation for a long series of years, as in this case, it may be impossible to adduce direct evidence of authority. In such a contingency the Court may draw an inference from all the surrounding circumstances. In the present case, the grantee and his successors in interest from generation to generation had been in possession, if the grants were unauthorised the landlord might have been expected to take steps long before this to eject the grantees.

UBILACK v. DALLIAL (1), *UGGRA KANTA CHOWDHURY v. HARRO CHANDRA SHICKDAR*, (2), *MAHARAM CHAPRASI v. TELAM-uddin KHAN* (4), *AIREY v. STAPLETON* (5) and *NAINA PILLAI v. RAMANATHAN* ('HETTIAR' (6) referred to.

The burden thus shifted upon the landlord to prove how he came to acquiesce in the long possession of the grantee and his successors. Besides, it was the landlord who should be aware of the scope and ex-

(1) 1 L. R. 8 Cal. 557 (1878).

(2) 1 L. R. 8 Cal. 209 (1880).

(4) 15 C. L. J. 230 (1911).

(5) [1897] 1 Ch. 164.

(6) 33 Mad. L. J. 94 (1916).

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tent of the outhority conferred by him upon his lessee, or upon the superintendent of his estate. No evidence being forthcoming from his side, it was open to the Courts below to draw an inference that the grants must have been made by persons who possessed the requisite authority, and the Plaintiff could not now urge that the grantee and his successors had held for so long a time without a lawful origin of their title and possession.

SUDUMAN JAMADAR v. BEHARI MAHTON (7) referred to.

Held further—*That having regard to the terms of the grants and the expression putra-poutradikrame used in the documents, the grants were made in perpetuity, and as they were perpetual grants the interest of the grantees was transferable.*

RAM NARAYAN SINGH v. RAMSARAN LAL (9) and RAMSARAN LAL v. RAM NARAYAN SINGH (10) referred to.

According to Hindu religious notions, a grant of land for digging tank is supremely meritorious, and it is inconceivable that the grant could have been of a temporary character or that the landlord could have intended to resume the grant.

BIRENDRA KRISHNA v. AKRAM ALI (11) referred to.

These were appeals against the order of Babu Bepin Behari Mukherjee, Additional Subordinate Judge, 2nd Court of Zillah Khulna, dated the 21st of August 1920, reversing the order of Babu Amullya Charan Chakravarty, Munsif, 3rd Court, Satkhira, dated the 31st of March 1919.

(7) 15 C. W. N. 953 (1911).

(9) I. L. R. 46 Cal. 683: s. c. 23 C. W. N. 686 (P. C.) (1918).

(10) I. L. R. 43 Cal. 305 (1916).

(11) I. L. R. 39 Cal. 439: s. c. 16 C. W. N. 304; 15 C. L. J. 194 (1912).

The facts material to this report will appear from the following portion of the judgment of the lower Appellate Court:—

“The subject-matter of litigation between the parties is a tank measuring 14 bighas in area at Mouja Bamankhali. The Plaintiff is the sole proprietor of the Mouja on a partition between him and his brother, *pro forma* Defendant No. 12. The Plaintiff is entitled to the Mouja to the extent of 6 as. 8 gds. share of zemindary and 9 as. 12 gds. of *putni* rights. The Plaintiff, it is said, was in *khas* possession of the tank until 1318 when it was settled with the Defendants Nos. 10 and 11. The Plaintiff in execution of a rent decree against them auction-purchased the tank and took delivery of possession on 3rd October 1916. The Defendants resisted the Plaintiff on 13th October 1916 in taking actual possession alleging their *niskar* right to the tank on the basis of two sanads purporting to have been granted to the Defendants' predecessor-in-interest by the Plaintiff and the Defendant No. 12's predecessor. The Plaintiff characterises the sanads as forged. The Defendants Nos. 2 and 4 assert their right to the tank on two *kabalas* from the successors in interest of Sonatan and Pitambar Ghosh of Tulsidanga. Sonatan is alleged to have got *niskar* grant of the tank from Biswanath Bhattacharja, *ijaradar*, for eight bighas in 1243 and another similar grant in 1256 B. S. for additional 6 bighas from the superintendent of the zemindar Babu Umesh Chandra Pal Chowdhury, Plaintiff's predecessor. Sonatan and his heirs were in possession of the tank up to 1313 B. S. when the above sale took place by two *kabalas*. The Plaintiff in his attempt to take *khas* possession of the tank created a false tenancy in favour of the Defendants which gave rise to a 145 case in which the Defend-

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ants' possession was maintained. The Plaintiff and Defendants Nos. 10 and 11 being thus baffled in their attempt caused the so-called tenancy to be auction-purchased by the former. The sale could not have passed any title to the Plaintiff. The learned lower Court found the Plaintiff's zemindary right but rejected his prayer for *khas* possession. So the appeal by the Plaintiff."

The lower Appellate Court was of opinion that the Court of first instance had not properly decided the questions whether the *niskar* was a transferable right or not, and whether Pitambar had any share in the tank and sent the case back for trial *de novo* after giving opportunity to the parties to adduce fresh evidence.

Against the decision of the Subordinate Judge, both the Plaintiff and the Defendants preferred the present second appeals (Nos. 330 and 392 respectively).

Dr. Dwarka Nath Mitter and Babus Prohas Chandra 'Pahasi', Hemendra Chandra Sen and Pramatha Nath Banerjee for the Appellant in Appeal No. 330 and for the Respondents in Appeal No. 392.

Babus Surendra Chandra Sen and Dwijendra Krishna Dutta for the Respondents in Appeal No. 330 and for the Appellants in Appeal No. 392.

The JUDGMENT OF THE COURT was as follows:—

These two appeals are directed against an order of remand made by the Subordinate Judge in a suit for recovery of possession of immoveable property on establishment of title. The subject-matter of the litigation is a tank with its banks, situated within the property of the Plaintiff. The Defendants purchased the tank under two conveyances, dated the 4th and 11th November 1906 from persons

who claimed to hold under two grants made in favour of their predecessors on the 6th October 1836 and 16th July 1849. The Plaintiff alleged that as the vendors of the Defendants had no transferable right, they were liable to be ejected as trespassers. The primary Court held that the Defendants had acquired a valid title by their purchase and dismissed the claim for ejectment, subject to a declaration in favour of Plaintiff in respect of his title as the superior landlord. The Subordinate Judge has remanded the case for further investigation. The Plaintiff as also the Defendants are dissatisfied with this order. They are agreed that further enquiry is not needed, but while the Plaintiff contends that the suit should have been decreed on the facts found, the Defendants maintain that the suit should have been dismissed. On the present appeals two questions have been raised, first—whether the grants made by the predecessors of the Plaintiff on the 6th October 1836 and the 16th July 1849 are operative against him, and secondly, whether the Defendants have acquired a valid title by their purchase.

As regards the first point the Plaintiff has contended that the document should not have been received in evidence, on the authority of the cases of *Ubilack v. Dallah* (1) and *Uggra Kanta Chowdhury v. Harro Chandra Shickdar* (2).

We are of opinion that the decisions mentioned do not assist the contention of the Plaintiff. There are really two questions for consideration, namely, first, whether the documents were genuine, and, secondly, if genuine, whether they were executed by persons who had authority to bind the predecessors of the Plaintiff. The solution of the first question

(1) I. L. R. 3 Cal. 557 (1878).

(2) I. L. R. 6 Cal. 209 (1880).

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depends upon sec 90 of the Indian Evidence Act, *Shafiq-un-nessa v Shaban Ali* (3). The Courts below, as we understand their judgments, have found that those instruments might be treated as ancient documents and that they were in fact executed by the persons whose signatures they bear. The second question is whether these documents were executed by persons who had the necessary authority. The first grant was made by one Biswanath Bhattacharja, who describes himself as the *iqaradar*, in other words, as a temporary farmer or tenure-holder. The document recites that the grantee Sonatan Ghose had made an application to the superior landlord for the grant of 8 bighas of land for the purpose of excavation of a tank, that the landlord had sanctioned the application and had directed the *iqaradar* to grant a sanad. The *iqaradar* accordingly made the grant in favour of Sonatan Ghose, to be held from generation to generation, in order that a tank might be excavated. The second document purports to have been granted by one Umesh Chandra Pal Chowdhury through the pen of Gurus Prosad Banerjee, who describes himself as a superintendent. This document recites the previous grant and states that as on measurement the tank had been found to extend over 14 bighas of land, it was necessary to make a supplementary grant of 6 bighas so that the grantee might remain in possession of the tank from generation to generation. Both the documents stated explicitly that no rent would ever be paid. The Plaintiff contends that the burden lies upon the Defendants to establish that in respect of the first document the *iqaradar* and in respect of the second document the superintendent had the requisite authority

to make a grant which would be operative against the zamindar. It is not disputed and cannot be disputed that the application of sec 90 of the Indian Evidence Act does not justify the inference that the documents, which are established to be genuine, were in fact executed by persons possessed of the requisite authority. That is an entirely different question, and the correctness of the decision in *Ubilack Rai v Dallah Rai* (1) and *Uggra Kanta Chowdhury v. Harro Chandra Shickdar* (2), which were followed in *Maharam Chaprasi v. Telamuddin Khan* (4) cannot be questioned. Indeed, a similar view was adopted in *Airey v. Stapleton* (5). In that case, where a deed purported to be an appointment under a special power and to be executed by the attorney of the donee of the power, it was ruled that presumption only arose as regards the execution of the deed but not with regard to the authority of the solicitor to execute the power. It does not follow, however, that it is necessary for the grantee of the document or his successor-in-interest to establish by direct evidence that the executant had the requisite authority. When a grant has been in operation for a long series of years, as in this case, it may be impossible to adduce direct evidence of authority. In such a contingency the Court may draw an inference from all the surrounding circumstances. In the present case, the grantee and his successors in interest from generation to generation have been in possession for more than 70 years. If the grants were unauthorised the zamindar might have been expected to take steps long before this to eject the grantees;

(1) I. L. R. 3 Cal. 557 (1878).

(2) I. L. R. 6 Cal. 209 (1880).

(4) 15 C. L. J. 220 (1911).

(5) [1897] 1 Ch. 164.

(3) I. L. R. 26 All. 581; 2, C. 9 C. W. N. 105 (P. C.) (1904).

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Naina Pillai v. Ramanathan Chettiar (6). The burden thus shifts upon the zamindar to prove how he came to acquiesce in the long possession of the grantee and his successors. Besides, it is the zamindar who is aware of the scope and extent of the authority conferred by him upon his lessee, or upon the superintendent of his estate. No evidence, however, is forthcoming from his side, *Suduman Jamadar v. Behari Mahton* (7). In these circumstances, it was open to the Courts below to draw the inference that the grants must have been made by persons who possessed the requisite authority. We are of opinion that the Plaintiff cannot now successfully urge that the grantee and his successors have held for 70 years without a lawful origin of their title and possession.

As regards the second point, the question for consideration is, whether the interest of the grantee was transferable. It has been rightly held by the Courts below that the effect of the grant cannot be determined by a reference to the provisions either of the Transfer of Property Act or of the Bengal Tenancy Act. The point for determination is, whether, in 1836 and 1849, interest in land created by a grant of this description was or was not transferable by custom or by contract; *Sulim Mohan v. Raj Krishna* (8). No evidence of custom has been produced. The terms of the grant, however, leave no room for doubt that the grant was made in perpetuity. The grant stated explicitly that the grantee was to hold from generation to generation. The expression used is *putra-poutradikrame*. The Plaintiff has urged that there is no evidence to show that this expression, now so fami-

liar, had in 1836 and 1849, the same meaning as is at present attributed to it. In this connection, reference has been made to the decision of the Judicial Committee in *Ram Narayan Singh v. Ramsaran Lal* (9), which reversed the decision of this Court in *Ramsaran Lal v. Ram Narayan Singh* (10). There, however, the expression was used in relation to a very special type of grant, namely, *jaigir*, which possessed well-known incidents. Here, on the other hand, we have a grant of land made for the excavation of a tank. The evidence recited in the judgment of the trial Court shows that there was scarcity of water in the village and that Sonatan Ghose whose daughter had been married in that village, undertook to remove the difficulty felt by the villagers, if land were granted to him in perpetuity, so that he might excavate a tank at considerable expense of money. The grant was made accordingly and the tank was excavated for public benefit. As pointed out by Chatterjea, J., in *Birendra Krishna v. Akram Ali* (11), according to Hindu religious notions, such grant of land for digging tank was supremely meritorious. In these circumstances, it is inconceivable that the grant could have been of a temporary character or that the landlord could ever have intended to resume the grant. We feel, no doubt, that the grant comprised in the documents of the 6th October 1836 and the 6th July 1849 was a perpetual grant; and if it was a perpetual grant there can be no room for controversy that the interest created was transferable. In our opinion, the decree made by the trial Court was correct

(6) 38 Mad. L. J. 84 (1916).

(7) 15 C. W. N. 958 (1911).

(8) 25 C. W. N. 420; s. c. 38 C. L. J. 193 (1920).

(9) I. L. R. 46 Cal. 683; s. c. 23 C. W. N. 866 (P. C.) (1918).

(10) I. L. R. 42 Cal. 805 (1916).

(11) I. L. R. 39 Cal. 439; s. c. 16 C. W. N. 304; 15 C. L. J. 194 (1912).

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and should not have been set aside by the Subordinate Judge.

The result is that the appeal preferred by the Defendants (M. A. 392 of 1920) is allowed and that preferred by the Plaintiff is dismissed. The order of the Subordinate Judge is set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of the Subordinate Judge. There will be no separate order for costs in M. A. 330 of 1920.

Appeal No. 330 dismissed,

Appeal No. 392 allowed;

H. C. S.

Suit dismissed

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2893 OF 1920

SYED ALI KAZEMINI

MATWALI, Plaintiff,

Appellant,

v.

MANIK CHANDRA

PRAMANIK, Defendant,

Respondent.

C. C. GHOSE, J.

PANIGON, J.

1923,

25, January.

Landlord and tenant—Origin of tenancy not known—Evidence necessary to prove the nature of tenancy—Circumstances under which permanency of tenure may be presumed—Estoppel and acquiescence—Pucca structures built by tenant, without objection by landlord.

When the origin of a tenancy is unknown, the evidence and the mode of dealing with the demised land and the acts and conduct of the party constitute the best, if not the only, evidence for the purpose of proving the nature of the tenancy.

ISMAIL KHAN MAHAMAD v. JAIGUN BIBI (1) referred to.

Permanency has been presumed in various cases where there was a series of successions and a series of recognitions by the landlord, the rent being allowed to

(1) I. L. R. 27 Cal. 570 (1900).

continue at an uniform rate for a long series of years; but this presumption cannot be drawn from the mere fact that there have been two or three transfers and that again within recent years.

In order that the tenant might avail himself of the plea of estoppel or acquiescence against the landlord, it is necessary for the tenant to show that in spending money for the erection of buildings of a permanent character, he was acting in an honest belief that he had a permanent right in the land and that the landlord knowing that he was acting in that belief stood by and allowed him to go on with the construction. Mere knowledge of the landlord or his agent is not enough.

BENI RAM v. KUNDAN LAL (2) and RAMSDEN v. DYSON (3) referred to.

This was an appeal against the decree of Babu Srish Chandra Chaudhury, Subordinate Judge, 3rd Court of Zillah Hooghly, dated the 4th of June 1920, reversing the decree of Babu Ramesh Chandra Sen, Munsif, 1st Court at that place, dated the 24th of March 1919.

The facts of the case will appear from the judgment.

Mr. A. S. M. Akram for the Appellant.

Babus Mahendra Nath Roy and Bryan Kumar Mukherjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit brought by the Plaintiff as *mutwali* of the Hooghly Imambara for a declaration that the Defendant has no permanent right in respect of the land referred to in the plaint and for a mandatory injunction that certain walls which had been erected by the Defendant should be demolished by him and

(2) L. R. 26 I. A. 58 : s. c. 8 C. W. N. 502 (1899),

(3) L. R. 1 Eng. & Ir. App. 189 (1865).

SYED 'ALI KAZEMINI MATWALI v. MANIK CHANDRA PRAMANIK.

for a permanent injunction restraining the Defendant from making any permanent structure on the land in question. The Defendant in his written statement urged that the *jama* of the land in question had been fixed at Re. 1 13 as. 10 gds. from before the decennial settlement and that the holding had been in the occupation of tenant on payment of rent at a uniform rate for a long period and that it had been transferred on several occasions at auction sales and by mortgages and conveyances to the knowledge of the landlord. He also stated in his written statement that if it was found that the holding in question was included within the *wakf* estate of the Hooghly Imambara, then it should be held to have been in existence from before the creation of the *wakf* estate. The learned Munsif who tried the case in the first instance came to the conclusion that the Plaintiff was entitled to a declaration that the Defendant had no permanent rights whatsoever in respect of the land in suit and that he should be restrained from erecting any fresh permanent structure on the land. As regards the existing structures the Munsif held that they should remain. On appeal by the Defendant, the lower Appellate Court has held that the Defendant's tenure was of a permanent nature and that the buildings on the land had been erected to the knowledge of the landlord and that in the circumstances the suit should stand dismissed with costs. The *mutwali* has now appealed to this Court, and on his behalf it has been contended that having regard to the fact that he is the *mutwali* of a *wakf* estate, it should have been held that under the Mahomedan law he or his predecessor-in-interest had no power whatsoever to grant any permanent interest in respect of any land within the ambit of the *wakf* estate. In the

second place, it has been urged that on the facts found, the presumption of permanency which has been drawn by the lower Appellate Court is wrong.

As far as we can gather from the judgments of the two Courts below, there is no document produced in this case showing the origin of the tenancy or the incidents of the tenancy at its inception. In the absence of any such document we are left to find out what the nature of the tenancy was and is from the evidence of the mode of dealing with the demised land and from the acts and conduct of the parties during such period. It is settled law [see the case of *Ismail Khan v Jaqun Bibi* (1)] that in the absence of any governing document in cases of this description, the evidence of the mode of dealing with the demised land and the acts and conduct of the parties constitute the best, if not the only, evidence for the purpose of proving the nature of the tenancy. The documents such as we have in this case are Exs C, B and B I. Ex (C) is a sale-certificate showing that the holding in question had been brought to sale in execution of a decree for arrears of rent at the instance of the landlord, namely, the then *mutwali*, and that it was purchased some time in September 1884, by one Alimuddin. It appears from the next exhibit in order of date that Alimuddin sold the holding to one Ram Chander Das on or about the 15th November 1884. Then there is Ex (B), dated the 26th June 1894, from which it appears that Ram Chander Das sold the property in question to the present Defendant. There is no doubt that Ram Chander Das was recognised by the landlord. There is also no doubt that after the sale to the present Defendant on the 26th June 1894 the rent which previously stood at Re. 1 13 as. 10

(1) I. L. R. 27 Cal. 570 (1900).

SYED ALI KAZEMINI MATWALI v. MANIK CHANDRA PRAMANIK.

gds. was raised to Rs. 3 per annum. There is not in this case, as is to be found in various cases in the reports, a series of successions and a series of recognitions by the landlord, the rent being allowed to continue at a uniform rate and without any variation for a long series of years. The documents, so far as we can see, are of modern times and besides the circumstances to which we have alluded, there are no other circumstances to which the tenant can point as showing that his case is within the principle of the cases decided by their Lordships of the Judicial Committee where a permanent grant has been inferred from a series of successions and transfers followed by recognition. The Defendant tenant points out, however, that there are permanent structures on the land and that some of them were erected about 20 years ago and he has invited us to infer from these circumstances that the tenancy was of a permanent character and that if it were not permanent he would not have been allowed to erect permanent structures on the land.

Now, to start with, the nature of the tenancy was perfectly well-known to the Defendant. That it was so is apparent from paras. 7 and 8 of his written statement. In the second place, it is settled law that in order that the tenant might avail himself of the plea of acquiescence or estoppel, it is necessary for the tenant Defendant to show that in spending money for the erection of buildings of a permanent character he was acting in an honest belief that he had a permanent right in the land and that the landlord knowing that he was acting in that belief stood by and allowed him to go on with the construction of the buildings. See the case of *Lala Beni Ram v. Kundan Lal* (2)

and *Ramsden v. Dyson* (3). In this case there is an entire absence of evidence showing any circumstances under which the present Defendant's case can be brought within the rule just referred to. It is, however, urged that the finding is that the erection of the *pucca* building on the land in suit was known to the *mutwali* or his agent. That is not enough. The tenant must in the first place show that he had an honest belief that he had a permanent right in the land and that the landlord knew that the tenant Defendant was acting under such a belief and further that the landlord knowing that the tenant Defendant was acting under such a belief stood by and allowed the erection of the permanent structure. It has been urged on behalf of the tenant Defendant that in the Courts below the nature of the limited interest of the Plaintiff landlord was not gone into and that the case was not approached from that point of view. There may be some room for this contention; but having regard to the very comprehensive nature of the written statement filed by the Defendant and having regard to the broad and comprehensive issues settled between the parties in this case, it is difficult at this stage to direct a remand. We see therefore no reason to direct a remand in this case and having regard to what has been stated above, we have no other alternative but to hold that the Plaintiff-Appellant is entitled to succeed.

The result, therefore, is that the appeal is allowed with costs and the judgment and the decree of the Munsif are restored.

S. C. C.

(3) L. R. 1 Eng. & Ir. App. 129 (1868).

(2) L. R. 26 I. A. 58: s. c. 3 C. W. N. 502 (1899).

[CIVIL REVISIONAL JURISDICTION.]**REFERENCE UNDER COURT FEES ACT***Re : R. A. FILE No. 160 OF 1922.*

IDOL SRI SRI GOKUL
NATH JIU, Appellant,
v.
THE NEW BIRBHUM
COAL Co., LD.,
Respondent.

B. B. GHOSH, J.
1923,
23, March.

Court Fees Act (VII of 1870, as amended by Bengal Act IV of 1922), Sch. II, Art. 17 (iii)—Suit for a declaratory decree where no consequential relief is prayed, but should have been prayed for—Suit dismissed under Specific Relief Act (I of 1877), sec. 42—Appeal—Proper court-fee on memorandum of appeal.

A suit for a declaratory decree was dismissed on the ground that the Plaintiff might and ought to have prayed, but did not pray, for consequential relief. The Plaintiff stamped his memorandum of appeal against this decision with the fixed fee provided by Art. 17 (iii) of Sch. II of the Court Fees Act.

Held—That in determining the amount of court-fees payable, the Court is not to consider whether the suit is properly framed, whether the Plaintiff is entitled to the declaration asked for or what would be the effect if the Plaintiff succeeds in obtaining a declaration as prayed for. The Court has only to see whether it is a memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed, and if it is such a suit, the fixed fee of Rs. 20 is sufficient under the provisions of Sch. II, Art. 17 (iii) of the Court Fees Act.

DEOKALI KOER v. KEDAR NATH (1) referred to.

This was a Reference by the Taxing Officer to the Hon'ble Chief Justice under sec. 5 of the Court Fees Act about the sufficiency of the court-fee of Rs. 20 paid on the memorandum of appeal in appeal from Original Decree File No. 160 of 1922.

(1) I. L. R. 39 Cal. 704 (1912).

The facts are fully set out in the Reference of the Taxing Officer, which was as follows :—

“In this case, the Plaintiff-Appellant brought a suit in the Court of the Subordinate Judge at Asansol for a declaration of title in respect of certain coal mines. The suit was dismissed by the Subordinate Judge, one of the grounds for dismissal apparently being that the Plaintiff ought to have sought for further relief other than a mere declaration of title. One of the grounds of appeal to this Court (*viz.*, Ground No. 16) is to the effect that the Plaintiff was not bound to ask for any further relief than a mere declaration of title. It seems to me that, in this case, the suit and the memorandum of appeal have been framed with a view, if possible, to avoiding the payment of an *ad valorem* court-fee under sec. 7, para. 4, cl. (c) of the Court Fees Act. But I do not think that the Plaintiff or an Appellant ought to be allowed to frame a suit or appeal in this fashion merely to the detriment of Government revenue. As a matter of fact, in whatever way the appeal is framed and whatever the Appellant may ask for in express terms, he really does ask for a good deal more than a declaration of title. The declaration of title really involves recovery of possession and, possibly, recovery of mesne profits: that is, in effect the Appellant does ask for consequential relief. If an *ad valorem* court-fee is to be paid in this case, the deficit court-fee would amount to Rs. 775. The matter is one of considerable importance and so I refrain from passing any final orders on the subject. In accordance with the provisions of sec. 5 of the Court Fees Act, I refer the matter to the Hon'ble the Chief Justice for orders.”

The matter was then laid before the Mr. Justice B. B. Ghose by an order of the Chief Justice.

IDOL SRI SRI GOKUL NATH JIU v. THE NEW BARBHAM COAL CO., LD.

Babus Baranashibasi Mukerjee and *Krishna Lal Banerjee* for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Surendra Nath Guha* for the Government.

THE JUDGMENT OF THE COURT was as follows :—

The memorandum of appeal in this case was filed with a court-fee of Rs. 20 in accordance with the provisions of Sch. II, Art. 17 (iii) of the Court Fees Act, 1870, as amended by Bengal Act, IV of 1922. There being a difference of opinion as to the fee payable between the Stamp Reporter and the Vakīl for the Appellant, the Taxing Officer referred the matter to the Chief Justice who has appointed me to decide the question under sec. 5 of the Court Fees Act. I thought it necessary to look into the plaint in order to enable me to decide it, and the learned Vakīl for the Appellant supplied me with a copy of it and also another copy to the learned Government Pleader who appeared on behalf of the revenue authorities. It is contended on behalf of the Appellant that the court-fee paid is sufficient. Art. 17 of Sch. II of the Court Fees Act runs thus :—“Plaint or memorandum of appeal in each of the following suits.— (iii) to obtain a declaratory decree where no consequential relief is prayed.” The third column prescribes the fixed fee payable. The fixed fee is payable under this article only when the suit is for a declaratory decree without any prayer for consequential relief. One of the grounds for dismissal of the suit by the trial Court was that the Plaintiff ought to have asked for consequential relief, which he had not done. I also find that the Plaintiff has not prayed for any consequential relief in his plaint. It struck me on reading the plaint that on the statement of facts the Plaintiff might and ought to have prayed

at least for an injunction, if not for any other relief. The learned Vakīl for the Appellant, however, argued that assuming it is so, he has not made any such prayer and says that, if his suit is found to be badly framed having regard to the provisions of sec. 42 of the Specific Relief Act, his appeal and the suit would be liable to be dismissed on that ground, but he cannot be asked to pay additional fee having regard to the fact that he has not prayed for any consequential relief. I am of opinion that his contention should be accepted. I think, the observation of Jenkins, J., in *Deokali Koor v. Kedar Nath* (1) is appropriate to this case, where he says. “It is a common fashion to attempt an evasion of court-fees by casting the prayers in the plaint into a declaratory shape. Where the evasion is successful, it cannot be touched, but the device does not merit encouragement or favour.” The learned Chief Justice further observed :—“If the Courts were astute, as I think they should be, to see that the plaints presented conformed to the terms of sec. 42, the difficulties that are to be found in this class of cases, would no longer arise.” It is, however, not within my province to see whether the suit is properly framed, whether the Plaintiff is entitled to the declaration asked for or what would be the effect if the Plaintiff succeeds in obtaining a declaration as prayed for. If the Court trying the appeal finds that the suit as framed is not maintainable, it will either dismiss it or make such other order as it considers proper. I have only to see whether it is a memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed. I think, it is such a suit. The learned Government Pleader states that, if the

(1) I. L. R. 39 Cal. 704 at p. 707 (1912).

IDOL SRI SRI GOKUL NATH JIU v. THE NEW BIRBHUM COAL CO., LD.

Plaintiff frames his prayer in this manner with full knowledge as to its effect, he cannot ask that the Plaintiff should be compelled to pay additional court-fee. Under the circumstances it seems to me, the court-fee paid is sufficient according to the provisions of Sch. II, Art 17 (iii) of the Court Fees Act.

J. N. R.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.

LORD ATKINSON.

LORD WRENBURY.

1923,

Heard, 5 and

6, February.

Judgment,

27, February.

KESHAVALAL BRO-

THES & Co.,

Appellants,

v.

DIWANOHAND & Co,

Respondents.

Indian Contract Act (IV of 1872), sec 7:—Measure of damages—Contract to deliver, breach of—Goods not shown to have been intended for a particular customer—Measure of damages, if difference between contract and market rates or between contract rate and rate expected from customer.

Where the contract was that the Defendant would deliver a certain quantity of coal to the Plaintiff at a certain price out of the Plaintiff's stock, and it did not appear that this coal, if delivered, was intended by the Plaintiff to be supplied and that the Plaintiff was bound to supply it exclusively to a particular customer, and the coal not having been delivered, the Plaintiff sued for damages:

Held—That there being nothing in the case to prevent the Plaintiff from selling the coal, if delivered, in open market, the measure of damages was the difference between the contract price and the market price and not between the former and the price which the Plaintiff might have got by selling the same to that particular customer.

Quære.—Whether the law in sec. 73 of the Indian Contract Act is different from that laid down in *HORNE v. MIDLAND RAILWAY CO.* (1).

This was an appeal from a decree of the High Court of Bombay, dated the 23rd February 1920, reversing a decree of the said Court in its Original Jurisdiction, dated the 26th June 1919.

The suit was instituted by the Appellants to recover damages for breach of a contract to deliver steam coal.

The vendors (Respondents) claimed that the contract became impossible of performance owing to the action of Government in commandeering mines. They further contended that under the emergency legislation in force at the time the coal under the contract could only be delivered to the consumer named therein and that no damage had been suffered by the purchaser owing to the consumer having received supplies from the Government reserve. The trial Judge (Kajji, J.) decided in favour of the Plaintiffs and awarded them Rs 17,508 as damages. That decision was reversed by the High Court on appeal (McLeod, C. J. and Heaton, J.) who held that there was no evidence of damage.

The facts are fully set out in the judgment of the Board.

Sir John Simon, K. C., Messrs. A. M. Dunne, K. C. and E. B. Rakes for the Appellants—The purpose of the indent was merely to enable the vendor to get wagons and replace the coal supplied from his stock.

The Appellate Court have erred in thinking that the particular coal and the particular wagons received from the colliery must be placed at the service of the particular consumer named in the indent.

(1) L. R. 8 C. P. 131, 138, 140, 141 1873.

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The evidence shows that some of the deliveries to the Appellants were from wagons allotted in respect of other contracts.

The measure of damages is the difference between the contract rate and the market rate at the time of breach. The fact that the Appellants may have had other contracts with the Ice Factory is immaterial.

Mahommed Habid Ullah v Bird & Co (2).

You must measure the damages at the time of breach. At that time there was no question as to whether the Ice Factory had received supplies from the Government reserve.

Benjamin on Sale, p. 1094

Wertheim v Chicoutimi Pulp Co (3), *Rodocanachi v Millburn* (4) and *Di Ferdinando v Simon, Smith & Co* (5)

Sir Geo Lowndes, K C and *Mr Douglas McNair* for the Respondents — Embodied in the contract is the indent which is notice to the buyer and seller of the purpose of the sale. That distinguishes this case from *Williams Bros v. Agus* (6) and *Rodocanachi v Millburn* (4)

There is no evidence of market rates and therefore no evidence that damage was suffered.

The principle is that the difference between the market rate and the contract rate is generally the fair measure of damages as stated in *Wertheim v Chicoutimi Pulp Co*. (3), *British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Railway Co. Ltd* (7) and *Watts, Watts & Co. Ltd v. Mitsui*

& Co. Ltd (8), but the contract may incorporate special terms necessitating a variation of the general rule.

Under Indian law if you have communicated the special circumstances your damages are limited to those special circumstances. See 73, Indian Contract Act.

Mr Dunne, K C, in reply — Provided there is a market the damages are assessed by the market rate.

Then LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON — This is an appeal from a decree of the High Court of Bombay in its Appellate Jurisdiction, dated the 22nd February 1920, reversing a decree of a single Judge of the said Court in its Original Jurisdiction, dated the 26th June 1919.

The suit out of which the appeal arises was instituted by the Appellants, as Plaintiffs, against the Respondents claiming over Rs. 40,000 damages for breach of a contract for the sale of steam coal. The suit was decided by the trial Judge in the Plaintiffs' favour. He assessed the damages at Rs. 17,508-6-5, but that decree was set aside by a Division Bench of the High Court (Macleod, C J and Heaton, J), which allowed the appeal and dismissed the suit on the ground that in the special circumstances which existed no damage had been suffered by the Plaintiffs.

The main question for determination by this Board is whether in these circumstances the Appellants are entitled to the sum of Rs. 17,508-6-5 awarded to them by the trial Judge or are, as decided by the Court of Appeal, not entitled to recover any damages. On the 11th October 1917, the Appellant Company and the Respon-

(8) [1917] A. C. 227 at p. 241.

(2) L. R. 48 I. A. 175 (1921)

(3) [1911] A. C. 301 at p. 307 (1910).

(4) L. R. 18 Q. B. D. 67 (1886).

(5) 36 Times L. R. 797 (1920).

(6) [1914] A. C. 510.

(7) [1912] A. C. 673 at p. 690.

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dent Company entered into an agreement in writing in the following terms :—

“ Keshavlal Brothers & Co.,

“ Bombay,

“ 11th October 1917

“ The undersigned have this day sold to Messrs Keshavlal Brothers & Co quantity of coal amounting to Rs ——— 1,200 tons or thereabouts.

“ Description —Bengal steam coal, good second class.

“ Delivery —To be despatched to Cotton Depot, coal to be weighed and delivered at Cotton Depot, monthly 200 tons from November 1917, to April 1918, in equal instalments

“ Rate —Rs 17—15, say Rs seventeen and annas fifteen per ton net

“ Delivery —At Cotton Depot

“ Terms —Payment on delivery in Bombay

“ Indent in any class to be furnished by the buyers, and the sellers agree and undertake to deliver the coal guaranteed in instalments as above from stock

“ (Signed) RAMAVTAR MAINI,

“ Per Pro' DIWANCHAND & Co’

The Cotton Depôt mentioned in this agreement is admittedly a place in Bombay where cotton and other goods are deposited for sale. The Respondent Company had admittedly a depôt there for coal. It is to be observed that the coal contracted to be sold is not identified. It is to be taken from the vendors' stock.

It is necessary to describe at some length the system for the supply of coal established at this date by the Indian Government. Owing to the shortage of coal due to the war, committees had been appointed for several Districts in India, including Bombay, to regulate the supply of coal, and the means by which it could be obtained. Officials styled Coal Controllers were, by the Government of India, appointed to superintend, direct, and control the action of these committees. On the 30th January 1917, the

Coal Controller, having jurisdiction in the matter, issued a notice to the effect that the committee appointed by Government to regulate coal supplies had directed that wagons would only be supplied after the 5th February then next succeeding, on indents signed by the actual consumer and countersigned by the authority appointed by the committee to certify these indents, and further that the indents should be prepared on the prescribed forms, copies of which were obtainable from the coal managers named. These indents were graded for priority into five classes, A, B, C, D, E, not according to the nature of the coal to be supplied, but rather according to the urgency of the need of the different consumers to obtain coal.

The Respondent Company had agreed with the Garraria Colliery at Jharia, Bengal, to buy from them the coal necessary, presumably, to implement the above-mentioned contract of the 11th October. The whole output from this colliery was placed at the disposal of the Government in December 1917. The indent was thereupon transferred to the Nandkurki Colliery. Shortly after, the produce of this latter colliery was restricted, and the indent was transferred to the Fatehpur Colliery.

The Appellants wrote to the Respondents the following letter or order; it bears date —

“ Bombay,

“ 8th November 1917.

No. 5951/73.

“ Messrs' Diwanchand and Company.

“ DEAR SIRS,

“ Re our Contract for 1,200 tons of steam coal dated 11th October 1917.

“ With reference to our above Contract we beg to send you herein enclosed a special indent, No. 719, dated 7th November 1917, in favour of the Proprietors, The Dhanjibhoy Ice Factory, Mazagaon, Bombay. The

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special indent has been certified by the Deputy Controller, "Coal Supplies," Bombay, recommending the special supply of 10 (ten wagons) monthly up to 120 wagons for despatch to Byculla (Bombay) on their account.

"We are forwarding the third part of the indent to the Coal Manager, Calcutta, requesting him to sanction special supply of wagons to Dullabhji Howjee's Garraria Colliery and instruct the District Superintendent, Dhanbad, to allot wagons against indents from the Colliery. Kindly forward this second part to the colliery concerned instructing them to indent for the wagons regularly and despatch coal without the least delay. We enclose herewith a copy of the Coal Manager's letter.

"Trusting you to do the needful, and hoping to hear soon from you re despatches.

"(Signed) GIRJASHANKER I. PATHEK.

"FOR KESHAVLAL BROTHERS AND CO

"Enc Sp Indent and Copy"

On the same day the Appellant Company addressed to the Coal Manager at Calcutta the following letter, —

• "8th November 1917

"To the Coal Manager,

"East Indian Railway, Calcutta

"DEAR SIR,

"We beg respectfully to send you herein enclosed a third part of the special indent No 719, dated 7th November 1917, in favour of the Proprietor, the Dhanubhoy Ice Factory, Mazagaon, Bombay. The special indent has been certified by the Deputy Controller, "Coal Supplies," Bombay, recommending the special supply of ten wagons monthly up to 120 wagons for despatch to Byculla (Bombay) on their account.

"We have to request your goodness to sanction supply of wagons as certified and instruct the District Superintendent, Dhanbad, to meet indents from Dulabhji Howjee's Garraria Colliery to enable them to expedite despatches.

"Thanking you in anticipation, and hoping to hear soon favourably,

Yours faithfully,

"Enc Sp. Indent"

The indent referred to in this letter was in the following form :—

* "Keshavlal Brothers and Company,

"East Indian Railway,

"Special Indent for Coal,

Indent No 719

"Dated 7th November 1917

"(1) Full name and address of Consumer : The Proprietors, The Dhanubhoy Ice Factory, Mazagaon, Bombay

"(2) Description of Industry Ice Factory.

"(3) Weekly Consumption 40 tons (forty)

"(4) Stocks held on date, tons 55 tons

"(5) Party from whom purchased : Messrs Bhukhandas Motilal and Company, c/o Diwanchand and Co

"(6) Name of Colliery Garraria Colliery.

"(7) Name of Managing Agents of the Colliery Dhulabhji Howji

"(8) Name of siding coal will be loaded at Garraria, E I Railway

"(9) Description of Coal Steam Coal

"(10) Total quantity purchased, tons 120 wagons

"(11) Terms of delivery. 10 wagons monthly

"(12) Name of railway station at which coal will be unloaded, Byculla (Bombay)"

The nature and minuteness of the information inquired after in this specimen indent shows how anxious the officers of the Government of India were that the coal to be carried in the wagons they permitted to be used should be applied to satisfy the needs of consumers, and not be trafficked in by middlemen. But the contract which by the use of the requested wagons it was sought to obtain coal to implement, was not the contract entered into between the Appellants and the Respondents on the 11th October 1917, nor yet a contract entered into between the Appellant Company and the Dhanubhoy Ice Factory. It is apparently a contract entered into between the ice factory and a company named the Bhukhandas Motilal Company.

It may well be that the words "c/o. Diwanchand and Company," found in the indent after the name of this Company,

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* so represented as the vendors, was designed to indicate that the purchase was made by the Respondents on behalf of the consumers, the ice factory. In a letter written by the Respondent Company to the Appellant Company on the 9th November 1917, the writers state that they have not bought the coal from the persons mentioned in the indent, but from the colliery, and express a fear that the colliery proprietors "may refuse to supply coal to these people." The Appellants replied on the same day, calming the fears of the Respondents in reference to this piece of deception, and begging of them to instruct the colliery people to despatch coal under this special indent, in favour of the proprietors of the Dhanubhoy Ice Factory, Bombay. Thus by the arrangement of these two middlemen the indent is falsified, the regulations of the Government evaded and possibly its officers deceived.

On the 26th November 1917, the Appellants wrote to the Respondents requiring delivery of 200 tons of steam coal under their contract of the 11th October 1917. On the next day the Respondents reply that they are receiving coals from the Deputy Controller, and would be pleased to deliver the Appellants 50 tons of it next day, the 28th November 1917. The Appellants wrote refusing to take delivery of this comparative small quantity of coal and demanding delivery at the earliest date of the full quantity in arrear. On the 10th December 1917, the Appellants wrote to the Respondents demanding the delivery next day of 100 tons of coal. To this letter the Respondents replied next day that they are expecting to receive soon a good lot of coal and asking the Appellants to wait a little. On the 18th January 1918, the Appellants wrote to the Respondents, referring to their contract of the 11th October 1917, stating that the writers had only received from them 217 tons 19 cwt., that the instalments for December 1917, and January 1918, were due, and that the writers were ready to accept delivery of these instalments and asking for immediate delivery of them. On the 7th March 1918, the Appellants again wrote to the Respondents demanding delivery of the instalments due. On the 7th March the Respondents wrote making an excuse for non-delivery. To the last letter the Appellants on the same day reply, that it is impossible for them to wait longer for the coal due to them, that as they desire to keep up the connection they will wait till Monday, the 11th March, and that if the Respondents then fail to deliver to them the coal they are entitled to receive, they will be reluctantly compelled to purchase same in the local market at the risk of the Respondents and on their account, and further, that they will claim the market difference. On the 13th March, the Appellants wrote to the Respondents informing them that being much in want of coal, they had purchased 150 tons at the market price of Rs 71 per ton. Two days later they sent to the Respondents a bill for Rs 7,959-6, being Rs 53-1 per ton difference between the contract price and the price they paid on the 150 tons so purchased. On the 18th March 1918, the Appellants wrote to the Respondents setting forth precisely how as regards the fulfilment of the contract of the 11th October 1918, matters stood. They point out that of the 800 tons (200 tons per month for four months) contracted to be delivered, they have only received 335 tons 6 cwt. up to the 28th February 1918, that the balance in arrear on the contract therefore amounted on that date to 464 tons 14 cwt., that the instalment of 200 tons for

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March was already overdue, that they were compelled to buy 150 tons at the market rate on the account of the Respondents, and that they therefore claim the difference between the contract price and the market price on the 150 tons so purchased. It will be observed that the Respondents never suggest that there is not an open market for the sale and purchase of steam coal in Bombay. Nor up to this do they suggest that the Appellants were joint adventurers in this enterprise of selling and delivering or procuring to be sold and delivered to the Ice Factory 1,200 tons of Bombay steam coal, nor yet that the Appellants had sub-contracted with the Ice Factory to deliver 1,200 tons of steam coal to it. On the contrary, the Respondents treat the Appellants as purchasers from them of this 1,200 tons of steam coal under the contract of the 11th October 1917, to whom they were bound to deliver the coal purchased. But on the 22nd March 1918, the Respondents wrote a letter in which, after stating that they were surprised at the Appellants making a demand for a difference of Rs. 53-1 on 150 tons, putting forward for the first time the contention that the Appellants were bound to deliver the coals deliverable under the contract of the 11th October 1917, to the Ice Factory. They state :—

“ You know that the Dhanjibhov Ice Factory is the consumer of the coal, and the contracted coal is to be supplied to them and to no one else. Before we send a reply to you in respect of the damages claimed by you, please let us know at once whether you delivered these coals to the Dhanjibhov Ice Factory, or not and if so, what quantity ”

And then after a long explanation as to the causes which prevented the receipt and delivery of the coals they expected, say :—

“ We fail to understand the reason of your

buying coals from the market for the Dhanjibhov Ice Factory unless they were refused on their application to the Deputy Controller to supply them from Government reserve stock

“ For the present we hasten to inform you that we are not at all liable to pay any damages to you, and we repudiate any liability in the matter, and you were not at all justified under the contract and under the circumstances which now prevail to buy coals from market and if you have done so it is at our own risk and responsibility

“ We request you to answer all the queries mentioned above, and also to send us the amount of Rs. 3,940-1-3 due to us which is now very long standing ”

To this letter the Appellants reply, stating that the Respondents know well that they are bound to give the Appellants the delivery guaranteed from stock, and that in spite of their repeated requests, as they have failed to carry out their contract, the Appellants are obliged to claim the damages mentioned in their previous letter. They add “ We are convinced that by putting forth such queries your intention is to avoid delivery of the instalment for the month of March 1918, which we regret we are unable to allow you for a moment.”

The Appellants have sued to recover damages for the Respondents' breach of the contract of the 11th October 1917, consisting in the non-delivery of the goods contracted to be delivered. They naturally claimed to recover the difference between the price which they contracted to pay for these goods and the market price at which they could have sold them. Had the goods been delivered and no questions of a sub-contract had arisen, they would have cost the Appellants the contract price, and had they been delivered they could have sold them at the market price, which would be presumably their value. The

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Appellants by the non-delivery have lost the money which they might have secured, namely, the difference between these two prices. They have been damaged to that extent. In the 7th paragraph of the statement of defence filed by the Respondents it is alleged that on the 8th November 1917, the Appellants informed the Respondents that they, the Appellants, had agreed (it is not said with whom) to sell the coal received under this contract to the Dhanubhoy Ice Factory, Bombay. The whole correspondence which took place between the parties is utterly inconsistent with this assertion and the parole evidence does not, in any way, sustain it.

It appears to their Lordships that this case does not at all resemble those cases in which, for instance, A contracts with B to sell and deliver to B certain commodities, and then contracts with C to buy from him similar commodities in order to implement his contract with B. Informing C at the time he buys, of the special purpose to which he intends to devote those commodities. In such a case if C does not deliver the commodities to A, questions may arise as to whether the damages to which he, C, would become liable for his breach of contract were not to be augmented by the extra loss A sustains by reason of the non-fulfilment of his contract with B. The authorities in England seem to go the length of holding that notice to C of the special purpose for which A requires the goods is not enough; that to make C liable for the additional damage he must have, expressly or implied, contracted to run the additional risk, *Horne v. Midland Railway Co.* (1). Sir George Lowndes contended, however, that under the 73rd section of the Indian Contract Act, 1872, notice would be

(1) L. R. 8 C. P. 181, 188, 140, 141 (1878).

enough to make a vendor liable though he did not contract to run the risk, to which Blackburn, J., refers in the case just cited. It does not appear to their Lordships to be necessary to decide this question, as in their view there is no evidence, oral or written, to establish that the Appellants had sub-contracted with any person or body to deliver to the Ice Factory the whole, or any portion, of the coal they had purchased from the Respondents, when they should receive it or at any time thereafter. The parties agreed that the coal in fact delivered by the Respondents to the Appellants only amounted to 315 tons 16 cwt. Five issues were settled for the Respondents. Two of them alone would seem to be of importance. No issue was raised as to whether the Appellants ever contracted to deliver over to the Ice Factory Company the coals they might receive from the Respondents. The two important issues were whether the contract sued upon did not become impossible of performance, and whether the Appellants were entitled to any damages, and if so how much. Upon those two issues the Respondents appear to have concentrated all their efforts. The trial Judge, rightly in their Lordships' opinion, held in favour of the Appellants on those issues. Ramavtar Maini, one of the partners of the Respondents' firm, admitted that coal was available and could be purchased in the local market, and it was admitted that at no time was an absolute embargo placed on the supply of coal from the Garraria Colliery. The trial Judge awarded to the Appellants Rs. 17,508-6-5 as damages. The Court of Appeal set forth their ground of decision in the following passages of their judgment. Macleod, C. J., said: "The Defendants knew that the Plaintiffs could only deliver coal to the party

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who signed the indent. The Plaintiffs (the Appellants) must have known that they could not deal with that coal in the open market. The only profit they could make out of the contract was the difference between the contract price and the price the indenter (the Ice Factory Company) would pay them." It must be taken, therefore, when the contract was made that both the parties knew that the only profit the Plaintiffs could make would be the difference between their contract and the contract they might make with either the indenter or an intended party, and would at the most provide the measure of damages.

Heaton, J, expresses a practically identical opinion. He says :—

"The purpose of the contract was to procure coal for one particular customer, and, therefore under the contract, the coal, if procured, had to go to that particular consumer, or as to part, might be used to replenish coal in stock from which that consumer had been supplied."

Their Lordships are unable to accept these views. As between the Appellants and the Respondents there was no contract to supply to the former the identical coal obtained from the collieries. On the contrary, it was expressly provided that the coal purchased from the Respondents was to be supplied from the Respondents' stock. Again, as already pointed out, no contract was entered into between the Appellants and the Respondents or between the Appellants and the Ice Factory that the Appellants should deliver over to the Ice Factory the coal that should be delivered to them under the contract of the 11th October 1917. The indent was, no doubt, manipulated in the way that has been already pointed out in order to get the use of the wagons. The Appellants' name does not appear on the indent. The Respondents' does appear.

No evidence was given as to the particular relations between the Respondents and the Ice Factory. Their Lordships are therefore of opinion that whatever those relations may have been, and whatever obligations rest upon the Respondents, the Appellants would not have been bound, had the agreement of the 11th October been performed, to sell or deliver to the Ice Factory the coals which should be delivered to the Appellants out of the Respondents' stock. They do not think that the Ice Factory was the Appellants' only customer. Their view is that had the coals purchased been delivered to the Appellants in pursuance of their contract, the latter would have been entitled to sell them in the open market at the market price, and that being so, the damages were rightly assessed at the difference between the contract price and that market price. Their Lordships are therefore of opinion that the judgment appealed from was wrong and should be reversed and the judgment and decree of Mr. Justice Kajji be restored, and they will humbly advise His Majesty accordingly. The Respondents must pay the costs of the Appellants here and in the Courts below.

Solicitors. *Messrs. Hallows and Carter* for the Appellants.

Solicitors. *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE DECREE
No. 2938 of 1920.

CHATTERJEA, J. } PRIYA NATH BASU and
CUMING, J. ors., Plaintiffs,
1923, Appellants,
Heard, 27 and v.
28, February. TARA CHAND MORAL
Judgment, and ors., Defendants,
25, May. Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 103B, 104H, 104J—Suit for rent—Plea of tenant that landlord has dispossessed tenant from a portion of the holding and rent should be suspended—Entry in record-of-rights as to area of holding, if conclusive

An entry in the record-of-rights as to rent settled under Part II of Ch X of the Bengal Tenancy Act cannot be challenged otherwise than by a suit under sec 104H, and except in so far as is allowed by such suit, the other entries in the record-of-rights cannot also be challenged so as to affect the amount of rent settled and recorded in such entry. These other entries, however, are not conclusive for any other purpose.

Where an entry in a record-of-rights prepared under Part II of Ch X of the Bengal Tenancy Act as to the area of a tenant's holding is questioned by the tenant in a suit for rent, for the purpose of shewing that the tenant has been dispossessed by the landlord of a portion of the holding and that therefore the rent should be suspended:

Held—That the entry as to area in the record-of-rights is not conclusive, under sec 104J of the Act, for the determination of such a question. It can only be presumed to be correct under sec. 103B until the contrary is proved.

This was an appeal preferred on the 17th December 1920 against the decree of the Additional District Judge of Zillah Khulna (H. K. Niyogi, Esq.), dated the 15th September 1920, affirming the de-

crecy of the Additional Subordinate Judge of that District (Babu Haripada Banerji), dated the 16th August 1919.

The facts of the case will appear from the judgment.

Babus Jogesh Chandra Roy and Anlendra Nath Ray Chowdhury for the Appellants.

Babu Salindra Nath Mukerjee for the Respondents.

THE JUDGMENT OF THE COURT was as follows.—

This appeal arises out of a suit for recovery of rent.

The Plaintiffs-Appellants alleged that the Defendants held a tenure consisting of 1752 bighas of land at a rent of Rs 915-12-6 under them, and the rent for the years 1321 to 1324 was claimed in the suit.

The main defence was that the tenure consisted of more than 2000 bighas of land, that the Plaintiffs had let out about 600 bighas of land out of the lands of the Defendants' tenure, to one Gobinda Mandu who had dispossessed the Defendants from a portion of the tenure, that rent had also been realised on Plaintiffs' behalf from some of the Defendants' tenants on the land, and that the rent payable for the tenure should therefore be suspended. The Courts below have concurred in dismissing the suit, and the Plaintiffs have appealed to this Court.

Three contentions have been raised on behalf of the Appellants. The first is that the Court below is in error in holding that the disputed land was included in the Defendants' tenure, and that it had misconstrued the Defendants' *pottah*, dated the 7th March 1839 in so holding. The southern boundary of the lands of the tenure in the *pottah* was "*khas land*." It was the case of both parties that "*khas land*" meant the *khas* land of the Govern-

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ment, but they differed as to the location thereof. The Court below has elaborately discussed the question and has found that the disputed land was all along treated by the Plaintiffs and their predecessors as being included within the Defendants' tenure, that rent was assessed upon the disputed land in accordance with the stipulation in the lease, and realized, that the Defendants through *dargantidars* and other tenants had been in possession of the disputed land from the very inception of the tenancy, and that the contractual rights and obligations of the parties under the lease were not affected by the subsequent settlement of some of the disputed lands taken by the Plaintiffs in 1908 from the Government. It has also found upon the evidence that the Plaintiffs dispossessed the Defendants from the disputed lands by realising rents from the Defendants' under-tenants, and by granting a lease to a third party with respect to a portion of the Defendants' tenure. We are of opinion that the *pottah* has been rightly construed by the Court below, and the above finding cannot be challenged.

The second contention is that the Defendants acquiesced in the dispossession, and reliance is placed upon the mortgage-bond, Ex. I, executed by the Defendants. But the circumstances under which the mortgage was executed have been stated by the Defendants and the statement has been accepted by the Court below.

The last contention is that the entry in the record-of-rights which shows that Rs. 820-1-6 was the rent settled for the Defendants' tenure of 1752 bighas and odd is conclusive not only as to the rent, but is also conclusive as to the area of the tenure under sec. 104J of the Bengal Tenancy Act. That the rent settled under Part II of Ch. X of the Bengal

Tenancy Act is conclusive under sec. 104J, has been held in a number of cases, but the question is whether an entry in the record-of-rights other than the entry as to the rent settled is conclusive.

In the case of *Ambica Charan Chakravarti v. Joy Chandra Ghosh* (1), Plaintiff sued for rent at the rate of Rs. 20 at which it was settled in the settlement proceedings, and the Defendant having relied upon a *pottah* granted before the settlement, and which fixed the rent at Rs. 3-2-0, it was held that the settlement of rent having been made under Part II of Ch. X of the Bengal Tenancy Act, the entry as to the rent was conclusive under sec. 104J of the Act. The learned Judges pointed out the distinction between secs. 103B and 104J, and observed that, "sec 104J applies to the rent-roll alone; and to no other part of the record-of-rights." No question, however, arose in that case other than as to the rent settled.

In the case of *Prosanna Kumar Adhikari v. Rachimuddin* (2) there was a *kabuliyat* in respect of 96 bighas at a rent of Rs. 220 with a stipulation for payment of additional rent if the tenant was found to occupy more land than was specified in the *kabuliyat*. Subsequently there was a record-of-rights, and according to it the Defendant was found to hold 117 bighas but the rent was fixed at Rs. 220. The Plaintiff having sued to recover rent for the 117 bighas at a rent of Rs. 268, it was held by Caruduff and Chapman, JJ., that the entry settling the rent was conclusive and observed:—"It appears that a suit was brought under sec. 104H in respect of the description of the Defendant in the record-of-rights, and the description was altered from that of an occupancy raiyat

(1) 13 C. W. N. 210 (1908).

(2) 17 C. W. N. 153 (1912).

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to that of an under-raiyat, but no attempt was made under the provisions of secs. 104 to 104F to alter the entries as to the rental and the area. The latter entries are, therefore in the view we take of the section, conclusive and this we may remark was the view taken by Stephen and Doss, JJ., in *Ambica Charan v Joy Chandra* (1) "

It is to be noted that in *Prosonna Kumar's* case (2), the learned Judges observed that the "latter entries" (which related to both the area and the rent) are conclusive. But the area was not in dispute in that case; only the rent was in dispute.

In *Baikuntha Nath Ghora v. Prosanna Kumar Mahapatra* (3) a rent suit was brought in respect of two tenancies in accordance with the record-of-rights. The defence was that the Settlement Officer had re-arranged the holdings and the two holdings were not held as they were originally, but they were different holdings although the same amount of land was comprised in the two holdings. It was argued for the tenant in that case that, although he may not be able to question the amount of rent, he may show that the land is not correctly stated in the record-of-rights and that therefore he is not liable to pay the rent which had been deemed to be correctly stated. But Fletcher, J., observed: "That seems to me to be quite impossible on the wording of the section. Correctness of the rent means that the amount of rent is correct with reference to the amount of land entered in the record. It is shown quite clearly by sec. 104H, sub-sec. (3) (d), in giving one of the grounds on which a suit can be instituted by a person who is

aggrieved by an entry of a rent settled in a settlement rent-roll. It is quite impossible to say that when the rent is deemed to be correctly settled the tenant can go behind the record and show that the record is wrong." It is to be observed that, in that case, the correctness of the area entered in the record-of-rights was challenged for showing the incorrectness of the entry as to the rent, which could not be allowed having regard to the provisions of sec. 104J.

The learned Pleader for the Respondents has strongly relied upon the observations quoted above. It is true that the rent of a tenancy is settled with reference to the lands comprised therein, and cl. (d) of sec. 104H provides for a suit being instituted on the ground, among others, that the land has been wrongly omitted from the land of a tenancy. But the decision of such question appears to be only incidental to the question of settlement of rent. In the case of *Jogendra Nath Singh v. Secretary of State* (4), the scope of a suit under sec. 104H was considered, and the learned Judges (Mookerjee and Holmwood, JJ) observed:—"No doubt, the Court with a view to determine the question whether the entry of the rent as settled is erroneous or whether there ought to be an entry of settlement must incidentally examine the grounds assigned by the Plaintiffs as set out in the six clauses of sub-sec. (3). But the Court cannot be called upon, in a suit under sec. 104H, to make an express declaration upon any of the six matters mentioned in the sub-section."

In the case of *Prafulla Nath Tagore v. Secretary of State for India* (5), the revenue officer in settlement proceedings settled the rent of the lands on the basis

(1) 13 C. W. N. 210 (1908).

(2) 17 C. W. N. 153 (1912).

(3) 23 C. W. N. 516 (1918).

(4) 17 C. W. N. 885 (1912).

(5) 26 C. W. N. 100 (1921).

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of the rent payable to the proprietor ignoring the existence of a tenure and certain holdings purchased by the proprietor in execution of decree for arrears of rent. It was found that the tenure had not merged in the proprietary interest, and the raiyati holdings (purchased before the amendment of the Bengal Tenancy Act in 1908) did not cease to exist. The Courts below held that the Court had no jurisdiction to settle the rent of the tenure and holdings. One of the members of this Bench (Chatterjea, J.) and Panton, J., held that a suit could be maintained on the grounds (d) and (e) of sec. 104H, and that under sub-sec. (4) of that section the Court had the power to settle the fair rent payable by the Plaintiff as the holder of the tenure and the holdings. A declaration was made as to the right of the Plaintiff as tenureholder and raiyat. The declaration was, however, unnecessary, as it was only incidental to the settlement of fair rent, and for which purpose the case was remanded to the lower Court. The question whether such a declaration could be made in a suit under sec. 104H does not appear to have been raised in that case, nor does the case of *Jogendra Nath Singh v. Secretary of State* (4) appear to have been brought to the notice of the Court.

In *Prasulla Nath Majumdar v. Palku Mahamad* (6), two suits for rent were brought for two holdings, one at the rate of Rs. 50 and the other at the rate of Rs. 30-10-0. The record-of-rights showed a *juma* of Rs. 30-10 only. Subsequently a decree for rent for Rs. 50 was obtained *ex parte*, but it was found that the decree had been obtained by keeping back the record-of-rights, and that it was

improbable that one of the *jamias* under the Plaintiff had been omitted from the record-of-rights. It was held by Fletcher, J. and one of the members of this Bench (Cumming, J.), that sec. 104J precluded any evidence being given to contradict the statement as to rent mentioned in the record-of-rights where a settlement rent-roll had been prepared under the provisions of secs. 104A to 104F. It is true that a question arose as to whether there were two *jamias*, and it was held that there was only one, relying upon the record-of-rights, but the actual decision proceeded upon the ground that the entry as to the rent settled could not be contradicted. In any case, there was no express decision that any entry other than of the rent settled was conclusive. In the case of *Profulla Nath v. Tweedie* (7), the conclusive character of an entry as to the rent settled was recognized and the question whether an entry in the record-of-rights other than as to the rent settled is conclusive was referred to but was not decided. The question in that case was whether having regard to the contract between the parties the landlord was entitled to any rent in respect of the *diarah* portion (of a big tenure held by the Defendant) which was resumed by Government and settled with the landlord the rent whereof was settled in the settlement proceedings and the decision proceeded upon a consideration of the provisions of sec. 192 of the Bengal Tenancy Act. In the last reported case on the point, *Protop Chandra Jana v. Secretary of State for India in Council* (8), it was held by Mookerjee, J., and one of the members of this Bench (Cumming, J.) that when a settlement of rent has been made under Part II of Ch. X of the Bengal Tenancy

(4) 17 C. W. N. 885 (1912).

(6) I. L. R. 46 Cal. 90; s. c. 23 C. W. N. 380 (1919).

(7) 85 C. L. J. 14 (1921).

(8) 85 C. L. J. 304 (1922).

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Act, the entry in the record-of-rights is conclusive unless altered by means of a suit instituted under sec. 104H. In that case there was no question of the conclusiveness of the area or any entry other than of the rent settled. In the unreported decision* of Richardson and Suhrawardy, JJ., all that appears to have been decided was that the rent settled could not be challenged by showing the incorrectness of other entries in the record-of-rights.

It will be seen that the decisions are agreed that an entry as to the rent settled is conclusive under sec. 104J. It may also be conceded that other entries in the record-of-rights upon which the rent is settled cannot be challenged so as to affect the rent settled, i.e., in so far as they bear upon the rent settled and for that purpose only. The fact that the suit under sec. 104H is to be instituted on the grounds mentioned in that section by a person aggrieved by an entry of a rent settled indicates that the other entries in the record-of-rights can be challenged under that section only for the purpose of showing the incorrectness of the entry as to the rent settled. But where as in the present case, the question in controversy is not as to the rent payable but the quantity of land included in the tenure, the determination of which is necessary not for deciding the amount of rent payable for the tenure, but for deciding the question whether the rent should be suspended because the Defendants had been dispossessed from a portion of the tenure, we think the entry as to the area is not conclusive under sec. 104J. Sec. 104J lays down: "Subject to the provisions of sec. 104H, all rents settled under secs. 104A to 104F and entered in a record-of-

rights finally published under sec. 103A or settled under sec. 104G shall be deemed to have been correctly settled and to be fair and equitable rents within the meaning of this Act." The section refers in terms only to rents settled and does not refer to any other entry in the record, and although a suit may be instituted under sec. 104H, cl. (d) on the ground that land has been wrongly recorded as part of a particular estate or tenancy or wrongly omitted from the lands of an estate or tenancy, the decision of such question as pointed out in *Jogendra Nath Singh v. Secretary of State* (4) is only incidental to the determination of the question whether the entry of the rent as settled is erroneous. If the contention that as the rent of a tenancy is settled with reference to the area comprised in the tenancy, the entry as to the area as well as the rent should be held to be conclusive even in cases where the rent is not in dispute were accepted, we must hold that other entries in the record-of-rights, such as an entry as to the status of the tenant (with reference to which also the rent is to be settled) is also conclusive even where the rent is not in dispute. Having regard to the express terms of sec. 104J which refers only to the rent settled, we are of opinion that the entry as to the area is not conclusive for the purpose for which it is sought to be so used. Such an entry no doubt raises a presumption of correctness under sec. 103B, but the Court below has found against the entry upon the evidence.

We are accordingly of opinion that the appeal must fail, but we make no order as to costs of this appeal.

N. G.

(4) 17 C. W. N. 885 (1912)

* Second Appeals Nos. 2768 of 1919 and 228 and 240 of 1920, dated the 8th May 1922.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES
Nos. 103, 107, 108 AND 1015 OF 1921.

SASI KANTA ACHARJA
CHOWDHRY, Plaintiff,

Appellant,

v.

SALIM SHEIKH and
ors., Defendants,
Respondents.

WALMSLEY, J.
B. B. GHOSE, J.
1923,
27, February

Bengal Tenancy Act (VIII of 1885), secs. 105, 109—Application for settlement of fair rent before Revenue Officer—Withdrawal—Suit to recover rent at enhanced rate, if lies—Jurisdiction of Revenue Officer to grant leave to bring a suit

An application for settlement of fair rent made under sec. 105 of the Bengal Tenancy Act and withdrawn has not the same effect as if the application had never been made. Sec. 109 of the Act therefore operates in such a case as a bar to the maintainability of a subsequent suit in the Civil Court by the landlord for rent at an enhanced rate.

Quære—Whether the Revenue Officer has jurisdiction to grant leave to withdraw proceeding before him with liberty to bring a suit in a Court of different jurisdiction.

SOROJ KUMAR ACHARJI v. UMED ALI HOWLADAR (5) referred to.

ABEDA KHATUN v. MAJUBALI (1), CHEODDITTI v. TULSI SINGH (2), ASWINI KUMAR AICH v. SARODA CHARAN BASU (3) and KAMINI SUNDARI v. ABDUL HABIB (4) considered.

These were appeals against the decrees of the Subordinate Judge of Mymensingh (Babu Atul Chandra Banerjee), dated the 13th September 1920, reversing the de-

(1) F. L. R. 48 Cal. 157 : s. c. 24 C. W. N. 1020 (1920).

(2) I. L. R. 40 Cal. 428 : s. c. 17 C. W. N. 467 (1912).

(3) 24 C. L. J. 79 (1916).

(4) 28 C. L. J. 254 (1918).

(5) 25 C. W. N. 1022 (1921).

crees of the Munsif of Mymensingh (Babu Trailakhya Nath Roy), dated the 30th January 1920.

The facts of the case material to this report will appear from the judgment.

Babus Jogesh Chandra Ray and Nogen-dra Nath Bose for the Appellant.

Babu Radha Binode Paul for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

B B GHOSE, J.—These appeals arise out of as many suits for rent at an enhanced rate on several grounds stated in the plants. The Munsif made a partial decree in favour of the landlord, the Plaintiff. On appeal by the Defendants, the Subordinate Judge has dismissed the claim for enhancement on the ground that the suit for enhancement is not maintainable under the provisions of sec. 109 of the Bengal Tenancy Act, the landlord having made applications under sec. 105 of the Act before the Revenue Officer, on the authority of the case of *Abeda Khatun v. Majubali* (1). The learned Vakil for the Appellant argues before us that there is a difference of opinion with regard to the construction of sec. 109, and contends that the case of *Abeda Khatun v. Majubali* (1) is distinguishable from the present case and that the other cases relied on by him support his contention that such a suit is maintainable notwithstanding the provisions of sec. 109 of the Bengal Tenancy Act. Before deciding the question it seems to me that it is necessary to look into the provisions of sec. 109 of the Act in order to see whether the present suit for enhancement is maintainable. What happened in this case was that the Plaintiff presented an application under sec. 105 of the Bengal

(1) I. L. R. 48 Cal. 157 : s. c. 24 C. W. N. 1020 (1920).

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Tenancy Act before the Revenue Officer with regard to a number of holdings. Then on the 18th of September 1917, he presented a petition before the Revenue Officer to the effect that certain of the tenants whose holdings had been recorded in a number of *khatians* had compromised the suit but certain other tenants among whom are the present Defendants did not appear for the purpose of coming to a compromise and he prayed that permission might be granted to him to bring suits in the Civil Court against the Defendants who had not compromised and that the case might be disposed of according to the compromise entered into by the others. On this petition, the Revenue Officer made this order "Plaintiff filed a petition for permission to withdraw cases against the Defendants of *khatians* Nos 172, 196, etc. The prayer is allowed. Other Defendants have compromised. Put up on 27th September 1917, for judgment." In the judgment, nothing further is said with regard to those Defendants who did not compromise. Now sec. 109 of the Bengal Tenancy Act runs thus—"Subject to the provisions of sec. 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under secs. 105 to 108 both inclusive." There cannot be any doubt that this matter, which is now for decision in the Civil Court, was a matter which was the subject of an application made under sec. 105 of the Bengal Tenancy Act. The contention is that when the application under sec. 105 was withdrawn against these Defendants, the operation of sec. 109 cannot come into play, or, in other words, the contention is that, unless there has been a deci-

sion on the application by the revenue authority, it is open to the party who made the application to bring a suit in the Civil Court with regard to the same subject-matter. It seems to me that to accept such a contention would be to make an addition to the section and to read the words "subject of an application made" as if they stand for "subject of a decision," which, in my judgment, we cannot do. Therefore, apart from authorities, it would seem that the decision of the learned Subordinate Judge is right as regards the true construction of sec. 109 of the Bengal Tenancy Act. It is contended, however, by the learned Vakil for the Appellant that a number of cases have been decided the other way and that this matter should be referred for decision to a Full Bench. The cases to which he refers are these—*Cheodditti v. Tulsi Singh* (2), *Aswini Kumar Aich v. Saroda Charan Basu* (3), *Kamini Sundari v. Abdul Habab* (4) and *Soroj Kumar Acharji v. Umed Ali Howladar* (5). In the case of *Cheodditti v. Tulsi Singh* (2), the learned Judges, although they expressed an opinion in favour of the contention now advanced by the learned Vakil for the Appellant, said this: "Moreover, it cannot well be said that the subject-matter of the application made in 1906 and the subject-matter of the suit brought in 1909 are the same." If the subject-matter of the two proceedings were different, then the suit was certainly maintainable and sec. 109 of the Bengal Tenancy Act would not prevent a party from bringing a suit. That case is, therefore, distinguishable from

(2) 1 L. R. 40 Cal. 428; s. c. 17 C. W. N. 467 (1912).

(3) 24 C. L. J. 79 (1916).

(4) 28 C. L. J. 264 (1918).

(5) 25 C. W. N. 1022 (1921).

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the present case and the observations made therein do not prevent us from taking a different view. The same may be said of the case of *Aswini Kumar Aich v. Saroda Charan Basu* (3). The learned Judges in that case said this: "These matters are entirely foreign to the jurisdiction of the Revenue Officer under sec. 106, his work being confined to a decision of the point whether the entry in the record-of-rights is correct or not." Similarly, in the case of *Kamini Sundari v. Abdul Habin* (4), the learned Judges observed as follows:—"We are unable to agree with him (that is, the Subordinate Judge) in this opinion as it seems to us that the subject-matter of the suit under sec. 106 and the subject-matter of the present suit are entirely different." The case of *Soroj Kumar Acharji v. Umed Ali Howladar* (5) apparently follows the previous cases and the case of *Abda Khatun v. Majubali Chowdhury* (1) is distinguished on the ground that, in that case, there was no permission to withdraw the suit with leave to bring a fresh suit. It may be said that in the present case also there was no such leave granted. It may be a question, as was raised in the case of *Soroj Kumar Acharji v. Umed Ali Howladar* (5), whether, even if such leave were granted, the Revenue Officer had any jurisdiction to grant leave to bring a suit in a Court of different jurisdiction. There is no provision, however, in the Bengal Tenancy Act that an application made under sec. 105 and subsequently withdrawn has this effect, that such application had never been made. It is only the legislature that can wipe

out the effect of an application made by reason of its being withdrawn and we cannot supply what may possibly be an omission of the legislature in not making such a provision. With great respect, therefore, I am unable to accept the opinion expressed in some of the cases that an application made and withdrawn has the effect as if the application had never been made. There does not appear to be any binding decision to the contrary on the question involved in these cases. On the other hand, the facts in *Abda Khatun v. Majubali Chowdhury* (1) closely resemble the facts in the cases before us. The appeals must, therefore, be dismissed with costs in those cases in which the Respondents have entered appearance.

WALMSLEY, J.—I agree.

N. G.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL ORDER

No. 279 of 1921.

MOOKERJEE, J.

RANKIN, J.
1923,

Heard, 20, April.

Judgment,

9, May.

RAJA PEARY MOHAN
MOOKERJEE, Appellant,
v.

MANOHAR MOOKERJEE,
Respondent.

Civil Procedure Code (Act V of 1908), sec. 2 (2), Or. 20, rr. 12-18—Suit for accounts—Preliminary decrees, more than one, if may be passed—Liability of trustee de son tort to account from the date of assuming office—Cestui que trust when can obtain an order for account against trustee on the footing of wilful default—Death of debitor, during pendency of appeal, if affects claims of his personal estate for indemnity from the trust estate.

After the passing of a preliminary decree for accounts, the Court passed a further order determining the period and the mode of accounting:

(1) I. L. R. 48 Cal. 157: s. c. 24 C. W. N. 1020 (1920).

(1) I. L. R. 48 Cal. 157: s. c. 24 C. W. N. 1020 (1920).

(2) 24 C. L. J. 79 (1916).

(4) 28 C. L. J. 254 (1918).

(5) 25 C. W. N. 1022 (1921).

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Held—That the order was a preliminary decree within the meaning of sec 2 (2) of the Civil Procedure Code and appealable as such.

CHANALSWAMI v. GANGADHARAPPA (6) approved.

KAMINI DEBI v. PRAMATHANATH (5) followed.

BHUP INDAR BAHADUR v. BIJAI BAHADUR (9) and other cases referred to.

It is not essential that an adjudication should be covered by one of the specific cases of preliminary decrees mentioned in Or 20 of the Civil Procedure Code in order that it may form the basis of a final decree.

Where the son of a previous shebait assumed the office of shebait immediately on his father's death, though he did not become entitled thereto till his uncle died

Held—That this did not make any difference in the liability of the son. If a person, by mistake or otherwise, assumes the character of trustee when it really does not belong to him and so becomes a trustee de son tort, he may be called to account by the cestui que trust for the moneys he received under colour of the trust; such a person cannot be heard to say for his own benefit that he had no right to act as a trustee.

LYELL v KENNEDY (13) and other cases referred to.

Held, further—That in order to obtain an account on the footing of wilful default against a trustee, the cestui que trust must allege and prove at least one instance

of wilful default. He must consequently prove that there is some part of the trust funds which should have been received but was not. When the cestui que trust has charged wilful default in his pleadings, either originally or as amended, but has not obtained a judgment on that footing, the Court can at any stage of the proceedings order an account to be taken on that footing, if evidence of wilful default is adduced.

NOYES v. POLLOCK (21) and COOP v CARTER (31) and other cases referred to.

The death of the shebait during the pendency of the appeal does not affect the terms upon which his personal estate can claim an indemnity from the debuttar estate.

KUMEDA CHARAN v. ASHUTOSH (36) referred to.

This was an appeal preferred on the 21st of September 1921 against the order of Babu Lal Behari Chatterjee, Subordinate Judge, 2nd Court of Zillah Hooghly, dated the 5th of September 1921.

The facts are briefly these—The Respondent instituted a suit against the Appellant, for the administration of a debuttar estate, for the removal of the trustee and for other reliefs. The suit was dismissed by the trial Court but decreed on appeal to the High Court. On appeal to the Judicial Committee, the decision of the High Court was affirmed, and amongst other things an order for accounts was made. On the basis of this order of the Judicial Committee, the Subordinate Judge made an order defining the extent and character of the liability of the Appellant shebait to render an account. The shebait thereupon preferred the pre-

(5) 19 C. W. N. 755; s. c. 20 C. L. J. 476 (1914)

(6) I. L. R. 39 Bom. 339 (F. B.) (1914).

(9) L. R. 27 I. A. 209; s. c. I. L. R. 23 All 152; 5 C. W. N. 52 (1900).

(13) 14 A. C. 437 (1889).

(21) 32 Ch. Div. 52, 61 (1886).

(31) 2 DeG. M. & G. 292; 95 E. R. 111 (1852).

(36) 17 C. W. N. 5 (1912).

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sent appeal to the High Court against this latter order.

Babus Dwarkanath Chakrabarti, Narendra Kumar Bose, Haradhan Chatterjee and Ramaprasad Mookerjee for the Appellant.

Babus Sarat Chandra Rai Chaudhuri and Hirralal Chakrabarti for the Respondent.

The JUDGMENT OF THE COURT was as follows.—

This is an appeal from an order for account made in a proceeding supplemental to a suit, instituted by the Respondent against the Appellant, for the administration of a *debttar* estate, for the removal of the trustee for the appointment of a new trustee or receiver, for declaration that an execution sale of a portion of the trust estate when it was purchased by the trustee in the name of his son was invalid and inoperative, for proper investment of a sum of Rs. 11,500 alleged to form part of the trust estate and for other incidental reliefs. The suit was dismissed by the trial Court. On appeal to this Court, the judgment was set aside and the suit was decreed in the following terms:—

"It is declared that the sale of Bahirgoia held on the 14th January 1913 is not operative against the *debttar* estate, but the first Defendant (the *shebait*) is entitled to be re-imbursed, the precise amount recoverable by him to be investigated by the Court below. Steps will be taken forthwith to place the *debttar* estate in the hands of a receiver to be appointed by this Court and the first Defendant will cease to be *shebait* from the date when the receiver takes possession." *Manohar Mookerjee v. Raja Pearymohan Mookerjee* (1).

(1) 24 C. W. N. 478 : s. c. 30 C. L. J. 177 (1910).

On appeal to the Judicial Committee this decision was affirmed. *Raja Pearymohan Mookerjee v. Manohar Mookerjee*

(2) The judgment of the Judicial Committee concludes as follows.—

"An order must be made declaring that the purchase by the second Appellant (son of the *shebait*) was invalid and that proper and necessary steps should be taken to secure the property, and that the first Appellant (the *shebait*) is entitled, subject as herein mentioned, to repayment of the purchase-money. An account should be directed showing what, if anything, is due from the first Appellant (the *shebait*) to the estate, and such money should be deducted from the purchase-moneys, the balance, if any, of the moneys in Court to be paid out, and the first Appellant (the *shebait*) to have a charge on the estate for such sum."

On the basis of this order of the Judicial Committee, the Subordinate Judge has made an order which defines the extent and character of liability of the *shebait* to render an account, and specifies the mode, the period, and the properties. The *shebait* has appealed against this order.

The Plaintiff-Respondent has raised an objection to the competency of the appeal on the ground that the order is not one of those expressly made appealable as an order by the Code of Civil Procedure. The Appellant has urged that the order is in essence a decree within the meaning of sec. 2 (2) of the Civil Procedure Code, 1908. The term "decree" is defined as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in

(2) L. R. 48 I. A. 254 : s. c. 26 C. W. N. 133 : 34 C. L. J. 86 (1921).

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the suit and may be either preliminary or final. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of, it is final when such adjudication completely disposes of the suit. A decree may be partly preliminary and partly final. There has been some divergence of judicial opinion as to the tests to be applied for ascertaining whether a particular decision constitutes an adjudication on the rights of the parties with regard to any of the matters in controversy in the suit. It was held at one time by the High Court of Bombay that a decision that a suit is not bad for misjoinder or that it is not barred by limitation or a decision that the Court has jurisdiction to entertain a suit was a preliminary decree, *Sidhanath v. Ganesh* (3) and *Narayan v. Gopal Jiu* (4). This extreme view was disapproved in this Court in the case of *Kamini Debi v. Pramathanath* (5) and has subsequently been abandoned in the Bombay High Court itself; see the Full Bench decision in *Chanalswami v. Gangadharappa* (6) which was applied in *Bharma v. Bhamagavda* (7) and *Municipal Committee of Nasik v. Collector of Nasik* (8). According to the view now adopted in Bombay, the word "matter" in the definition means the actual subject-matter of the suit with reference to which some relief is sought, and the word "right" means substantive rights of the parties, which directly affect the relief to be granted, or which, in the words of the definition, relate to all or any of the matters in controversy. Tested from this

point of view, there is really no room for dispute that the order under appeal is a decree. This view is supported by the decision of the Judicial Committee in *Bhup Indar Bahadur v. Bijai Bahadur* (9), where Lord Hobhouse held that an adjudication that mesne profits were recoverable in respect of a defined period was in its nature a decree within the meaning of the Code. This is not inconsistent with the decision in *Bharat Indu v. Yakub Husam* (10) and *Ghulusham Bibi v. Ahamadsa Rowther* (11), and is in accord with the view adopted in *Kamini Debi v. Pramathanath* (5). It may be conceded that the legislature contemplated that ordinarily there should be one preliminary decree and one final decree in a suit, the preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree. But as observed by Piggott, J., in *Bharatendu v. Yakub Hosam* (12), there may be exceptions, and the case before us furnishes an instance. Here the original suit was for removal of the *shebait*, for cancellation of the judicial sale, and for recovery of the trust property. The decree made in the suit has directed the removal of the *shebait* and the cancellation of the sale subject to investigation of accounts to be rendered by the *shebait* in a supplementary proceeding. The order which has now been made is in essence a preliminary decree in the supplementary proceeding and will lead up to the final decree to be made therein. It is not essential that an adjudication should be covered by one of the

(3) I. L. R. 37 Bom. 60 (1912).

(4) I. L. R. 38 Bom. 392 (1914).

(5) 19 C. W. N. 755; s. c. 20 C. L. J. 476 (1914).

(6) I. L. R. 39 Bom. 339 (F. B.) (1914).

(7) I. L. R. 39 Bom. 421 (1915).

(8) I. L. R. 39 Bom. 422 (1915).

(9) 19 C. W. N. 755; s. c. 20 C. L. J. 476 (1914).

(10) L. R. 27 I. A. 309; s. c. I. L. R. 28 All. 152; 5 C. W. N. 52 (1900).

(11) I. L. R. 35 All. 159 (1913).

(12) I. L. R. 42 Mad. 296 (1918).

(13) 11 All. L. J. 120 (1918).

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specific cases of preliminary decrees mentioned in Or. XX of the Code in order that it may form the basis of a final decree; those cases are illustrations of preliminary decrees and help us in determining the true meaning of the definition of the term "decree." Whether the order made by the Judge possesses the qualities of a decree, preliminary or final or partly preliminary and partly final, clearly depends upon its contents. We are of opinion that the order now under appeal is a decree and that the objection to the competency of the appeal cannot be sustained.

The objections urged against the order made by the Subordinate Judge may be grouped substantially under two heads, namely, period of account and method of account. The Subordinate Judge has directed the *shebait* to render an account for the period which has elapsed since the death of his father on the 19th July 1888. As stated in the judgment of this Court, the Appellant assumed the office of *shebait* immediately on the death of his father, though he did not become lawfully entitled thereto till his two uncles, Naba Krishna and Bijay Krishna, had been removed from the scene by death, the former on the 11th September 1890 and the latter on the 29th January 1894. This plainly does not make any difference in the liability of the Appellant. It is well-settled that if a person, by mistake or otherwise, assumes the character of trustee when it really does not belong to him and so becomes a trustee *de son tort*, he may be called to account by the *cestui que* trust for the moneys he received under colour of the trust; such a person cannot be heard to say for his own benefit that he had no right to act as a trustee; see the judgment of the Earl of Selborne in *Lyell v. Kennedy* (13), where *Rackham*

v. *Siddal* (14) and *Life Association of Scotland v. Siddall* (15) were approved. Nor does any question of limitation arise. No accounts have ever been demanded or rendered, and we are not called upon to consider what period of limitation would be applicable if a suit for accounts were now to be instituted. But we may observe that the decision in *Dhanpat Singh v. Maheshnath* (16) is an authority for the proposition that under the Indian Limitation Act, 1908, a suit for accounts in respect of trust property falls within the scope of sec 10 and a trustee *de son tort* stands in the same position as an express trustee.

As regards the method of accounting, the Subordinate Judge has held that the Commissioner will enquire if any loss has been occasioned to the *debutter* estate by the wilful neglect or misconduct of the Appellant during the period that he was in charge thereof as *shebait*, *de facto* or *de jure*, and the amount will be added to his liability. The Appellant has urged that this direction is erroneous. To test the validity of this contention, we may usefully re-call that, as explained by Kindersley, V. C., in *Partington v. Reynolds* (17), there are two forms of account which can be claimed by a *cestui que* trust against the trustee. One is an account of all such of the moneys or funds comprised in the trust deed or from time to time subject to the trusts thereof, as have been possessed or received by the trustee or by any person by his order or for his use. * The other is an account, in addition to the former account, of the moneys or funds comprised in the trust deed or from time to time subject to the

(14) 1 Mac. & G. 621 (1844).

(15) 3 DeG. F. & J. 58, 69 (1861).

(16) 24 C. W. N. 752 (1920).

(17) 4 Drewry 253; 113 B. R. 300 (1855).

(13) 14 A. C. 437 (1888).

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trusts thereof, which might, without the wilful neglect or default of the trustee, have been so possessed or received; see the judgment of Lord Cottenham, L. C., in *Terrell v. Mathews* (18). The former is the common account and is given as of course when a decree is made for general administration. In taking the common account, the *cestui que* trust cannot charge the trustee with anything beyond his actual receipts and is not permitted to show that there is some part of the trust funds which the trustee should have got in and has failed to get in. *Dowse v. Gorton* (19). But a trustee, where a common account is being taken, can properly be charged with a breach of trust which arises on the accounts themselves; he stands charged with his receipts, and if he seeks to discharge himself by improper payments, the discharge is disallowed; *In re Stevens* (20). On the other hand, in order to obtain an account on the footing of wilful default against a trustee, the *cestui que* trust must allege and prove at least one instance of wilful default. He must consequently prove that there is some part of the trust funds which should have been received but was not. When an account is ordered in this form, he is thus liable not only for rent actually received but also for not letting the property if possible or not obtaining the full rent obtainable; *Noyes v. Pollock* (21) and *Re : Symons* (22). An order on the footing of wilful default is a very strong one to make against an accounting party and is not made unless there has been a loss of assets received or assets which might have been received; *Re : Stevens*

(20) and *Re : Wrightson* (23). It is plain that wilful default is a relative term, and, in the words of Bowen, L. J., in *Noyes v. Pollock* (21), implies an existing duty on the part of the accounting party in which default has been made and may consist in knowingly doing what he ought not to do or knowingly omitting to do what he ought to do, *Re Owens* (25) and *Re : Young and Harston's Contract* (26). Unless there is sufficient proof, it is not right to insert in a judgment any declaration of liability or even an enquiry as to liability based upon supposed breach of duty, *Re Stevens* (20). It was observed by Stirling, J., in *Re Barclay* (27), that the rule as to wilful default is not now so strict as it was before the Judicature Acts, and in a proper case, it is competent for the Court, upon the further consideration of an action, to charge trustees with interest on balances although no case of wilful default has been raised by the pleadings and the question of interest was not referred to in the judgment, *Shaw v Turbitt* (28). Under the former practice, if the *cestui que* trust discovered in the course of the suit that the trustee had been guilty of misconduct, his remedy was by filing, with the leave of the Court, a supplemental bill adapted to the state of circumstances; *Hodson v Ball* (29), and *Re Youngs* (30). Under the present practice, where the *cestui que* trust has charged wilful default in his pleadings, either originally or as amended, but has not obtained a judgment on

(20) [1897] 1 Ch. 432; [1898] 1 Ch. 175.

(23) [1908] 1 Ch. 799.

(24) 54 L. T. 475.

(25) 47 L. T. 64 (per Cotton, L. J.).

(26) 31 Ch. Div. 164, 174 (per Bowen, L. J.) (1885).

(27) [1899] 1 Ch. 681.

(28) 18 Ir. Ch. Rep. 478.

(29) 1 Phill. 177; 12 L. J. Ch. 80 (1842).

(30) 80 Ch. Div. 421 (481) (1885).

(18) 1 M. & G. 438 (n). 84 R. R. 120 (1841).

(19) [1891] A. C. 190 (202).

(20) [1898] 1 Ch. 162 (172).

(21) 82 Ch. Div. 58, 61 (1886).

(22) 21 Ch. Div. 767, 760 (1882).

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that footing, the Court can at any stage of the proceedings order an account to be taken on that footing, if evidence of wilful default is adduced. Thus, if in the prosecution of enquiries under an ordinary judgment, facts come out, which, if proved at the trial, would have enabled the *cestui que* trust to have then obtained an enquiry as to wilful default, that enquiry will be added; *Coope v Carter* (31), *Re Fryer* (32), *Brooker v Brooker* (33), *Re Symons* (22) and *Re Youngs* (30). We are of opinion that this course may be appropriately followed in the present proceeding. The suit was not expressly framed as a suit for accounts on the footing of wilful default throughout, the accounts directed unavoidably extend over a long period of time as there has been no adjustment of accounts between the *shebait* and the *debutter* estate at any time, and the *shebait* cannot make good his claim to an indemnity unless the net balance is determined on a scrutiny of the accounts for the whole period. In these circumstances, we are of opinion that the direction for account on the footing of wilful default should be expunged and a common account taken as explained above. Liberty will, however, be reserved to the Plaintiff or other party interested in the taking of the account, to apply, when the accounts have been lodged, for a direction that the Commissioner should take the account on the footing of wilful default either in respect of any particular matter or generally. It may be pointed out that an account on the footing of wilful default may be taken in two ways, first, the Court may think

that the instances of wilful default brought forward are not sufficient to justify a general account upon the footing of wilful default, and in such a case the Court will direct special enquiries only with regard to the particular transactions in question; or, secondly, although only one or two cases of wilful default are proved, they may be of such a character as to induce the Court to direct an account generally on the footing of wilful default, applying to all the acts of the trustee; *Coope v Carter* (31), *In re Stevens* (20), *Sleight v Lawson* (34) and *Harvey v Bradley* (35). It would not be right to anticipate at this stage what directions may be found necessary. But we may add that the lower Court will have to give effect to the views previously expressed by this Court upon the question of the sum of Rs 11,500 and the costs of the previous litigation. We are further of opinion that the direction given by the Subordinate Judge that if the accounts show a balance in favour of the *debutter* estate, there will be a personal decree against the *shebait*, should be expunged. It is needless to decide this question hypothetically and in advance before the facts have been ascertained. We are further of opinion that when the accounts are taken, notice should be given to the new *shebait*, or if there is a dispute as to the succession to the *shebaitship*, to the receiver who may be appointed in a suit instituted for that purpose. The death of the *shebait* during the pendency of this appeal does not obviously affect the terms upon which his personal estate can claim an indemnity from the *debutter* estate, and the decision in *Kumeda Charan v.*

(22) 21 Ch. Div. 757, 760 (1882).

(30) 80 Ch. Div. 421, 431 (1885).

(31) 2 DeG. M. & G. 292; 95 R. R. 111 (1852).

(32) 3 K. & J. 317; 112 R. R. 160 (1857).

(33) 3 Sm. & G. 475; 107 R. R. 155 (1857).

(20) [1897] 1 Ch. 432 (442).

(31) 2 DeG. M. & G. 292; 95 R. R. 111 (1852).

(34) 3 K. & J. 292; 112 R. R. 155 (1857).

(35) L. R. 4 Eq. 13.

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Ashutosh (86) does not touch the matter. We may add finally that there is no substance in the technical objection that the order of the Subordinate Judge is *ultra vires*, because he dealt with the matter before the order of His Majesty in Council had been formally transmitted by this Court to his Court.

In view of the nature of the questions which may require consideration, we reserve liberty to the parties to apply to this Court, should any real difficulty arise in giving effect to our orders: ordinarily however, applications should be made to the Subordinate Judge for further directions as to the accounts.

Subject to the modifications indicated above, the order of the Subordinate Judge will stand confirmed and each party will pay his costs in this Court.

Appeal dismissed,

J N R *Decree partially modified*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. (MIS.) No. 531 OF 1922.

WALMSLEY, J.	}	BENODE BEHARY NATH,
CHOTZNER, J.		Accused,
1922,		v.
28, July.		THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 193 (2)—Sec. 110, case under—Reference under sec. 123, by the Sub-Divisional Magistrate to the Sessions Judge—Transfer of the Reference to the Additional Sessions Judge—Power of Sessions Judge to transfer.

Where on failure of the accused to furnish security to be of good behaviour, the Sub-Divisional Magistrate referred the case to the Sessions Judge under the provisions of sec. 123, Cr. P. C., and the latter by an order transferred the Reference to the 1st Additional Sessions Judge for disposal:

Held—That the Sessions Judge had
(38) 17 C. W. N. 5 (1912).

jurisdiction to transfer such case to the Additional Sessions Judge for disposal.

BENGAL GOVERNMENT NOTIFICATION,
DATED THE 19TH JUNE 1916, referred to.

This was a Rule against an order of the Sessions Judge of 24-Parganas transferring a Reference under sec. 123, Cr. P. C., made by the Sub-Divisional Magistrate of Alipur, to the file of the 1st Additional Sessions Judge of the 24-Parganas for disposal.

Mr P Sen, Sub-Divisional Magistrate of Alipur instituted proceedings under sec. 110, cls. (d), (e) and (f) of the Cr. P. C., against the Petitioner. After examination of 266 witnesses for the prosecution and 142 for the defence, the Magistrate directed the Petitioner to enter into a bond to be of good behaviour for two years in the sum of Rs. 300 with two sureties for the like amount.

The Petitioner not having furnished the security demanded, the Magistrate referred the case under sec. 123, Cr. P. C., to the Sessions Judge of 24-Parganas, who on the 25th May 1922 transferred the Reference to Mr. Ward, 1st Additional Sessions Judge of Alipur, before whom Counsel for Petitioner appeared and contended that he had no jurisdiction to hear the Reference, but he informed the Counsel that he had jurisdiction and that he would hear the Reference on the 27th May.

Against the order of transfer, the present Rule was obtained.

The Notification published by the Government of Bengal authorising such transfers and referred to in the Court's judgment is the following:—

Judicial Department.

Circular Judicial No. 113 J. D.

From the Hon'ble Mr. J. H. Kerr, C.I.E., I.C.S., Officiating Chief Secretary to the Government of Bengal.

BENODE BEHARY NATH v. THE KING-EMPEROR.

To all Sessions Judges (except the Sessions Judges of Midnapore, Jessore, Khulna, Bakarganj, Dacca and Mymensingh).

Dated Darjeeling, the 19th June 1916.
Sir.

I am directed to say that, under subsec. (2) of sec. 193 of the Code of Criminal Procedure, the Governor in Council is pleased to direct that Additional Sessions Judges in this Presidency shall try such cases as may from time to time be made over to them for trial by the Sessions Judge of the Sessions Division to which they may be attached.

I have, etc , .

(Sd.) J. H. Kerr,

Officiating Chief Secretary to the Government of Bengal.

Mr. Monnier and Babu Jites Chunder Guha for the Petitioner.

Babu Surendra Nath Guha for the Crown.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This Rule relates to a Reference under the provisions of sec. 123, Cr. P. C. The Sessions Judge of the 24-Parganas transferred the hearing of the Reference to the first Additional Sessions Judge and the Rule was obtained calling upon the District Magistrate to show cause why that order of transfer should not be set aside on the ground that such References can be heard only by the Sessions Judge himself. Mr. Monnier on behalf of the Petitioner has examined the Criminal Procedure Code exhaustively dealing with all the sections which he thinks have a bearing on the question. Of these sec. 193, cl. (2) seems to me most important and I am not prepared to whittle it down in the manner which Mr. Monnier suggests. I do not see any

reason why it should not be interpreted in a liberal sense and I think that the Notification published by the Government of Bengal, Circular Judicial No. 113 J. D. of the 19th of June 1916 purporting to be an order under cl. (2) of sec. 193, Cr. P. C. does authorize the Sessions Judge to transfer such cases to the Additional Sessions Judge for disposal. I, therefore, think that the first Additional Sessions Judge has jurisdiction to hear the Reference. The Rule is accordingly discharged. Let the record be returned to the lower Court at once.

CHOTZNER, J.—I agree.

N G.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.

LORD PHILLIMORE

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1922,

Heard, 24, 25 and

27, November.

1923,

Judgment, 23, January.

Hindu law—Dayabhaga—Mixing up of joint and separate property—Presumption that property acquired out of mixed fund joint property.

The general presumption that arises when members of a joint family who have control over the joint estate blend that estate with property in which they have separate interests is that the properties acquired with such mixed up funds are intended for the benefit of the joint family. There is no difference in this respect between a case where the separate estate is brought into the joint family account as in *SURAJ NARAIN v. RATUN LAL* (1) and a case where joint family property is brought into the separate accounts.

(1) L. R. 44 I. A. 201: s. c. 21 O. W. N. 1065 (1917).

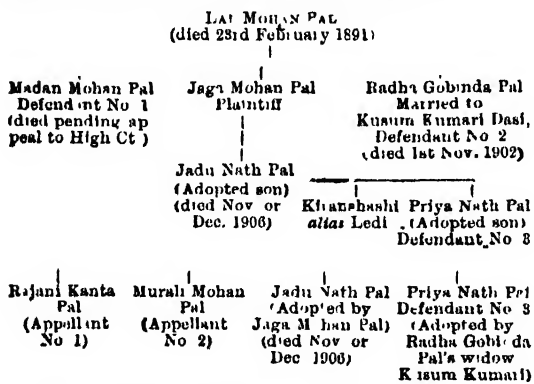
RAJANI KANTA PAL v. JAGA MOHAN PAL.

This was a consolidated appeal from two decrees of the High Court of Bengal, varying a judgment and decree of the Court of the Subordinate Judge of Dacca.

These were two consolidated appeals—one by the Plaintiff and the other by the Defendants—from one judgment and two decrees of the High Court of Judicature at Fort William in Bengal, dated the 20th June 1918, which partly affirmed and partly reversed a judgment and decree, dated the 27th September 1913, of the Subordinate Judge, Second Court, of Dacca.

The appeals arose out of a suit brought for partition of joint family properties and accounts, and the main questions related to the extent of the shares of the several co-parceners and the nature of some of the properties in dispute.

The relationship of the parties will appear from the following pedigree :—



The said Lal Mohan Pal carried on business in partnership with one Paju Lal, and with the assistance of his eldest son Madan Mohan Pal, Defendant No. 1. The joint business was closed in or about 1883, and thereafter Lal Mohan Pal started a business in piece goods and yarns with the assistance of his sons, the Defendant No. 1 alleging that he had contributed therein Rs. 16,942, which, according to him, was the remuneration due to

him from the partnership business. Lal Mohan Pal died on the 23rd February 1891, leaving him surviving his three sons, who carried on the joint family business as before.

The third son, Radha Gobinda Pal, died on the 1st November 1902, having left a Will, dated the 25th September 1902, and his widow and daughter him surviving. Probate with a copy of the said Will annexed thereto was granted on the 5th May 1903, to the executor, Jaga Mohan Pal (Plaintiff, testator's second brother). By his Will the testator gave authority to his widow to adopt three sons in succession. The testator bequeathed 'whatever moveable property or *harbar* I have got' to the said executor, subject to his paying certain specified legacies to the testator's widow and sisters and spiritual preceptor, etc.

It was common ground that the provisions of the above-mentioned Will gave rise to dissension between the Plaintiff and his brother, Defendant No. 1. The matter is thus summarised by the learned Judges of the High Court :—

"There is thus no doubt that there were disputes and that as the result of the settlement arrived at, Defendant No. 1 abandoned the claim to Rs. 16,000 as his share in the original capital of the joint business, that both he and the Plaintiff gave up their intention of opening each a separate business, and that the joint business was continued."

Defendant No. 1 gave his third son in adoption to the Plaintiff and his fourth son to the widow of his deceased brother, Radha Gobinda Pal. Four deeds were executed by the parties—all at the same time—on the 1st May 1904, in order to record the fact of the two adoptions, and to define the rights of the adopted sons respectively.

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It was provided that "from the moment of this gift the said son, being accepted and treated as an adopted son to you (Kusum Kumari Dasi) recipient of the deed, and of the late Radha Gobinda Pal, shall become as your son full *malik* and possessor of *all the moveable and immoveable properties* left by Radha Gobinda Pal, deceased."

It would thus appear that the joint family continued as it was in the life-time of the said Radha Gobinda Pal, and that after his death the two surviving brothers and their sons, including the adopted son, and the widow of the said Radha Gobinda Pal continued the joint family and its business in the same way as before.

Although probate had been taken out of the Will of Radha Gobinda Pal, all the properties of the family members remained joint, their expenses and income and disbursement continued to be joint and inseparable. The adopted son of the Plaintiff having died in November or December 1906, a further breach occurred between the members of the family and the Plaintiff began to take his meals separately from May or June 1910, and finally in November 1910, the Plaintiff gave notice to the Defendants dissolving the joint family and business, and instituted the present suit on the 8th December 1910, in the Court of the Subordinate Judge of Dacca.

The Plaintiff asserted in his plaint that he was entitled under the said Will of his deceased brother, Radha Gobinda Pal, to the deceased's one-third share of the moveables and of the assets of the business from the date of the Will. In other words, the Plaintiff claimed that he was entitled on partition to receive a two-thirds share of the joint properties [moveable and *karbar* (business)]. •

Five schedules were attached to the plaint. The first schedule contained immoveable properties possessed by the family up to the death of Lal Mohan Pal. The second schedule consisted of immoveable properties acquired between the death of Lal Mohan Pal and Radha Gobinda Pal. The third schedule contained a list of immoveable properties acquired since the death of Radha Gobinda Pal. The fourth schedule contained a list of the improvements made in respect of the immoveable properties mentioned in Schs. 1 and 2. The fifth schedule was divided into three sub-divisions, 5 (ka), 5 (ka) 1, 5 (ka) 2. 5 (ka) consisted of Government promissory notes and shares in limited liability company, 5 (ka) 1 was a list of moveables, including gold and silver ornaments, in the possession of the Defendants; and 5 (ka) 2, contained a list of moveables, including gold and silver ornaments, in the possession of the Plaintiff •

The Plaintiff claimed one-third share of the immoveable properties comprised in Schs. 1 and 2, and a two-thirds share of the properties specified in schedules 3, 4, 5 (ka), 5 (ka) 1, and 5 (ka) 2.

The Defendant No 1, Madan Mohan Pal (since deceased, and now represented by the Appellants), filed a written statement, and pleaded among other things that the Plaintiff was precluded from claiming more than one-third share of the joint estate by reason of the family settlement set forth above. A large number of issues was framed by the said Subordinate Judge, but the following alone are now material —

(9) Whether the Plaintiff, a member of an admitted joint Hindu family up to Jaishta of 1317 B. S.,

(9a) consisting of Plaintiff and Defendants, can claim more than one-third

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share of the immoveable properties named in the plaint?

(9b) Whether after the death of Radha Gobinda and regard being had to the fact of his Will, the principle of joint Hindu family would have applied to the family consisting of the Plaintiff and Defendants?

(10) Whether the acquisitions and improvements of the immoveable properties mentioned in Schs Nos 3 and 4 to the plaint respectively were made separately with the money of the *karbar* as alleged in the plaint, or whether the incomes of the *karbar* and of the immoveable properties were entered in one and the same account and formed one joint family fund out of which without any discrimination the said acquisitions and improvements were made?

If the latter, can the Plaintiff claim more than one-third share of the same?

(26) Whether there was an arrangement and agreement between the Plaintiff and the Defendant No 1 regarding the former's share in the family business and other family properties, under which Plaintiff agreed to take one-third share only as alleged in para. 36 of the written statement of the Defendant No. 1?

(27) In case the Court finds against the said alleged arrangement or finds it invalid, whether the Defendant No. 1 is entitled to the benefit of Rs 16,942-8-0 as alleged in paras 25 to 27 of his written statement?

(28) Whether this money belonged to the Defendant No. 1 on account of the pay and commission, etc., as alleged by him?

The above issues covered one broad question, namely, whether the Plaintiff was entitled to an additional one-third share under the Will, dated the 25th September 1902, of (1) the joint properties

existing at the time of Radha Gobinda Pal's death, and (2) of the acquisitions and improvements made since the death of Radha Gobinda Pal with the profits of the family funds and business

After examining a mass of evidence the said Subordinate Judge delivered judgment on the 27th September 1913. He found all the material issues against the Defendants, with this exception, that he held that the Plaintiff was entitled to only one-third of the acquisitions contained in Sch No 3, and of the improvements in Sch No 4.

He held that the Plaintiff had thrown the whole income and profits of his share, including the additional share in the joint estate, into the joint family stock, and that the whole stock had been so blended and inextricably mixed up as to prevent the Plaintiff from asserting his right to the additional one-third share in the properties acquired and improved since the death of Radha Gobinda Pal. He concluded as follows —

“The improvements on the joint family properties with the amalgamated fund also import the intention that they were made for the benefit of the joint family.

“As the fund formed by the mixing up of the income from the joint family immoveable properties and from the *karbar* separately belonging to the Plaintiff and the Defendant No 1 without any chance of identification and without the means of ascertaining the proportion and extent of such incomes and as I have already found that the intention of the Plaintiff and of the Defendants had been that the properties acquired and improvements made should be equally for the benefit of the members of the joint family, the Plaintiff cannot get more than one-third of such properties and improvements. The income of the *karbar* mixed up with

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the income of the joint family immoveable properties may also be reasonably regarded as thrown into the joint family fund of such acquisitions and improvements.

"On the above reasons I hold that the Plaintiff should get only one-third of the acquisitions in Sch. No. 3, and of the improvements in Sch. No. 4."

The Subordinate Judge therefore held that the Plaintiff was entitled to a two-thirds share in the ornaments and other moveables specified in schedules 5 (ka) 1, and 5 (ka) 2, and to a two-thirds share of the nett assets of the family business, and to a one-third share of the properties mentioned in the remaining schedules, and he made a decree accordingly, and from that decree both parties appealed to the High Court of Judicature at Fort William in Bengal.

The learned Judges of the High Court heard the appeals of the Plaintiff and of the Defendants together, and delivered one judgment on the 20th June 1918. They held that the Defendants had failed to establish that the Plaintiff was precluded by any family settlement from recovering his additional one-third share in the moveables and *karbar* (business) to which he was entitled under the Will. They further held that the alternative case of the Defendant, namely, that the Plaintiff had thrown the income and profits of the additional share into the common stock, which had been accepted by the Subordinate Judge, had not been made out. They said:—"The alternative case of blending is, in fact, inconsistent with the case based on a settled arrangement, and we are satisfied that neither by special arrangement nor by throwing his legacy into the common stock did Plaintiff waive or give up his rights under the Will of Radha Gobinda."

But the learned Judges of the High

Court affirmed the finding of the Subordinate Judge in favour of the Defendants in respect of the improvements specified in schedule 4, and said as follows:—

"With regard to schedule 4—the improvements and additions to joint family property existing at the time of Radha Gobinda's death, the position is somewhat different. With regard to the items in this schedule we think it reasonable to hold that the intention of the parties was to assimilate the additions and improvements to the original properties. We therefore agree with the Subordinate Judge in holding that Plaintiff has only one-third share in the properties comprised in this schedule."

The High Court therefore made a decree allowing both appeals in part and modifying the decree of the Subordinate Judge as follows:—

"(1) item 5 of Sch. 2, that is, the property of Pulm Pal is to be excluded from the decree as not being the property of the parties,

(2) item 12 of Sch. 3 should be excluded from that schedule and included in Sch. 2,

(3) of the properties in Sch. 1, in Sch. 2 as thus amended, and in Sch. 4, the Plaintiff is to get one-third, the said third to be allotted to him on partition;

(4) in the properties in schedule 3 as amended, the Plaintiff is to get two-thirds, the said two-thirds to be allotted to him on partition;

(5) of the items 1 to 3 in schedule 5 (ka), Plaintiff is to get two-thirds."

From the said decree of the High Court, the Plaintiff as well as the Defendants appealed to His Majesty in Council.

Sir Geo. Lowndes and Mr. J. M. Parikh for the Defendants-Appellants.

Messrs. A. M. Dunne, K. C. and G. Bagram for the Plaintiff-Respondent.

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Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER —The facts in this case have been carefully investigated both by the Subordinate Judge and by the High Court, with the result that many of the points originally in dispute are now determined, and the two that remain depend upon the true inference to be drawn from ascertained circumstances and not from the consideration of what those circumstances may be. Upon these two questions there is a difference of opinion between the Subordinate Judge who decided in favour of the Appellants and the High Court, by whom his judgment in this respect was reversed. The nature of the points involved will be best understood after a statement of the relevant facts.

Lal Mohan Pal, who died on the 22nd February 1891, originally carried on business with one Paju Lal in the sale of yarns and cloths. This business ended in 1882 and therefrom Lal Mohan Pal started a similar business, the head office being at Dacca, with branch places of business at Calcutta and elsewhere. He was, in this business, assisted by his three sons, Madan Mohan Pal, Jaga Mohan Pal and Radha Gobinda Pal. After the death of Lal Mohan Pal, this business was carried on by the three sons jointly as a joint family business, and Madan Mohan Pal asserted that the original capital of the business was largely composed of monies, amounting to Rs. 16,000 and upwards, due to him for services rendered to the original firm. The third son, Radha Gobinda Pal, died on the 1st November 1902, having made a Will, of which he appointed his brother, Jaga Mohan Pal, as the executor. He had no sons living at the date of his Will or of his death, and only one wife Kusum Kumari, who sur-

vived him. He conferred upon his wife the power to adopt a son, and provided that if a son was adopted and died within fifteen years unmarried or childless, his wife should adopt another son, and if he died in similar conditions she should adopt a third. He gave his wife the yearly profits of all his immovable property, except certain monthly allowances in favour of his daughter, such profits to be received by her till the adopted son should attain twenty-one years, and thereafter one-half of the profit was to be received by his wife and one-half by the son. After the death of the wife all the immovable property was to go to the adopted son, with the provision that until such son had attained twenty-one the estate should remain in the hands of his executor. He gave all his movable property or *karbar* to Jaga Mohan Pal, and directed that after realising the debts of the *karbar* he should pay out of the balance Rs. 2,000 to his wife for performing meritorious acts, Rs. 500 to his spiritual preceptor, Rs. 2,000 to the idol Iswar Radha, Syamsunder Jiu, and Rs. 600 to his three sisters, and such sum as would accrue as profit on the investment of Rs. 2,500 for charitable purposes. He died in 1902 and probate of the Will was granted to the executor. A dispute subsequently arose between Jaga Mohan Pal, the executor, and Madan Mohan Pal, the eldest son of Lal Mohan Pal. This dispute was due to the assertion by Madan Mohan Pal that he had originally contributed to the business Rs. 16,942 in his father's life-time, and this he claimed as his share in the original joint capital of the business. This was finally settled by the Defendant abandoning his claim, and both he and Jaga Mohan gave up their intention of opening separate businesses and the joint business was continued.

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Following upon this, Madan Mohan Pal gave his third son, Jadu Nath Pal, in adoption to his brother Jaga Mohan Pal, and the fourth son, Preonath Pal, as adopted son to the wife of Radha Gobinda Pal. Jadu Nath Pal died in December 1906, and following upon his death a breach occurred in the family so that Madan Mohan Pal took his meals separately, gave notice to the Defendants dissolving the joint family business, and finally instituted the suit out of which this appeal has arisen, claiming that he was entitled on partition to a two-thirds share of the joint properties, the movables and the business.

The property in respect of which this claim was made was separated under a variety of heads, but all that need now be considered were those that were contained in Sch. 3 and Sch. 5 (*kha*). The first included immoveable property that had been acquired after Radha Gobinda's death and the second, investments, Government paper, and houses. In respect of these the Subordinate Judge gave the Plaintiff only one-third and the High Court two-thirds, the present appeal being brought by the widow and Preonath, claiming that a one-third was all that he was entitled to obtain.

The real question for determination therefore, is whether these properties were acquired under circumstances which made them part of the joint family estate in which the widow and the adopted son were entitled to a one-third, or whether they belonged to the business which, after the death of Radha Gobinda, was owned as to two-thirds by the Plaintiff and one-third by Radha Mohan. It is important to remember that the parties are governed by the Dayabhaga law by virtue of which it was possible for the deceased brother to make a valid bequest

of his share, but except to the extent to which that Will affected the joint family it remained joint, with the result that, apart from the business, the immovables and all the property not actually included in the gift to Jaga Mohan Pal was joint family property. The business was, of course, under the control of the two elder brothers, and it appears that from the date of the death of the third brother no alteration whatever was made in the way in which the accounts were kept. The payments in respect of obtaining the probate of the Will, which though not great in extent are several in number, were all made out of the business accounts. The payment of the monies for the probate itself was made in the same manner, but the legacy of Rs. 2,000 to the widow, and the like legacy to her as *shebast* of the idols, remained unpaid. The income received from the real estate was all through shown under separate heads and nowhere distinguished as between the business and the joint estate, and although it is said that the income from the latter was only Rs. 1,100 a year, yet none the less it was all treated in the same way.

It is quite true, as has been pointed out, that having regard to the nature of the items being carefully specified, both in respect of receipt and payment, it would have been possible to have prepared from the books a further account showing how the respective estates stood in relation to each other, and it is also said that the actual monies paid to the widow and the adopted son exceeded the amount of their interest in the joint estate of which they were members; while finally, and this is perhaps the strongest point of all, the method of blending the two sets of items was continued by Rajani Kanta, even after the dispute had begun. These circumstances all deserve considera-

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tion, but their Lordships do not think that they have sufficient weight to displace the general presumption that arises when members of a joint family, who have control over the joint estate, blend that estate with property in which they have separate interests.

In a case before this Board, *Suraj Narain v Ratun Lal* (1), it was pointed out that the effect in such transactions was to cause the whole property to become joint, and the only real distinction that can be drawn between that case and the present is that there separate estate was brought into a joint family account instead of as in this case the joint family property being brought into the separate accounts. Their Lordships are unable to see that this distinction is sufficient to defeat the Appellants' claim. The real question for determination is what is the true conclusion to be drawn when people united, as the present parties were, by bonds of close relationship and living as a joint family, draw for the joint family expenses out of a fund enriched by other contributions. They think that the result is accurately stated by the Subordinate Judge, in the following words.—

"If the members of a joint Hindu family confuse the incomes of their joint properties with their separate properties, their intention presumably is that the properties acquired with such mixed-up funds are for the benefit of the joint family. It should be noticed that not only these acquisitions and improvements made in this case with the amalgamated and confused funds, but the incomes arising from such acquisitions and improvements were again partly spent also for joint family expenses and purposes, and the balances were again mixed up and confused from year to year to acquire properties and make improvements."

Indeed, the fact urged on behalf of the Respondents that the joint family expenses exceeded all the property which, according to their contentions, was properly joint, in their Lordships' opinion, tells against the Respondents instead of in their favour. They think, therefore, that the decree of the High Court should be varied by providing that of the items 1—3 in Sch 5 (*kha*) the Plaintiff gets only one-third as also in Sch 3, and that the provision in the said decree for payment of interest on the sum of Rs 4,000 be omitted. The cross-appeal will be dismissed. The Appellants are entitled to their costs of these appeals, but their Lordships will not vary the order as to costs in the High Court, and they will humbly advise His Majesty to this effect.

Solicitors *Messrs W W Box & Co.*
for the Defendants-Appellants.

Solicitor *Mr H S. L Polak* for the
Plaintiff-Respondent

G D M

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

LORD SALVESEN.

1922,

Heard, 23, October.

Judgment, 23, October.

SHIBA PRASHAD
SINGH, Appellant,

v.

RANI PRAYAG
KUMARI DEBI and
ors., Respondents.

Privy Council, appeal to—Interlocutory order of High Court, pending appeal—Temporary injunction upon application for stay of execution pending appeal and order directing security to be furnished by Respondent

Case in which the Judicial Committee entertained an appeal against and modified an interlocutory order passed by the High Court in a pending appeal and cross-appeal imposing conditions as regards the Defendant's dealing with properties which

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had been decreed in his favour pending the disposal of the appeal and directing him to give security for the due performance of such decree as might be ultimately made in the suit.

These were two consolidated appeals from an interlocutory order, dated the 9th February 1922 of the High Court of Bengal (Mookerjee and Cuming, JJ.) made pending the hearing of two appeals before the said Court.

The appeals pending in the High Court were cross-appeals against a decree of the Subordinate Judge of the 24-Parganas, dated the 3rd November 1921.

The Respondents had instituted a suit in the said Court against the Appellant for possession of the Jharia Raj, an impartible estate in Manbhoom. The late Raja of Jharia died without issue on the 7th March 1916 leaving a Will whereby he left certain properties to his widows (the Respondents). The Appellant was the nearest agnate of the late Raja and succeeded to the *gadi* on his death, and took possession of the estate. The Respondents who contended that they were heirs of the deceased Raja under the Hindu law claimed (i) to recover possession of the Raj, (ii) certain properties which they contended were the self-acquired properties of the deceased Raja, (iii) for a declaration that certain deeds executed by them were not binding on them and (iv) for a receiver and an injunction.

An interim injunction issued by consent on the 28th January 1920.

The Subordinate Judge delivered judgment on the 3rd November 1921 mainly in favour of the Defendant and passed a decree.

Both parties appealed from this decree to the High Court and these appeals had not yet been heard. *

An application was made by the Respondents on the 15th November 1921 for an injunction to restrain the Appellant from alienating or otherwise wasting the properties in his possession and on the 4th January 1922 the Appellant applied for a stay of execution of the decree of the Subordinate Judge in so far as the same was in favour of the Respondents.

Both applications were heard together by a Division Bench of the High Court composed of Mookerjee and Cuming, JJ. and on the 9th February 1922, the following order was made —

“(1) That the Defendant do deposit in this Court within four weeks from this date a sum of three and a half lakhs of rupees which the Plaintiffs will be entitled to withdraw from Court, in whole or in part, in partial satisfaction of the decree, upon furnishing security to the satisfaction of this Court for such amount as may be withdrawn by them from time to time

“(2) That with a view to expedite the disposal of both the appeals the paper-book be prepared in the office of the Court (under such special arrangements as may be necessary) and that the entire cost of the preparation of the paper-book be paid into Court by the Defendant in the first instance (within a time to be fixed later), the ultimate allocation of the cost to be determined by this Court at the time of the final disposal of the appeal.

“(3) That within six weeks from this date the Defendant do furnish security (other than the impartible Raj) to the satisfaction of this Court to the extent of five lakhs of rupees for the due performance of such decree as may ultimately be made in the suit.

“(4) That the Defendant do make over possession of premises No. 239, Lower Circular Road to the Plaintiffs and also

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of one of the motor cars decreed in their favour and the Defendant i.e. restrained from interfering with the possession of the Plaintiffs of the three-storied building at Jharia or any portion thereof or of any fixtures therein.

“(5) That the injunction already issued be maintained so as to restrain the Defendant from making alienations or entering into agreements to grant leases or dealing or otherwise interfering with the estate except with the express sanction of this Court previously obtained after due notice to the Plaintiffs

“(6) That the Defendant do forthwith deposit in this Court to the credit of the suit all such sums as may from time to time be realised by him out of moneys invested in the various money-lending business

“We are clearly of opinion that all applications in respect of this matter should be dealt with by this Court and we reserve liberty to both parties to apply

“We have not considered the question of the appointment of a receiver which was mentioned incidentally at the hearing. The order now made will in no way debar the consideration of that question hereafter or of such other questions as may arise during the pendency of the appeal.”

This appeal was preferred by the Defendant to have this order varied

Messrs. W. Upjohn, K. C., L. De-Gruyther, K. C., A. M. Dunne, K. C. and Kenworthy Brown for the Appellant.

Sir George Lowndes, K. C., Messrs E. B. Rakes, B. Dubé and Taric Ameer Ali for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Their Lordships will humbly advise His Majesty that the

order of the High Court, dated the 9th February 1922, ought to be varied by ordering (1) that execution against the Appellant of the decree of the Court of the Subordinate Judge at Alipur, dated the 3rd November 1921, ought to be stayed pending the hearing of the appeal therefrom, on the terms that the Appellant complies with cls. 1, 2 and 3 of the order, dated the 9th February 1922, provided, however, that the time for making the deposit referred to in cl. 1 thereof, and the time for the furnishing of security mentioned in cl. 3 thereof ought to be four and six weeks respectively from the date on which His Majesty's Order in Council on this appeal is lodged in the High Court, and (2) that para 5 of that order ought to be set aside, and that in lieu thereof it ought to be ordered that the injunction already issued be maintained so as to restrain the Appellant from making alienations or dealing or otherwise interfering with the corpus of the estate or entering into agreements to grant leases, except with the express sanction of the High Court previously obtained after due notice to the Respondents, but that such injunction ought not to prevent the Appellant without such sanction from (a) granting a simple mortgage or simple mortgages of his interest in the estate, such mortgage or mortgages being subject to the provisions of the Transfer of Property Act, 1882, sec 51, the Appellant undertaking not to confer possession upon the mortgagee or mortgagees, and (b) entering into agreements to grant leases to take effect after the final determination in the present litigation of the title to the property, the Appellant being at liberty, on the basis of such agreements, to obtain *salamis* from the persons who enter into such agreements at their own risk, he undertaking not to

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confer possession upon such persons. Liberty ought to be reserved to the parties to apply to His Majesty in Council with reference to the payment of the costs of this appeal after the determination of the appeal now pending in the High Court

Solicitors Messrs. Pugh & Co. for the Appellant.

Solicitors Messrs W. W. Box & Co for the Respondents

G D • M

CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL

JURISDICTION

No. 147 OF 1922.

MOOKERJEE, J.	SATCHIDANANDA DUTT,
RANKIN, J.	Defendant, Appellant,
1923,	v.
3, May	NRITYA NATH MITTER,
	Plaintiff, Respondent.

Broker's commission, when payable—Principle of quantum meruit, if applies when broker fails to complete transaction on terms specified—Plaint, amendment at a time when new suit would be time-barred

Where the Defendant authorised the Plaintiff to negotiate a lease on certain terms specified by him and the Plaintiff secured a party who accepted the lease on those terms subject to certain qualifications, and the Defendant took up the position that there was no concluded contract for a lease:

Held—That the Plaintiff having failed to complete the transaction on the terms specified by the Defendant was not entitled to the remuneration promised to be paid to him by the latter.

Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook

to do even if the principal acquires no benefit from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided that it does not fall through in consequence of any act or default of the agent.

Several cases referred to.

Where the parties have made an express contract for remuneration, the amount of the remuneration and the condition under which it becomes payable must be ascertained by a reference to the terms of that contract and no implied contract can be set up to add to or deviate from the original contract, though it can be interpreted by a reference to custom, not inconsistent with it

HOWARD HOULDER AND PARTNERS, LTD v. MANX ISLES STEAMSHIP CO., LTD. (5) referred to.

Held also—That in the circumstances of the case, the broker was not entitled to any remuneration on the basis of quantum meruit.

HOWARD HOULDER AND PARTNERS, LTD. v. MANX ISLES STEAMSHIP CO., LTD. (5) and KISHAN PRASAD SINHA v. PURNENDU NARAIN SINHA (14) referred to.

Semle —It is competent to the Court to allow a plaint to be amended even after the expiry of the period prescribed for the institution of a new suit.

This was an appeal preferred on the 24th November 1922 against a judgment and decree of Mr. Justice Pearson, dated 22nd August 1922.

The facts of the case will appear from the judgment and the letters set out below.

SATCHIDANANDA DUTT v. NRITYA NATH MITTER.

The Defendant authorised the Plaintiff to negotiate the lease of certain plots of land. The contract between the parties is contained in the following letters:—

31-1, Nayan Chand Dutt Street,
Calcutta, the 5th November 1918.

Re. 31, Mirzapore Street and 38 and
40, Harrison Road.

To

Babu N. N. Mitter,
226B, Bowbazar Street,
Calcutta.

Dear Sir,

I do hereby authorise you to negotiate the lease of the above plots of land on the terms specified below:—

1. Lease for 91 ninety-one years.
2. Salamy Rs. 25,000 twenty-five thousand only.
- 3 Rent Rs. 312 monthly for the first 5 five years plus taxes Rs 455 four hundred and fifty-five plus taxes for the next 5 five years and thereafter Rs. 600 six hundred monthly plus taxes for the remaining period.
4. Three-storied building to be erected over the plot with first class materials.
- 5 Remuneration Rs. 1,800 one thousand eight hundred only to be paid after the registration of this lease.
6. This letter will be void after 5 five days from this date.
7. The party should be a respectable one.

Yours truly,
S. Dutt.

31-1, Nayan Chand Dutt Street,
Calcutta, the 6th November 1918.

To

N. N. Mitter, Esq.,
226B, Bowbazar Street.

Dear Sir,

In continuation of my letter of 5th November 1918 I undertake to pay you an additional remuneration of Rs. 1,700

one thousand seven hundred only provided you complete this transaction on the terms mentioned in my aforesaid letter to you.

Yours truly,
S Dutt.

Babu N. C. Mandal, Attorney for one Krishna Chandra Dey, wrote as follows on behalf of his client to the Defendant:—

8th November 1918.

S. Dutt, Esq.

31-1, Nayan Chand Dutt Street,
Calcutta.

Re. 31, Mirzapore Street and 38
and 40, Harrison Road.

Dear Sir,

With reference to your letter, dated the 5th instant addressed to the broker Babu N. N. Mitter the broker herein, my client Babu Krishna Chandra Dey accepts the terms of the lease mentioned therein. It is of course distinctly understood that your verbal representation to the broker to the effect (a) that the existing rent realised from the tenants is not less than Rs. 380 per month and (b) that no tenant holds any lease for a period of more than 3 years yet to run and (c) the area of the lease-hold premises is not less than 44 cottahs. I am preparing the draft lease and will forward the same to you for your approval no sooner the draft is completed and fair copied.

Yours faithfully,
N. C. Mandal.

Babu Indra Chandra Ghose, on behalf of the Defendant wrote as follows to Babu N. C. Mandal:—

Calcutta, 9th December 1918.

Babu N. C. Mandal,

R. 31, Mirzapore Street and 38
and 40, Harrison Road.

Dear Sir,

With reference to your letter of the

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2nd instant and the enclosure sent therewith to the address of my client Satchidananda Dutt, I am instructed to write in reply as follows :—

My client denies there has been any concluded contract with Mr. N. C. Bose's client or with yours inasmuch as both yours and Mr. N. C. Bose's client failed to accept unqualifiedly and unconditionally my client's offer and as such the conditional acceptance of both of them amounts to a new offer on the part of yours and Mr. N. C. Bose's client and my client rightly refused to accept the new offer so made and he denies any liability whatsoever to yours or to Mr. N. C. Bose's client

Please therefore refrain from further publishing the advertisement forthwith as otherwise my client shall take such steps in the matter as he may be advised without further reference and would hold yours liable for all costs and damages to be incurred by my client herein.

Yours faithfully,
Indra Chandra Ghose.

Sir B. C. Mitter and Mr. S. C. Bose for the Appellant.

Messrs. J. N. Mitter and S. N. Banerjee (Jr.) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal against a judgment of Mr. Justice Pearson by the Defendant in a suit instituted by a broker for commission alleged to have been earned in respect of the lease of premises belonging to the Defendant. On the 23rd August 1918, the Defendant Satchidananda Dutt gave a letter of authority to Gosthabihari Saha to negotiate the lease of the properties in question. On the strength of this letter,

apparently, one Kirtichandra Dawn, on the 26th August 1918, intimated to Dutt through his solicitor that he was prepared to take the lease, provided the title was approved and the area of the land was not less than two bighas as had been assured by the agent. What followed on this has not transpired, but we find that on the 5th November 1918 Satchidananda Dutt granted another authority to Nriitya Nath Mitter to negotiate the lease of the properties on terms specified.

The terms were as follows :—

1. Lease for ninety-one years.
2. Salami Rs. 25,000 (twenty-five thousand) only.
3. Rent Rs 312 (three hundred and twelve) monthly for the first five years plus taxes, Rs 455 (four hundred and fifty-five) plus taxes for the next five years and thereafter Rs. 600 (six hundred) monthly plus taxes for the remaining period.
4. Three-storied building to be erected over the plot with first class materials.
5. Remuneration Rs. 1,800 (one thousand and eight hundred) only to be paid after the registration of this lease.
6. This letter will be void after five days from this date.
7. The party should be a respectable one.

On the day following, Dutt addressed another letter to Mitter in which he promised to pay an additional remuneration of Rs. 1,700 only provided the transaction was completed on the terms mentioned in the previous letter. The result of the letter to Mitter was that one Krishnachandra Dey intimated to Dutt his willingness to accept the terms of the lease. The letter, however, contained the following qualifications :—

"It is of course distinctly understood from your verbal representation to the

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broker (a) that the existing rent realised from the tenants is not less than Rs. 380 per month and (b) that no tenant holds any lease for a period of more than three years yet to run and (c) that the area of the lease-hold premises is not less than 44 cottahs."

Thereafter a notification was published on the 26th November by the solicitor of Krishnachandra Dey to give caution that as Dey had accepted a lease from Dutt any one dealing with the owner in respect of the premises would do so at his own risk and peril. Later on Kirtichandra Dawn appeared on the scene and contended that he had got a concluded contract in his favour. On the 9th December 1918, Dutt took up the position that there was no concluded contract in fact either with Dawn or with Dey inasmuch as neither of them had accepted unconditionally an unqualified offer of the lease. On the 11th December 1919, the present suit was instituted by the broker against Dutt for recovery of rupees three thousand and five hundred (3,500). The plaint was subsequently amended on the 8th August 1922 by the insertion of an alternative prayer in the following terms:

"In the alternative the Plaintiff claims the said sum of Rs. 3,500 or such other amount as this Honourable Court may award as damages sustained by reason of the Defendant's wrongful refusal to complete the said transaction with the said Krishnachandra Dey and thus preventing the Plaintiff from earning his remuneration."

We may state incidentally that Dey instituted a suit against Dutt, which was dismissed on the 13th February 1923; and no foundation has been laid for a possible theory that the contract failed by reason of the wrongful conduct of the

vendor Defendant. Dutt defended the present action substantially on the ground that on the terms of the agreement between him and Mitter the latter was not entitled to the remuneration as claimed in the plaint. Mr. Justice Pearson has overruled this contention and has decreed the suit.

The principle applicable to cases of this description is well-established. Where the remuneration of an agent is payable upon the performance by him of a definite undertaking he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do even if the principal acquires no benefit from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed, falls through, provided that it does not fall through in consequence of any act or default of the agent.

On behalf of the Appellant, reliance has been placed upon the decisions in *Alder v. Boyle* (1), *Benningfield v. Kynaston* (2), *Battams v. Tompkins* (3), *Didcott v. Friesher* (4) and *Howard Houlder and Partners, Ltd. v. Manx Isles Steamship Co., Ltd.* (5). On behalf of the Respondent, reliance has been placed upon the decisions in *Green v. Bartlett* (6), *Prickett v. Badger* (7), *Fisher v. Drewett* (8), *Green v. Lucas* (9), *Roberts v. Bernard* (10), *Martyrose v. Courjon* (11),

(1) 4 Com. Bench Rep 635 (1847).

(2) 3 Times Law Rep 279.

(3) 3 Times Law Rep. 707 (1892).

(4) 11 Times Law Rep. 18.

(5) [1923] 1 K. B. 110 (1922).

(6) 14 C. B. N. S. 681 (1863).

(7) 1 Com. Bench Rep 297 (N. S.) (1856).

(8) 48 L. J. Ex. 32 (1878).

(9) 31 L. T. 731; 33 L. T. 554 (1875).

(10) [1894] 1 Cab. & El. 336.

(11) 15 C. L. J. 312 (1899).

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Elias v. Govind Chunder Khatick (12) and *Annaswami Iyer v. Zentinder of Ayakudi* (13) These cases were analysed and reviewed in the judgment of this Court in *Kishan Prasad Sinha v. Pur-nendu Narain Sinha* (14) Our attention has been invited on behalf of the Respondent also to the decisions in *Turner v. Goldsmith* (15) and *Municipal Corporation of Bombay v. Cuverji Hirji* (16), which was explained in *Stokis v. Soonder-nath* (17) We have been finally pressed with the decision of Mr. Justice Chaudhuri in *Raghu Nandan Lal Sarma v. Madan Mohan Das* (18)

No useful purpose will be served by an analysis of the facts of each of the decisions cited before us It cannot be disputed that where the parties have made an express contract for remuneration, the amount of the remuneration and the condition under which it becomes payable must be ascertained by a reference to the terms of that contract and no implied contract can be set up to add to or deviate from the original contract though it can be interpreted by a reference to custom, not inconsistent with it [See the observations of Lord Justice Bowen in *Beningfield v. Kynaston* (2), *Broad v. Thomas* (19) and *French & Co. v. Leeston Shipping Co.* (20)].

The general principle is thus explained in *Howard Houlder and Partners, Ltd. v. Manx Isles Steamship Co., Ltd.* (5):—

- (2) 3 Times Law Rep 279.
- (5) [1923] 1 K. B. 110 at p. 113 (1922).
- (12) 1 L. R. 30 Cal. 202 (1902).
- (13) [1910] Mad W. N. 199.
- (14) 15 C. L. J. 40 (1911).
- (15) (1891) 1 Q. B. 541.
- (16) 1 L. R. 20 Bom. 124 (1895).
- (17) 1 L. R. 22 Bom. 540 (1898).
- (18) Suit No. 654 of 1914: decided, 15th February 1915.
- (19) 7 Bingham 99; 33 R. R. 399 (1881).
- (20) [1923] A. C. 451 (445).

“It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a Plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled If he proves fulfilment he recovers If not, he fails. There appears to be no half way house, and it matters not that the Plaintiff proves expenditure of time, money and skill This rule is well-illustrated by *Alder v. Boyle* (1) (where commission was not payable until an abstract of conveyance was drawn out), *Bull v. Price* (21) (where the commission was only payable on money actually obtained), *Battams v. Tompkins* (3) (commission payable on completion of purchase), *Clack v. Wood* (22) (commission payable subject to the title being approved by my solicitor), and by such illustrative decisions as *Mason v. Clifton* (23) (commission to be paid if money is raised on specified terms) and *Martin v. Tucker* (24) (commission to be paid on the amount of the capital brought into the business).”

We have consequently to consider the actual terms of the contract between the parties in the present case As we have already pointed out, the letter of authority, dated the 5th November 1918, states in specific terms that the remuneration of Rs. 1,800 is to be paid after the registration of the lease. The letter of the 6th November 1918 emphasises this and states that an additional remuneration of Rs. 1,700 will be paid provided that the broker completes the transaction on the terms mentioned in the previous letter.

- (1) 4 Com. Bench Rep. 685 (1847).
- (3) 8 Times Law Rep. 707 (1892).
- (21) 7 Bingham 237 (1831).
- (22) 9 Q. B. D. 276 (1882).
- (23) 3 F. & F. 899 (1863).
- (24) 1 Times Law Rep. 655 (1885).

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We are of opinion that the contract could not have been expressed in clearer terms and that on the true construction thereof the Plaintiff cannot possibly succeed in this litigation.

We have been finally pressed by the Respondent to hold that the Plaintiff ought to have a decree in his favour on the basis of *quantum meruit*. We are of opinion that this contention cannot possibly be sustained, and in support of this view, reference may be made to the decision in *Howard Houlder and Partners, Ltd. v. Manx Isles Steamship Co., Ltd.* (5), where McCurdie, J., deals with the question in these terms—

“I must point out that the commission note before me represented the result of discussion between the Plaintiffs and the Defendants. It embodied their bargain. They reduced their agreement to writing. There was no collateral arrangement whatsoever. The rights of the Plaintiffs are to be found in the commission note alone, and so the parties intended. If this be so, then it follows, as Mr. Neilson so forcibly indicated for the Defendants, that the rule “*Expressum facit cessare tacitum*” here applies. There is no scope on the present facts for the operation of the *quantum meruit* principle. If I were to rule in the Plaintiffs’ favour, I should ignore the well-established rule and a substantial body of authoritative decisions. In *Mason v. Clifton* (23), Cockburn, C. J., when summing up to the jury said: “If . . . B is employed to procure money upon certain terms, and does not procure it upon those terms, but upon other and different terms, then A will not be liable to him for commission. Nor can B in such case claim to recover a reasonable remuneration for

trouble and labour; for he has not done what he was employed to do.” So too in *Green v. Mules* (25), Willes, J., in speaking of the commission agreement there in question said, the substance of the matter was if the letter is effectual, I (the Defendant) will pay you £100 though not liable, if it is not effectual I will pay you nothing. The matter was clearly put in *Martin v. Tucker* (24), in the judgment of Lord Coleridge, C. J., when he said that the Plaintiffs could not claim on a *quantum meruit* because they had chosen to tie themselves down by the express terms of the agreement. Much the same view was expressed by the Court of Appeal in *Barnett v. Isaacson* (26), where Lord Esher, M. R., said that the Plaintiff was only to be paid in case of success, no matter what labour and trouble he had devoted to the matter. Finally I may mention *Lott v. Outhwaite* (27), where Lord Lindley, J., stated—It was said that there was an implied contract to pay the agent a *quantum meruit* for his services. The answer was that there could be no implied contract when there was an express contract.”

This was precisely the position adopted by this Court in the case of *Kishan Prosad Sinha v. Purnendu Narain Sinha* (14). We are consequently of opinion that in either aspect of the case the Plaintiff cannot possibly succeed.

We may add finally that the Appellant urged before us that the plaint was allowed to be amended at too late a stage and in support of this argument relied upon the decision in *Weldon v. Neal* (28). We must not be taken to accept this conten-

(24) 1 Times Law Rep. 655 (1885).

(25) 30 L. J. C. P. 343 (1861).

(26) 4 T. L. R. 645 (1888).

(27) 10 Times Law Rep. 76 (1893).

(28) 19 Q. B. D. 304 (1887).

(5) [1928] 1 K. B. 110 (114) (1922).

(23) 3 F. & F. 800 (1863).

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tion of the Appellant as well-founded, because, as pointed out in *Kisandas Rupchand v. Bachappa Vithoba Shilwant* (29), *Savugan Chetty v Krishna Anyanger* (30) and *Muhammad Sadiq v Abdul Majid* (31), it is competent to the Court to allow the plaint to be amended even after the expiry of the period prescribed for the institution of a new suit.

The result is that this appeal is allowed, the judgment of Mr Justice Pearson set aside and the suit dismissed with costs throughout.

RANKIN, J—I agree

Babu Ramces Chandra Basu, Solicitor for the Appellant.

Babu Jogendra Krishna Dutt, Solicitor for the Respondent

P K C

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2322 OF 1922.

RANKIN, J.

B. B. GHOSE, J.

1923,

Heard, 11, July.

Judgment,

12, July.

SABU BIBI, Defendant

No. 1, Appellant.

v.

ISMAIL SHEIK,

Plaintiff, Respondent.

Mahomedan law—Dower—Widow's lien over husband's estate—Possession must have been taken with consent of husband or other heirs—Stare decisis—Obiter dictum.

The widow of a deceased Mahomedan is not entitled to retain possession of her husband's estate for the satisfaction of her claim for dower unless she obtained such possession lawfully with the express or implied consent of the husband or his other heirs.

The statement of the law to that effect by the Judicial Committee in HAMIRA

(29) I. L. R. 33 Bom. 644 (1909).

(30) I. L. R. 36 Mad. 378 (1911).

(31) I. L. R. 33 All. 616 (1911).

BIBI v ZUBAIDA BIBI (1) is not obiter dictum.

BEEJU BEE v MOORTHYA SAHIB (2) followed.

A case is only an authority for the ratio decidendi

This was an appeal preferred on the 11th November 1922 against the decree of the District Judge of Murshidabad, J. W. Nelson, Esq., dated the 8th June 1922, affirming the decree of the Munsif, Barhampur, Babu Dharendra Nath Guha, dated the 31st March 1921.

The facts of the case will appear from the judgment

Babus Durga Charan Mittra and Rupendra Kumar Mitter for the Appellant.

Babu Atindra Kumar Mukherjee for the Respondent

The JUDGMENT OF THE COURT was as follows.—

RANKIN, J.—One Satkan Seikh, a Mussalman of the Sunni School died leaving him surviving one widow, one daughter and two sisters. The Plaintiff acquired by purchase the shares of the two sisters and, on attempting to obtain possession of the land, was resisted by the widow and the daughter. At the trial, the widow claimed that a sum of Rs. 925 being due to her for deferred dower and she being in possession of her husband's estate she was entitled to retain such possession until the sum due to her had been paid out of the rents and profits by reason of the widow's lien for dower recognised by the Mussalman law. To that defence it was answered that the widow had not obtained possession by any consent, express or implied, of her husband or his other heirs. The learned Munsif found

(1) I. L. R. 38 All. 581; s. c. 21 C. W. N. 1 (P. C.) (1916)

(2) I. L. R. 43 Mad. 214 (F. B.) (1919).

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as a fact that no consent was obtained and he followed the decision of the Judicial Committee in *Hamira Bibi v. Zubanda Bibi* (1) and rejected the widow's defence of lien for dower. The learned District Judge, on appeal, has accepted this finding of the Munsif, has agreed with his view of law and has dismissed the appeal.

On this appeal, the first question for consideration is whether the judgments of the Courts below can rightly be subjected to any valid criticism on the ground that the question of implied consent has not been found upon. In my judgment, there can be no doubt that the learned Munsif had before him the question of implied consent and, on the facts of this case, he found and meant to find that there was no consent at all. The learned Vakil who appeared for the widow, the Appellant before us, contended that though the decision of the Judicial Committee in *Hamira Bibi's* case (1) contained a statement to the effect that consent was necessary to give validity to such a defence, such statement was only *obiter* and he pointed out that a Full Bench of the Madras High Court in the case of *Begum Bee v. Syed Moorthiya Sahib* (2) had adopted this view and had held, contrary to the dictum of the Judicial Committee, that such consent was not necessary. In these circumstances, he asked us to follow the Madras decision, to treat what is said in *Hamira Bibi's* case (1) as not binding upon us and to allow this appeal.

Now, it is quite true—and I am glad to know that it is recognised—that, in appreciating decisions of Court, it is necessary to remember that a case is only an authority for the *ratio decidendi*. This principle is in constant exercise when

dealing with the decisions of Courts wherein each Judge gives or may give his individual opinion. It is, however, particularly difficult to apply to decisions of the Judicial Committee and every lawyer in India knows that the Judicial Committee, in giving its reasons, has always a very scrupulous regard to the inconvenience that may be caused by *obiter dicta*. In the present case, the argument on behalf of the Appellant is that the case before the Judicial Committee involved only the question whether or not interest should be allowed to the widow in the accounts. The case was one in which undoubtedly the widow had obtained possession by the court of a house held on his heirs. In these circumstances, it is said that the observations were unnecessary for the decision, that the decision is contrary to a series of decisions in India and that it ought not to be followed.

The first question is, as to whether or not the observations of the Privy Council are merely intended to apply to a case where, in fact, interest has been obtained. In my judgment, it is not possible to read the decision in this manner whether interest should or should not be allowed was argued on behalf of the Appellant on the view that the widow's claim for dower was a creation of the Mahomedan law, that interest was a general obnoxiousness to the Mahomedan law and that the ordinary principles of English equity should not, therefore, be applied to a right which was entirely defined by a different law altogether. Accordingly, one of the questions stated in the report as a *subordinate point* for determination was the question whether the dower payable by a Mahomedan husband to his wife in consideration of marriage was in the nature of an ordinary debt. The members of the Board were Lord Atkinson, Lord Parker, Sir John Edge

(1) I. L. R. 38 All. 581; A. C. 21 C. W. N. 1 (P. C.) (1916).

(2) I. L. R. 43 Mad. 214 (F. B.) (1919)

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and Mr Ameer Ali. It is impossible not to notice, as indeed was noticed by one of the Judges in the Madras case, that two of the members of the Board must have been well-acquainted with the conflict of authorities on the present point that has been exhibited in the Indian decisions. In the circumstances, the final decision of the Board was prefaced by a statement of the nature of the widow's right to dower and of the extent to which under the Mahomedan law she had a priority therefor. The statement is as follows:— "Dower is an essential incident under the Mussulman law to the status of marriage, to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation, but the law divides its division into two parts, one which is called *prompt*, payable before the wife can be called upon to enter the conjugal domicile, the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally, the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt and the wife is entitled along with other creditors to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that, if she lawfully with the express or implied consent of the husband or his other heirs obtains possession of the whole or part of his estate to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower and this is the only creditor's lien of the

Mussulman law which has received recognition in the British Indian Courts and at this Board." That statement of law is a statement, first of all, in an intentional form or restriction. The statement is that the widow's right is no greater than that of any other unsecured creditor except as there defined. That this decision is contrary to the view taken by the Full Bench of Madras in the case referred to above and the view pressed upon us on this appeal admits of no doubt whatsoever. The contrary view, if I may take its expression from the judgment of the Officer-in-Chief Justice in that case which will be found at p. 233, is as follows:— "All the authorities suggest that the Mahomedan widow's lien for dower on property of which she is in possession arises not by virtue of any agreement with the husband or his heirs but by the provisions of Mahomedan law relating to the administration of a deceased person's estate—that is why it stands on the same footing as any other creditor's lien. If a widow or any other creditor of a deceased Mahomedan acquired the rights of a pledgee or pawnee by reason of being placed in possession of the deceased person's property by the consent of his heirs, then she or he would have a preferential right relatively to the rights of other creditors of the deceased. If it is not as a pledgee properly so-called that a widow having a claim for dower has a lien over property in her possession, then there can be no necessity under the Mahomedan law that she should have obtained possession with the consent of the heirs. What is called a widow's lien in this connection is founded on the rule of Mahomedan law as to the administration of a deceased person's estate, namely, that a creditor who has obtained possession of the property of the deceased debtor should be allowed

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to continue in possession until the debt is satisfied "

Coming to the next point, it is not in my opinion, a sound comment on the decision of the Board in *Hamira Bibi's* case (1) to say that their exposition of the nature of the widow's lien for dower had no connection with their decision on the point about interest. Having set forth that her lien was to take its origin with the express or implied consent of the husband or his heirs, the Judicial Committee on that basis addressed themselves to the question whether on ordinary equitable principles she ought to be allowed interest as a consideration for her forbearance in enforcing her debt against her husband's estate. It seems to me that it would be both unnecessary and presumptuous to say that, if the Board had taken a different view of the nature of the widow's lien, their decision on the point of interest would necessarily have been different. But that their Lordships considered the application of equitable principles to be dependent on their general view of the nature and origin of the widow's lien for dower is to my mind fairly clear. It was for that reason and for that reason only that the question arose whether the dower was in the nature of an ordinary debt, whether it could only be given the incidents which particular provisions of the Mahomedan law had already attached. It is to be observed that one decision wherein interest was allowed but wherein a different view of the widow's lien had been adopted was laid before the Judicial Committee in that case. I refer to the decision in *Sahebjan Bewa v. Ansaruddin* (3). It was suggested in the Madras Full Bench case already referred to that there

was a preponderance of opinion in India to the effect that consent of the heirs was not necessary and that accordingly it must not be supposed that the Judicial Committee intended to settle the question which had been agitating in Indian Courts for some time. In my judgment, it is impossible to think that the Board gave the definition of the widow's right to dower which is to be found in the judgment of Lord Parker without knowing very well that in so doing they were passing upon a matter as to which difference of opinion had prevailed. It is a difficult question and one upon which I think it unnecessary to pronounce whether the preponderance in the previous decisions was very great in favour of one view or the other. That is and must remain a matter of opinion, but it is undoubted that, at all events, ever since 1870, there has been authority in the case law for the view that consent of the husband or his heirs is necessary to ground the widow's right to lien. That view will be found stated in the case of *Mussammut Wahid-unnessa v. Mussammatt Shubratum* (4). It was a main point of the decision to which Sir John Edge was a party in the cases of *Amanatunnessu v. Basirunnessa* (5) and *Mahammad Karimullah Khan v. 'Imani Begum* (6). It was followed in this Court in 1910 in the case of *Bibi Tasliman v. Bibi Kuseman* (7) and although in the following year in a case already cited a different view was taken, it seems unnecessary in view of the recent decision of the Judicial Committee to address oneself to the question as to the preponderance being in favour of one view or the other. Much depends upon

(1) 1 L. R. 38 All. 581; a. c. 21 C. W. N. 1

(P. C.) (1916)

(3) 1 L. R. 38 Cal. 475 (1911),

(4) 14 W. R. 299; 6 B. L. R. 54 (1870).

(5) 1 L. R. 17 All. 77 (1894).

(6) 1 L. R. 17 All. 93 (1893).

(7) 12 C. L. J. 584 (1910).

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whether one confines oneself to a review of the cases in which the present point was exactly raised. To take a particular instance, the language used by Mahmood, J., in the case of *Azizulla Khan v Ahmad Ali Khan* (8) must be controlled by the consideration that he was there dealing with a second appeal in which the consent of the heirs had been found as a fact. For all these reasons, it is, in my opinion, the duty of this Court to follow the decision in *Hamira Bibi's* case (1). It may be observed that, under this decision the widow has for her dower all the rights of an ordinary creditor and may be given, by the consent of her husband or his heirs, a right to possession of the estate until by the rents and profits the debt has been liquidated. That means a position of great privilege. I can see no reason why that privilege as defined by the highest tribunal should not be taken as settled. For these reasons, this appeal must, in my opinion, fail and be dismissed with costs.

B. B. GHOSE, J.—I entirely agree. I only desire to add that the rule of Mahomedan law with regard to this matter was laid down by the Privy Council in the case of *Bibee Bachun v Hamid Hossein* (9), where it was said that where a widow obtained possession lawfully without force or fraud, she had a lien on the property for her dower. This expression has been interpreted in some of the cases as possession peacefully obtained without force or fraud. It seems to me that peaceful possession cannot always be said to be lawful possession and the case of *Hamira Bibi v. Zubaida Bibi* (1) only reiterates the law laid down by the Privy Council

and explains the expression "lawful" by adding the words "with the express or implied consent of the husband or his other heirs." This interpretation we are bound to accept as a correct statement of the law.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 369 OF 1921.

LAKSHMI NARAIN BAIJ-
NATH, Plaintiff,

CHATTERJEE, J.

Appellant,

CUMING, J.

v.

1923,

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Defendant,

13, February.

Respondent.

Indian Railways Act (IX of 1890) - Liability of Railway Administration for loss of goods—Indian Contract Act (IV of 1872), secs 151, 152 and 162 - Care to be taken by the bailee—Inference from facts not disputed, whether a question of law in second appeal.

Under sec. 72 of the Indian Railways Act (IX of 1890), the responsibility of a Railway Administration for the loss of goods delivered to it to be carried by Railway is that of a bailee under secs. 151, 152 and 162 of the Indian Contract Act. The bailee is only bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value.

A man of ordinary prudence would not send his own goods in a boat with 20 or 30 leaks on its side, 1 or 1½ inches in length, and keep the goods in the hold of the boat for 30 hours.

When the facts are not disputed, the propriety of the inference to be drawn from the facts is a question of law and can be gone into in second appeal. Con-

(1) I. L. R. 38 All. 581 s. c. 21 C. W. N. (P. C.) (1916).

(8) I. L. R. 7 All. 353 (1886).

(9) 14 M. I. A. 377 (1871).

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sequently it was open to the High Court in second appeal to see whether the Court below was right in holding that the Defendant in despatching bailed goods in a boat with 20 or 30 leaks through which water entered into the boat, the goods being left in the hold of the boat for 30 hours, complied with the requirements of sec. 151 of the Indian Contract Act.

This was an appeal against the decree of Babu Kali Prosanna Sen, Subordinate Judge, 3rd Court of Zillah 24-Perganahs, dated the 10th of December 1920, reversing the decree of Babu Durga Prosad Ghosh, Munsif, 2nd Court at Sealdah, dated the 24th of February 1919.

The facts of the case will appear from the judgment.

Babus Ram Chandra Mozumdar and Bijan Kumar Mukherjee for the Appellant.

Babus D. N. Chakravarty and Surendra Nath Guha for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit brought against the Secretary of State for India in Council for damages for loss sustained by the Plaintiff with respect to sixty-eight bales of jute booked by the Eastern Bengal Railway, and consigned to the National Jute Mills. The Plaintiff alleged that he contracted to sell jute to the National Jute Mills and made over sixty-eight bales of jute to the Eastern Bengal Railway at the Khalulbali Station for carriage to the jute mills at Rajgunge and that in the course of transit the jute got damaged in consequence of which the jute mills refused to take the same and the Plaintiff had to sell it (after notice to the Railway Administration) at a loss. The loss suffered by the Plaintiff has been found to be Rs 1,822-7-3.

The Defendant did not deny that the goods were damaged but the defence shortly stated was that they were damaged by an act of God in a severe cyclone during transit and that he was consequently not liable for damages.

The Court of first instance decreed the suit holding that the Defendant did not take proper care of the goods during transit, and that the consequences of the act of God would be avoided had proper care been taken. On appeal that decree was reversed, and the Plaintiff has appealed to this Court.

The facts are not in dispute. The goods after arrival at Chitpur Ghat were transhipped into a boat of the Calcutta Shipping & Landing Company by 10 A.M., on the 20th September 1916 and the boat was detained at the ghat for the day. On the night of the 21st September there was a severe cyclone and the boat sprang leaks as it bumped against the other boats and the jetty to which it was securely fastened during the cyclone. On the 22nd September the leaky boat was towed to Rajgunj where the goods were delivered to the National Jute Mills on the 23rd September. The goods were damaged by water which entered the boat through the leaks, and as stated above they were rejected by the Jute Mills with the consequence that they had to be sold by the Plaintiff at a loss.

Under sec. 72 of the Indian Railways Act, IX of 1890, the responsibility of a Railway Administration for the loss of goods delivered to it to be carried by railway is that of a bailee under secs. 151, 152 and 162 of the Indian Contract Act, 1872. Sec. 151 of the Contract Act lays down that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar cir-

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circumstances, take of his own goods of the same bulk, quality and value as the goods bailed and sec 152 provides that in the absence of any special contract, the bailee is not responsible for the loss of the things bailed if he has taken the amount of care of it described in sec 151.

It is contended before us on behalf of the Appellant that the Defendant failed to take care of the goods which he was required by law to take. The first ground is that the boat should not have been detained at Chitpur Ghat on the 20th September but should have been despatched at once to Rajgunj as on the morning of the 20th September, intimation was received of an expected storm within thirty-six hours. It is urged that the 20th September was a fair day, there was only one shower of rain in the afternoon and the distance from Chitpur Ghat to Rajgunj Ghat being about twenty miles the boat could have reached its destination long before the cyclone. But as the learned Subordinate Judge rightly points out the storm was expected within and not after thirty-six hours, the Defendant's agents could not know when the storm would come and the storm signal was given evidently to detain the boats at the ghat. It would have been imprudent to start the boat in these circumstances at once, because it might have been overtaken on its way to Rajgunj by the storm which was expected every moment. We are accordingly of opinion that the Defendant could not be liable on this ground.

The second ground urged is that the bales of jute ought to have been unloaded from the boat and stored in the goods shed, at any rate upon the open pontoon with tarpaulins spread over them, and should not have been left in the boat when a cyclone was expected. It appears that after the storm signal was hoisted on the

morning of the 22nd September the boat was fastened with the jetty like other boats. The Court of first instance pointed out that coolies were available for the purpose of unloading the boat, and that the goods could have been stored in the goods shed, at any rate placed on the open pontoons, with tarpaulins spread over them which would have saved them from being damaged to any very great extent. But it is found by the Court of Appeal below that in the ordinary course of business boats are not unloaded when the storm signal is hoisted. That being so, this ground also fails. The third ground is that the Defendant in sending the bales of jute in a leaky boat from the Chitpur Ghat to Rajgunj did not act as a man of ordinary prudence would have done under similar circumstances with his own goods.

It is found that the boat while fastened to the jetty at Chitpur Ghat during the cyclone had bumped against the jetty and other boats and had sprung 20 to 30 leaks of 1 or 1½ inches in length. Although the leaks had been caused by bumping due to the cyclone which was beyond the control of the Defendant, the Defendant as a bailee was bound to use all reasonable care, skill and diligence to avoid the consequences of an act of God, and if there was any damage which is attributable to this breach of duty he is liable for damages. A man of ordinary prudence would not have sent the bales of jute in boat with 20 to 30 leaks of 1 or 1½ inches in length. The Court of first instance found that "the boat was kept afloat by continuous pumping of the water that got into the hold." When the leaks were on the sides, the water would naturally pass over the bales lying about them and no amount of pumping out the water could save them from being wetted. The goods as a matter of fact remained in that condition

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for thirty hours, and from the letter, Ex III, addressed by the Mills to Messrs Ducat and Co, the brokers, we got it that some of the bales when received appear to have been lying in the water. That the goods would be further damaged if sent in such a boat struck even the *manyi*, and he asked for orders for unloading it, but the Agent of the Calcutta Landing & Shipping Co did not permit him to do so. On the contrary, he sent for a launch and ordered the boat with the cargo to be towed to its destination. That it was a very rash act none possessed with a sense of fitness of things could doubt for one moment. The facts found by the Court of first instance have practically been accepted by the Court of Appeal below. The learned Subordinate Judge observed — “It appears that the boat was kept afloat by continuous pumping and the goods were delivered to the consignee not long after the storm subsided. No doubt the bales were about thirty hours within the hold of the boat, but that fact does not show that the Defendant’s agents did not take care of them. As the boat sprang leaks it would have sunk if the pumping was not going on. In these circumstances it cannot be argued that the Defendant’s agents did not take steps for the protection of the goods. I find that they took steps for the protection of the goods as well as for their speedy delivery to the consignee.”

The degree of the care required of a carrier in dealing with goods depends upon and varies with the nature and condition of the thing carried. Had the goods been of such a nature that they would not have been damaged even if carried in a leaky boat, and left in the hold of the boat for thirty hours, the pumping out of the water would be sufficient to show that reasonable care was exercised,

because in that case the only thing necessary was to see that the boat was not sunk. But bales of jute would be wetted and damaged by water entering the boat; the Defendant’s agent must have been perfectly aware of the same. A man of ordinary prudence would not have sent his own jute in a boat with twenty or thirty leaks of 1 or 1½ inches in length and kept the jute in the hold of the boat for thirty hours. The pumping out of the water no doubt saved the boat from being sunk, but it is clear that the goods were damaged by their being despatched in such a leaky boat, as the learned Subordinate Judge himself finds that they were damaged by water which entered the boat through the holes. It was not, and could not, be suggested that a good boat was not available at the Chitpur Ghat, and we think the learned Subordinate Judge upon the facts found should have come to the conclusion that the Defendant by despatching the sixty-eight bales of jute in a boat with 20 to 30 leaks, 1 or 1½ inches in length, on its sides, and allowing the jute to remain in the hold of the boat for 30 hours did not take as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value.

It is contended by the learned Pleader for the Respondent that the finding arrived at by the Court of Appeal below is a finding of fact which cannot be interfered with in second appeal. We are, however, not questioning the facts found, indeed the facts are not in dispute in this case. We are differing as to the inference which the Court below drew from those facts and as to the legal standard of reasonable care set up by it. We think it is open to us to see whether the Court below was right in holding that the Defendant in despatching baled jute in a boat with 20 or 30

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leaks, 1 or 1½ inches in length, through which water entered into the boat, the jute being left in the hold of the boat for thirty hours, complied with the requirements of sec. 151 of the Contract Act, merely because there was continuous pumping out of the water which had only the effect of saving the boat.

We are of opinion that the decree of the lower Appellate Court should be set aside and that of the Court of first instance restored with costs here and below, and we direct accordingly.

S. C. C.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.

LORD PHILLIMORE

MR. AMEER ALI

SIR LAWRENCE JENKINS.

LORD SALVESEN.

1922,

Heard, 20 and

21, November.

Judgment,

20, December.

KAMULAMMAI,
since deceased
(now represented
by Kattari
Nagaya Kama-
rajendra Rama-
sami Pandiya
Naicker),
Appellant,

v.

T. B. K. VISVA-
NATHASWAMI

NAICKER, since
deceased, and ors.,
Respondents.

*Hindu law—Madras Presidency—Mitakshara—
Succession—Illegitimate son and widow of deceased
Sudra, shares of.*

Held—That the High Court of Madras was right in following in this case, in which the competition was between an illegitimate son and the lawfully wedded wife of a deceased Sudra, the course of decisions in that Court according to which they are to divide the inheritance in equal shares, the illegitimate son being entitled to one-half of what he would have taken

had he been legitimate and not one-half of the other participant's share.

* GANGABAI v BANDU (2) explained.

Though the widow is not named in the text it is well settled that as a preferential heir to the daughter's son she is included among those who share with the illegitimate son.

This was an appeal from a decree, dated the 26th October 1915, of the High Court of Madras, which varied a decree, dated the 11th October 1905, of the Subordinate Judge of Madurai.

The suit was instituted by the 1st Respondent for possession of the Zamindari of Bodinaickenur as heir of the late Zamindar against the latter's widow and other relations.

The Plaintiff was an illegitimate son of the Zamindar who had no surviving legitimate issue. The question for determination in the appeal was whether the Plaintiff was entitled as against the Zamindar's widow, the Appellant, to a ½ or ¼ share in the self-acquired properties of the Zamindar.

The trial Judge held that he was entitled to ½, but on appeal the High Court (Miller and Abdur Rahman, JJ.) decided that his share should be one-half. From this decision the Zamindar's widow appealed to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and B. Dubé for the Appellant.—The rights of an illegitimate Sudra are set out in Mayne's Hindu Law, para. 550. An illegitimate son takes half the share of a legitimate son, if there is no lawful son, the illegitimate son takes the whole provided there are no daughters and other stated relations. In the present instance there are daughters, therefore the illegitimate son takes a half.

(2) 1 L. R. 40 Bom. 369 (1915).

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(See Mitakshara I, 12, sec. 2.) “

The question remains does “half” mean “half the estate” or “half the share of a legitimate issue” I contend that it means half the actual share and not half the hypothetical share.

The views expressed by Mayne in para. 550 have been accepted as correct without considering the original Sanskrit texts and have resulted in a number of decisions which I submit are inconclusive

[He referred to the following --

Rabi v Govinda (3), *Sheagun v Circwa* (4), *Sadu v Baiza* (5), *Ranop v Kandoi* (6), *Parvathi v Thirumalai* (7), *Chinnamali v Varadarajulu* (8), *Mecnakshi Anni v Appakutti* (9) and *Chellammal v Ranganatham Pillai* (10)

Saibadhikari's Law of Inheritance, pp. 942-3

Setlur's Hindu Law of Inheritance, Pt I, p 163.

Ghose's Principles of the Hindu Law of Inheritance, p 771]

The principle was very fully discussed, and decided in favour of my contention by the Bombay High Court in 1915 [*Ganqabai Pecrappa v Bandu* (2)], where the findings are based on the original Sanskrit texts and in *Chellammal v Ranganatham Pillai* (10)

The Dattaka Chandrika is against me but that is a treatise on adoption

Messrs Mathew, K. C and *Ingram* for the 1st Respondent -- The view that the illegitimate Sudra takes a half-share along

with the widow is supported by Mayne, para. 550, and by Strange, Vol. II, p 70, and by an unbroken line of decisions in Madras.

[LORD SALVESEN.—You can't say there is a chain of decisions in your favour because this particular point has not been decided]

It is a chain in which this particular point has come up for decision and it all turns on the exact shade of meaning of a Sanskrit word.

The texts do not expressly apply to the contest between a widow and an illegitimate son The view adopted by Mayne is the more consistent, the principle being that an illegitimate son gets half the share of a son, that is to say, that illegitimacy deprives a son of 50 per cent of the share

Mr Kenworthy Brown for the Respondents Nos. 3 to 8.

Mr. DeCruyther, K C replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This is an appeal from a decree, dated the 26th October 1915, of the High Court of Judicature at Madras, which varied a decree, dated the 14th October 1905, of the Court of the Subordinate Judge of Madura.

The case started as far back as the 25th April 1902, and is one of much detail in which numerous issues have been raised ; but the points now in contest have been reduced to two, and it will only be necessary to set forth so much of the complicated story as relates to them.

In December 1888, Kamaraja Pandiya Naicker, the Zamindar of Bodinaickenur, a Sudra by caste, died, and there survived him (among others) his illegitimate son the original Plaintiff in the suit, his wife the original 1st Defendant, his daughter,

(2) I. L. R. 40 Bom. 364 (1915).

(3) I. L. R. 1 Bom. 97 (1875).

(4) I. L. R. 14 Bom. 282 (1889).

(5) I. L. R. 4 Bom. 37 at p. 52 (1878).

(6) I. L. R. 8 Mad. 557 (1883) (1885).

(7) I. L. R. 10 Mad. 334 (1887).

(8) I. L. R. 15 Mad. 307 (1892).

(9) I. L. R. 33 Mad. 226 (1909).

(10) I. L. R. 34 Mad. 277 (1910).

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the second Defendant, and certain collateral agnates who are parties to the suit. He left no legitimate male issue. The Appellant set up a paper-writing as her husband's last Will. Both Courts have held it not proved. Though this finding has been questioned in the Appellant's case, its propriety is, in their Lordships' opinion, concluded by the concurrent findings of the Courts in India. And so the only point left for decision is whether the Plaintiff, as the sole illegitimate son of the late Zamindar, was entitled as against the Appellant, the lawfully-married widow, to a one-third or a one-half share in the personal or self-acquired properties of the Zamindar.

The Subordinate Judge decreed only one-third in his favour, the High Court held him entitled to one-half. From this decision the widow has appealed. Both the widow and the illegitimate son have died during the litigation, and representatives have been substituted in their place. The rights of the illegitimate son of a Sudra in the Madras Presidency rest principally on a text of Yajñavalkya as explained and developed in the Mitakshara and other authoritative commentaries.

In the concluding section of Chap. I of the Mitakshara the rights of a son by a female slave in the case of a Sudra's estate are considered. It is conceded that the Plaintiff comes within the scope of the section. In para. 1 the text of Yajñavalkya is quoted, and in the second paragraph it is interpreted. According to Colebrook's translation they run as follows:—

"1. The author next delivers a special rule concerning the partition of a Sudra's wealth. 'Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead the brethren should make him partaker of the moiety of a share; and one who has no

brothers may inherit the whole property in default of daughters' sons' "

"2. The son begotten by a Sudra on a female slave obtains a share by the father's choice or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share, that is, let them give him half [as much as is the amount of one brother's] allotment. However, should there be no sons of a wedded wife the son of a female slave takes the whole estate, provided there be no daughters of a wife nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only "

The words enclosed in brackets are a gloss by Balambhatta or Subodhini.

Here the contest is between the illegitimate son and the widow, and though the widow is not named in the text, it is well settled that as a preferential heir to the daughter's son she is included among those who share with the illegitimate son, and it would serve no useful purpose to speculate why she was not mentioned in the text. But the measure of the respective shares still has to be determined. The text and the commentary speak of the illegitimate son being made partaker of a moiety of a share or participating for half a share, but there is no explicit statement as to the unit in which he is to take his half-share. There are two possible views—either that he is to take one-half of the other participant's share, or one-half of what the illegitimate son would have taken had he been legitimate.

Mr. J. R. Gharpure, an able Sanskritist and a vakil of the Bombay High Court, in his recent translation of the Mitakshara, renders the text of Yajñavalkya as providing that the brothers should make the illegitimate son "a half-sharer," and his translation of Vijnaneswara's commentary on this text is "these brothers

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should make that son of the female slave a half-sharer, *i.e.*, they should give him a half from their own allotment." He appends a foot-note in which he says this is made clearer by Balambhatta and Subodhini, and gives what purports to be a quotation from Balambhatta and Subodhini in these words "From the entire estate a half of what would be regarded as his share, *i.e.*, one-half of the amount allotted to a legitimate issue." Then Lordships have unfortunately had no opportunity of examining these authorities. This rendering "half-sharer," which is not without significance, is also to be found in Rao Sahib Mandlik's translation of Yajñavalkya's text.

In the *Sarasvatī Vilāsa* this text is cited, and the comment on it is in these terms "The meaning is that even when there is a daughter's son, the son of the female slave takes only a half" (para 396).

The *Dattaka-Chandrika*, Ch. V, 31, deals with the text as follows:—"Therefore if any, even in the series of heirs down to the daughter's son, exist, the son by a female slave does not take the whole estate, but only shares equally with such heir." Though the *Dayabhaga* is not a governing authority in Madras it is worthy of notice that in commenting on this text Jimuta Vahana lays down that if there be a daughter's son the illegitimate son shall share equally with him, adding the explanation that as no special provision occurs it is fit that the allotment should be equal (Ch. IX, 31).

The *Daya-Krama-Sangraha*, another Bengal authority, is to the same effect (VI, 1—35). In *Colebrooke's Digest* the rule is further elaborated, and it is there said that "after the death of the father, if no such Will had been declared, the

brethren born of a wife legally married shall allot him half a share—that is, half of such share as would have been assigned had his mother been legally married. Consequently a son by a female slave not superior in class to her Sudra master shall obtain the moiety of a full share."

These last cited commentaries, while not of governing authority in Madras, at any rate show the sense in which the text has been understood elsewhere.

Though in Ch. I, sec. 12, of the *Mitakshara* there is no explanation of how the half-share is to be computed, still in another part of the treatise there are directions which indicate the method of computation approved by its author in the ascertainment of fractional shares. Thus in Ch. I, sec. 7, para 5, it is provided that "sisters should be disposed of in marriage, giving them as an allotment the fourth part of a brother's own share." In para 6 it is said that the meaning is that the girl shall be allowed to participate for a quarter of such a share as would be assignable to a brother of the same rank with herself. This is worked out in para 7 as follows:—

"For example, if a person had only a Brahman wife and leaves one son and one daughter the whole paternal estate should be divided into two parts and one such part be sub-divided into four, and the quarter being given to the girl, the remainder shall be taken by the son. Or, if there be two sons and one daughter, the whole of the father's estate should be divided into three parts, and one such part be sub-divided into four; and the quarter having been given to the girl, the remainder shall be shared by the sons. But if there be one son and two daughters the father's property should be divided into thirds, and two shares be severally sub-divided into quarters; then, having given two quarter shares to the girls, the son shall take the whole of the residue. It must be similarly understood in

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any case of an equal or unequal number of brothers and sisters alike in rank"

In the second volume of Norton's *Leading Cases*, p. 499, reference is made to a case of *Annasamy Moodelly v. Tandararaya* (1) and the ruling is stated in these terms "Where Plaintiff (illegitimate) and Defendant (legitimate) were two brothers the property was divided one-quarter to the Plaintiff, three-quarters to the Defendant." This would be in conformity with the rule of division that would give an illegitimate son one-half of the share to which he would have been entitled had he been legitimate.

Reference, however, has been made to *Gangabai v. Bandu* (2), where it was decided by the Bombay High Court that in a competition between the widow and an illegitimate son, the son took only one-third. But from the judgment delivered it is apparent that this conclusion was not in accordance with the view that the learned Judges took of the text and the commentaries, but was founded on what they understood to be the case-law of the Bombay Presidency.

If the true method of computation be to allot to the illegitimate son one-half of what he would have taken had he been legitimate, then where the competition is between the illegitimate son and the widow the allotment of the respective shares presents no difficulty. Such a son, if born of a lawfully-wedded wife, would have taken the whole; by reason of his illegitimacy this would be reduced to one-half; and so he and the lawfully-married widow would take in equal shares.

In Madras this result, according to the judgment of the High Court now under appeal, has the support of the case-law of that Presidency, and it was definitely

stated in the course of the present argument, without being controverted, that as between an illegitimate son and a lawfully-wedded widow there has been no departure in Madras from the rule of equal shares.

The learned Judges of the High Court, after a reference to the decisions, say: "In this state of things we are not prepared to depart from the course of decisions in this Court, which hold that the Plaintiff is entitled to share equally with the widow." This, in their Lordships' opinion, was the right conclusion at which to arrive, and they will accordingly humbly advise His Majesty that this appeal be dismissed with costs. There will be only one set of costs.

Solicitor Mr H. S. L. Polak for the Appellant.

Solicitor Mr D. Graham Pole for the 1st Respondent.

Solicitor Mr Douglas Grant for the Respondents Nos. 3 & 8.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

NO. 2214 OF 1920

INJAD ALI and ors.,
SANDERSON, C. J. Plaintiffs, Appellants,
RICHARDSON, J. v.

1923,
23, July

MOHINI CHANDRA
ADBHKARI, Defendant
No. 1, Respondent.

Sale of immovable property without title by registered conveyance—Suit for refund of purchase-money—Indian Limitation Act (IX of 1908), Arts. 62 and 115, applicability of—Transfer of Property Act (IV of 1882), sec. 55, cl. 12—Covenant of title when implied.

The Plaintiff brought a suit for the recovery of possession of certain property by right of purchase under a conveyance, and in the alternative claimed a refund of purchase-money on the footing that at the

(1) Madras S. R. for 1860, p. 11.

(2) I. L. R. 40 Bom. 389 (1915).

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date of sale the Defendant No. 1 had no title to convey inasmuch as the property had passed to other Defendants by a previous sale. The trial Court dismissed the suit against the other Defendants but gave a decree against Defendant No. 1 for refund of purchase-money with interest. On appeal by Defendant No. 1 to the District Court the point was taken for the first time that the suit was barred under Art. 62 of the Limitation Act. The District Court remanded the case to the trial Court for a finding on the point after taking additional evidence. No additional evidence was offered by either party and the trial Court held that the suit was barred under Art. 62 and that decree was affirmed by the District Court.

Held—That the order of remand was bad in law. The Code makes no provision for a remand where the issue had been settled and the case had been fully tried.

That if no covenant of title was expressed in the conveyance, the conveyance itself imported such a covenant under sec. 55, cl. (2) of the Transfer of Property Act and a suit for refund of purchase-money might be regarded as a suit for damages for breach of this covenant. The conveyance being registered, Art. 116 of the Limitation Act applied to the suit.

BASARADDI SHEIKH v. ENAJADDI MALEAH (1) and ARUNACHALA AIYER v. RAMASAMI AIYER (3) referred to.

If "a contract" in the sense of Art. 116 is in writing the writing represents the implied as well as the express covenants, a breach of either of which would bring the case within the article.

This was an appeal from the decision of Mr. S. Banerjee, Additional District Judge of Sylhet, dated the 25th May 1920,

confirming that of Babu Hem Ch. Bose, Subordinate Judge of that District, dated the 13th November 1919.

The facts of the case will appear from the judgment of Richardson, J.

Babus Girish Chandra Pal and Nany Lal Dey for the Appellants

Babu Hemendra Kumar Das for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal from the judgment of the learned Additional District Judge of Sylhet by the Plaintiffs in the suit. The suit was dismissed on the ground that it was barred by the Act of Limitation. The learned Additional District Judge applied Art. 62 of the Limitation Act to the case holding that this was a "suit for money payable by the Defendant to the Plaintiffs for money received by the Defendant for the Plaintiffs' use." The learned Vakil who appeared for the Plaintiffs argued that that article was not applicable, but that Art. 116 applied. The suit was for establishment of title to and recovery of possession of two annas share in the property described in the schedule to the plaint, it being alleged that the Plaintiffs purchased such share from Defendant No. 1. There was an alternative prayer that in case it was found that the Plaintiffs were not entitled to possession, a decree for the refund by the Defendant No. 1 of the consideration paid with interest thereon be passed. In the course of this litigation it was established that, at the time of the Plaintiff's purchase from Defendant No. 1, he had no interest in the property inasmuch as the property had passed to the other Defendants by reason of a previous sale: and, on remand, the learned Subordinate Judge had to deal only with the question of the

(1) I. L. R. 25 Cal. 298 (1897).

(3) I. L. R. 38 Mad. 1171 (1914).

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recovery of the consideration paid by the Plaintiffs. Both the Courts treated the case as one in which the consideration had entirely failed and therefore it was a suit for money received by the Defendant No. 1 to the Plaintiffs' use. In order to see what the nature of the suit was, the learned Vakil for the Plaintiffs referred us to some portions of the plaint and to the prayer. In one of the paragraphs (para 3) the Plaintiffs alleged that they were entitled to possession of the property or in the alternative the Defendants or one of them were bound in equity, law and justice to pay back to the Plaintiffs the purchase-money with interest as compensation: and, the prayer was that if the suit could not be decreed in respect of the land in suit then a decree might be passed against Defendant No. 1 directing him to pay Rs. 450 with interest from the date therein mentioned. Having regard to the plaint and the prayer and the form of the suit, in my judgment, this is not a case to which Art. 62 applies: and, I am of opinion that the learned Vakil for Plaintiffs is right in his contention that this is a case to which Art. 116 of the Limitation Act applies. According to that article, in suits for compensation for the breach of a contract in writing registered, the period of limitation is six years from the time when the period of limitation would begin to run against a suit on a similar contract not registered. It is agreed that if Art. 116 applies the suit is within time: and consequently in my judgment, this appeal ought to be allowed.

RICHARDSON, J.—I agree. The Plaintiffs brought this suit in the first place to recover possession of two annas share of certain land to which they made a title under a conveyance executed in their favour by the Defendant No 1 on the 21st Pous 1318 (6th January 1912). In

the alternative the Plaintiffs claimed a refund of purchase-money on the footing that at the date of sale the Defendant No. 1 had no title to convey. In the trial Court the learned Subordinate Judge found that during the minority of the Defendant No 1 his mother had sold the land in question to the Defendants Nos. 2 to 37 and that this prior sale by the mother was justified by legal necessity. This finding does not appear to have been since questioned. By this decree the Subordinate Judge dismissed the suit as against the Defendants Nos. 2-37 but condemned the Defendant No. 1 to repay the purchase-money with interest at 12 per cent. per annum. The appeal of the Defendant No 1 to the District Court was heard by the then Additional District Judge Mr. Roy. The point was then taken for the first time that the suit was barred by Art. 62 of the schedule to the Limitation Act. The article applies to a suit "for money payable by the Defendant to the Plaintiff for money received by the Defendant for the Plaintiffs' use" and the period of limitation is three years from the time when the money is received. In this case the money was received in 1912 and the suit was not brought till 1917. The learned Additional Judge considered that this was a material point, as no doubt it was, but he did not decide it. He remanded it to the trial Court with a direction that that Court should come to a distinct finding upon it and decide the case after taking such evidence as the parties might adduce. On the remand it was held by the trial Court that Art. 62 applied and that the suit was time-barred. The Subordinate Judge, therefore, dismissed the suit and his decree was affirmed by the Additional Judge, Mr. Banerjee, from whose judgment the present appeal has been taken. As there was no appeal from

INJAD ALI F. MOHINI CHANDRA ADHIKARI.

the order of remand, it became final and cannot now be attacked. But I take this opportunity to observe that in my opinion it was a bad order from every point of view. The learned Additional Judge who made it entirely misapprehended his powers and liabilities as a Court of Appeal. In the first place the Code makes no provision for a remand in such circumstances. In the second place no reason appears why the point raised which was a point of law should involve the investigation of any facts which had not already been investigated at the trial. The liberty given to the parties to adduce additional evidence was, therefore, wholly unnecessary. Issues had been settled, the case had been fully tried and it is difficult to conceive what materials the parties could supply for the decision of the point of limitation other than those then on the record. On the remand no additional evidence was in fact offered by the parties. If an investigation of new facts had been involved the Additional Judge might well have refused to allow a point of this kind to be raised for the first time in appeal; or he might have proceeded under Or. 41, r. 25. If the materials on the record were sufficient for arriving at a decision, as it appears they were, it was the learned Additional Judge's plain duty to undertake the responsibility of deciding the point himself. If he had directed his attention to relevant provisions of the Code he would have gathered for himself that it was not competent for him to remand the point for decision by the trial Court. The question to be decided on this appeal is whether on the remand the Courts below have rightly held that the present case is governed by Art. 62. In my opinion the answer should be in the negative. If no covenant of title was expressed in the conveyance to the Plaintiffs, nevertheless, under

sec. 55, cl. (2) of the Transfer of Property Act, "the seller shall be deemed to contract with the buyer that the interest which the seller proposes to transfer to the buyer subsists and that he has power to transfer the same." It follows that the conveyance itself imports a covenant of title [*Basaraddi Sheikh v Enajaddi Maleah* (1)] and the suit as a suit for the refund of the purchase-money may be regarded as a suit for damages for breach of this covenant. The article applicable to such a suit, where, as here, the conveyance is registered, is, in my opinion, Art. 116. In *Biswanath Gorain v Surendra Mohon Ghose* (2) cited in the judgment appealed from, the attention of the learned Judges was not directed to the possibility of applying Art. 116. But if there is no precedent in this Court the question in the form in which it is now presented has been fully discussed by the Madras High Court in *Arunachala Aiyer v. Ramasami Aiyer* (3) and I desire to concur in the reasoning of the learned Judge. It was ingeniously suggested for the Defendant No. 1 that inasmuch as Art. 115 speaks of the breach of any contract, "express or implied, not in writing registered," Art. 116, of the breach of contract in writing registered omitting any reference to implied covenant or title. The suggestion is in my opinion unavailing. In suits within Art. 115 the contract may be not only not registered but also not in writing, and the words "express or implied" were inserted to embrace all unregistered contracts in whatever way they may have been made. Art. 116 on the other hand applies to the particular case of contracts in writing registered. It appears to me that the implied and the express cove-

(1) I. L. R. 25 Cal. 298 (1897).

(2) 19 C. W. N. 102 (1913).

(3) I. L. R. 38 Mad. 1171 (1914).

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nants cannot be separated in the manner suggested. If "a contract" in the sense of the article is in writing, the writing represents the implied as well as the express covenants. Where as in the case of a conveyance, the law imports or reads into the writing such covenants as a covenant of title, the writing becomes the repository of the whole contract including the implied covenants. In the language of the learned Judges in Madras the covenant of title is attached to the conveyance. It is a question of the construction of the writing. Similarly when the writing is registered the registration will be effective for the purpose of all covenants which the written words properly construed express or imply. The reasoning covers, I think, not only covenants implied by law but all implied terms, collected from the language used by any legitimate process of construction or interpretation. It cannot have been intended that the express terms of a written and registered contract should be governed by one article and the implied term by another. I may add that it has been held in England that when the terms of an expired lease as to repairs are implied in a written agreement for a new tenancy, the terms are "contained in" the writing within the meaning of the Conveyance Act, 1881 [*Cole v. Kelley* (4)]. I concur therefore in allowing the appeal and in the order which the learned Chief Justice has proposed.

SANDERSON, C. J.—We think it desirable to record our opinion to the effect that we see no reasons to differ from the finding of the trial Court contained in the learned Subordinate Judge's judgment of the 3rd of October 1917 that the first sale was a valid sale, with the result that the Plaintiffs should not recover possession of the property. We also agree that the

(4) L. R. (1920) 2 K. B. 106.

whole amount of the purchase-money should be paid to the Plaintiffs by Defendant No. 1.

The result of our judgment is to restore the decree made by the learned Subordinate Judge on the 3rd October 1917. A decree therefore will be made in favour of the Plaintiffs against the Defendant No. 1 for Rs 713-4 annas and such sum will carry interest at the rate of six per cent. per annum from the date of that decree (the 3rd October 1917) until realization. The remainder of that decree as regards the other Defendants will stand. The Plaintiffs are entitled to their costs against the Defendant No. 1 in this Court and in the lower Court both before and after remand. I desire to add that I entirely agree with what my learned brother said about the impropriety of the order of remand which was made by the learned Additional Judge on the 13th of February 1919. I will only add that the improper order resulted in a delay of something like fifteen months.

S. C. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE No. 2167 OF 1920.

ANNADA KUMAR DAS

GUPTA, Plaintiff,
Appellant,

v.

[DWARKA NATH MANDAL
and ors., Defendants,
Respondents.

MOOKERJEE, J.

WALMSLEY, J.

1923,

19, January.

Permanent lease, executed by guardian during ward's infancy, how far binding on the ward—Conveyance of property by guardian as his own—What passes—Refund of premium paid as consideration for the lease—Ratification.

A Hindu widow, during her son's infancy, granted a permanent lease in respect of a holding, without expressly reciting that she was dealing with the pro-

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perty on behalf of her son, and the son after attaining majority went on receiving rent from the lessee, but eventually sued for khas possession.

Held—That the lady having had no property to deal with as her own, the grant did not create any valid title in the lessee. The lease was accordingly not binding on the son. The son must, however, refund the premium paid to the mother as consideration for the lease.

WATSON v. SHAMLAL (1), HUNOOMAN PERSHAD PANDEY v. MUNRAJ KOONWARFF (2), HEMANTAKUMARI DEBI v. BROJENDRA KRISHNA ROY CHOUDHURY (3) and GOPINATH MOHAN TAKRRO v. RADHANATH (4) distinguished.

Where a document appears as one executed by the guardian in his own right, it is not possible to apply the principle that where there may be a doubt as to whether the guardian is acting for himself or for his ward the executant may be deemed to have acted lawfully within the scope and in exercise of his authority. In this view, no question of ratification arose, for there was no unauthorised act done by the mother on behalf of the infant which could be ratified.

JANARDAN v. ANANT (5) and NARAIN v. MOHENDRA (6) referred to.

This was an appeal preferred on the 26th of November 1920, against the decree of Babu Sush Chandra Banerjee, Subordinate Judge, 1st Court of Zilla Backergunge, dated the 27th of August 1920, reversing the decree of Babu Surja-

moni Dey, Munsif, 6th Court at Barisal, dated the 31st of July 1919.

The facts and the grounds on which the suit was brought will appear from the following extract from the judgment of the lower Appellate Court—

“Plaintiff’s case was that Defendant came into possession of the disputed land upon the strength of an invalid *pottah* granted by his mother during his minority and so Defendant’s possession being that of a trespasser he was entitled to get *khas* possession. The learned Munsif held that the *pottah* was a *bonâ fide* one but that Plaintiff was not legally bound by it. In the result he decreed the suit. Hence this appeal.

The points for determination are—

1. Is the lease granted by Plaintiff’s mother a valid lease? Was there any subsequent ratification by Plaintiff?

2. Can Plaintiff recover *khas* possession?

3. Is the claim barred by limitation?

Findings

It is admitted that Plaintiff was a minor and that the *pottah* was granted by his mother during his minority. From the *pottah* it appears that the mother Lakhypriya did not describe herself as the mother and guardian of her minor son. It is argued that his *pottah* is to be considered as having been granted by a stranger. In this case it was known to the parties that the property belonged to Plaintiff’s father as a settlement record had already been prepared, and it cannot be presumed that the mother claimed the estate adversely to her son and the estate was also under her management as his natural guardian. As has been held in *Watson and Company v. Shamlal Mitter* (1) “if there were any doubt as to the capacity in which she

(1) L. R. 14 I. A. 178 : s. c. I. L. R. 15 Cal. 8 (1887).

(1) L. R. 14 I. A. 178 : s. c. I. L. R. 15 Cal. 8 (1887).

(2) 6 M. I. A. 333 (1876).

(3) L. R. 17 I. A. 65 : s. c. I. L. R. 17 Cal. 875 (1890).

(4) 2 Knapp P. C. 20.

(5) I. L. R. 32 Bom. 366 (1904).

(6) 15 C. L. J. 332 (1912).

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acted it should be presumed that she did so in her lawful capacity "

In *Rash Moni Dasi v. Soorja Kanta Ray* (7) it has been laid down that as natural guardian of her infant son a Hindu mother has no power to sell immoveable properties belonging to the infant except for legal necessity. In the present case there was no sale but a lease, and the learned Munsif has no doubt that Plaintiff's mother acted in good faith and for benefit of the Plaintiff in granting a permanent lease like this as she was badly in need of money to manage the affairs of the Plaintiff. There was thus legal necessity. I therefore hold that Plaintiff cannot get rid of the *pottah*. The learned Munsif also remarks that there is satisfactory evidence that Plaintiff received rent from Defendant some time in the year 1923, i.e. to say, after attaining majority. But the learned Munsif says that this does not amount to ratification of the lease in the strict sense of the law. I do not agree in this view. When minors after coming of age receive rents under a lease which were granted by their guardians during their minority they thereby ratify the lease and cannot afterwards repudiate it [*Ram Chandra v. Pran Gobinda* (8)].

For all these reasons I am of opinion that the *pottah* is valid and that Plaintiff cannot get *khas* possession.

As regards limitation the learned Munsif remarks that the suit having been brought within 12 years it is not barred under Art. 144 of the Limitation Act. But in my opinion Art. 14 is applicable in this case. In *Laxmava Huchappa Nasipudi v. Rachappa Karveersetti* (9), it has been held that a suit to set aside a sale of a minor's property effected by his

mother who was his natural guardian brought more than three years after the minor's attaining majority is barred under Art. 14 of the Limitation Act. In my opinion the suit is barred by limitation.

The result therefore is that in my judgment the Plaintiff will be entitled to get rent from the Defendant at the rate mentioned in the *pottah* and that the claim for *khas* possession is dismissed. The appeal is therefore allowed and the decree of the lower Court declaring Plaintiff's title is affirmed but that for *khas* possession is reversed. The Appellant shall get his costs in both the Courts "

Babus Mohes Chandra Banerjee and Promotho Nath Bandyopadhyay for the Appellant.

Babus Trailokhyanath Ghose and Jitendra Nath Ray for the Respondents.

The JUDGMENT OF THE COURT was as follows.

This is an appeal by the Plaintiff in a suit for possession upon establishment of title. The disputed land belonged to the father of the Plaintiff and passed to him by right of inheritance when his father died. On the 22nd May 1909, when the Plaintiff was still an infant, his mother granted a permanent lease of the subject-matter of the litigation to the Defendants. On the 20th July 1918, the Plaintiff instituted the present suit to eject the Defendants on the ground that the lease was unauthorised. The Court of first instance decreed the suit. Upon appeal that decision has been reversed by the Subordinate Judge.

We have examined the lease and we find that it was granted by the lady on the assumption that she was the proprietor in possession, competent to deal with the property. There can be no dispute that this was not the true state of facts. As

(7) 9 C. W. N. 1019 (1905).

(8) 25 W. R. 71 (1876).

(9) 20 Bom. L. R. 498 (1918).

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the Defendant has stated in the written statement, a document was first drawn up which purported to transfer the property to the Defendants, the mother of the Plaintiff professing to act as his natural guardian. When the document was taken to the Registration Office, the registering officer declined to register it on the ground that no permission of the District Judge under the Guardians and Wards Act, authorising the mother to grant a permanent lease of the property of her son, was produced. Thereupon, a fresh document, the one now before the Court, was drawn up. The recitals are undoubtedly untrue and there can be no dispute as to their meaning. The lady had no property to deal with as her own and consequently the grant did not create any valid title in the lessee.

Reliance has been placed, however, on the decision of the Judicial Committee in *Watson v. Shamlal* (1) in support of the contention that the document may be construed to mean exactly the reverse of what its language signifies, namely, a lease by the mother, not in her own right, but as the guardian of her infant son who is not even mentioned within its four corners. The case mentioned is, in our opinion, of no assistance to the Respondents. There the name of the executant appeared on the face of the document and was followed by the description "mother and guardian of the infant." It was held that the description might be construed to indicate that the deed was executed by the lady on behalf and as guardian of her infant son. This principle of liberal construction of Indian documents martistically drawn up was applied by the Judicial Committee in the cases of *Hunooman Pershad Pandey v.*

Munraj Koonwarce (2), *Hemantakumari Debi v. Brojendrakrishna Roy Choudhury* (3) and *Gopeemohan Takro v. Radhanath* (4) which are all distinguishable. In each instance, the question was one of the intention of the party who executed a document, to be gathered from the language used, and it was pointed out that as there was no suggestion that the lady had claimed any interest in the estate as her own, she might be deemed to have acted on behalf of her infant ward. In the case before us, the history of the document has been disclosed by the Defendants themselves. The original document was executed by the lady on behalf of her infant son. A difficulty, real or imaginary, was raised by the registering officer. The document was thereupon deliberately altered, so as to become a deed executed by her in her own right. It is impossible, in such circumstances, to apply the principle that where there may be a doubt as to whether the guardian is acting for himself or for his ward, the executant may be deemed to have acted lawfully within the scope and in exercise of his authority; see *Janardan v. Anant* (5) and *Narain v. Mohendra* (6). In this view, no question of ratification arises, for there is no unauthorised act done by the mother on behalf of the infant which could be ratified.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. We direct, however, that from the amount recovered by the Plaintiff as mesne profits the sum of Rs. 60 (sixty rupees) which was paid by the Respondent as premium for the lease should

(2) 6 M I A 333 (1856).

(3) L. R. 17 I. A. 65; s. c. I. L. R. 17 Cal. 875 (1890).

(4) 2 Knapp. P. O. 20.

(5) I. L. R. 32 Bom. 386 (1908).

(6) 15 C. L. J. 322 (1912).

(1) L. R. 14 I. A. 178; s. c. I. L. R. 15 Cal. 8 (1887).

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be deducted The Appellant is entitled to his costs both in this Court and the Court of Appeal below.

J N. R. Appeal allowed

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1694 of 1920.

MOOKERJEE, J. CHANDRA MOHAN
RANKIN, J. GANGULI, Plaintiff,
1923, Appellant,
Heard, 11 and v.
12, January. JNANENDRA NATH
Judgment, BANERJEE and ors., De-
24, July. fendants, Respondents.

Hindu law—Debut or—Planting of sacred grove on consecrated ground, of a religious purpose—Panchabati—Idol, establishment of, if essential—Debutter, description by owner as, effect of

Planting holy trees on ground consecrated for the purpose is a valid form of dedication for a religious purpose according to Hindu law.

Dedication for "Panchabati" upheld in this case as valid debutter.

To effect a valid debutter it is not necessary to establish the image of an idol, all that is essential is that the religious purpose should be clearly specified and the property intended for the endowment set apart for that object.

The designation of property as debutter is not conclusive though valuable evidence of the intentions of the founder.

This was an appeal preferred on the 28th June 1920 from a decision of J. McNair, Esq., District Judge, Zillah 24-Parganas, dated the 5th May 1920, reversing that of Babu Bonomali Sen, Officiating Subordinate Judge, Alipur, dated the 2nd February 1920.

The facts of the case will appear from the judgment.

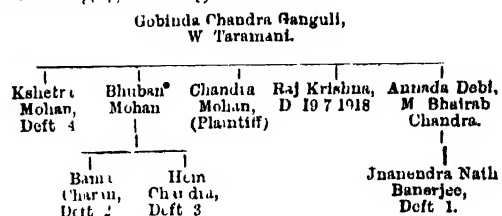
Babus Mahendra Nath Ray and Manmatha Nath Ray for the Plaintiff-Appellant.

Dr Dwarkanath Mitter and Babus Nagendra Nath Ghose and Hemendra Nath Chatterjee for the Defendants-Respondents

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an appeal by the Plaintiff in a suit for recovery of possession of land upon establishment of title as *shebat*. The Subordinate Judge gave the Plaintiff a decree which has been reversed on appeal by the District Judge.

The subject-matter of the litigation admittedly belonged to one Gobinda Chandra Ganguli who, shortly before his death, which took place on the 29th January 1897, made a testamentary disposition on the 29th October 1896. The names of the members of his family appear on the following genealogical table—



The testator had a garden in the northern suburb of Calcutta, which covered an area of more than 12 bighas. He had a map of the garden prepared, which was mentioned in his last Will. He gave the portion marked D to his eldest son Kshetra Mohan, B to his second son Bhuban Mohan, A to his third son Chandra Mohan, and C to his youngest son Raj Krishna. The portion marked E was called *panchabati debutter*, and the passage marked F was described as appurtenant to the *debutter* as a passage for ingress and egress from the public road. He

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appointed Raj Krishna as full *shebait* of the *debutter* in the following terms :—

“(As regards) the Iswar Debutter Panchabati and brick-built house (containing) two bighas (of land situate) on the east side of the same (and) which has been marked (F) and coloured in neutral tint in the accompanying map, and the passage (measuring) two kathas (and) leading to the *sadar* road from the said *debutter* house on the western side, which (passage) has been marked (F) and coloured light red, my youngest son Sriman Raj Krishna Gangopadhyay Babaji shall be full, *shebait* of the said *debutter* (property) and shall enjoy (and) possess (it) down to (his wife and son, son's son and so forth in succession) The said *shebait* shall, if necessary, give unto my other three sons Sriman Kshetra Mohan Gangopadhyay, Sriman Bhuvan Mohan Gangopadhyay (and) Sriman Chandra Mohan Gangopadhyay nine kathas of land, being three kathas to each, on the east side, for residential purposes.”

The wife of Raj Krishna pre-deceased him and he died childless. On the 18th January 1919, the Plaintiff instituted the present suit for possession of the *debutter* property, on the allegation that the *shebaitship* had, upon the death of Raj Krishna, vested in himself and Kshetra Mohan and that as Kshetra Mohan had not joined as Plaintiff, he had been made a *pro forma* Defendant. Kshetra Mohan died on the 9th January 1920 during the pendency of the suit in the primary Court, and his executor was brought on the record in his place. The contesting Defendants repudiated the claim and set up title under a Will alleged to have been executed on the 11th January 1918 by Raj Krishna who had made a testamentary disposition of his private properties. The question, consequently, arose whether the

disputed property was secular or *debutter*, for if the property was validly dedicated by the original owner, it could not be affected by the Will of his son. The Courts below have taken divergent views upon this matter. I am of opinion that the conclusion of the District Judge cannot be supported.

The Subordinate Judge found on the evidence—and his finding has been accepted by the District Judge—that the disputed land was dedicated by the proprietor as a place of worship and was regularly used by him for that purpose. The evidence shows that the land was consecrated, holy trees were planted and a *vedi* (raised brick-built platform) was erected. The founder used to go to this *panchabati* everyday, performed his *pau* *ahnik* there, seated on the *vedi* and engaged in pious and religious meditation. On these facts, there is no room for controversy that there was a valid religious dedication.

Special religious efficacy is ascribed in the sacred books of the Hindus to selected groupings of plants, one of these is called the *panchamra*, while another is known by the name of *panchabati*. The *panchamra* is described in the Mahabharata quoted in the Danakhandā of the Chaturvarga Chintamani of Hemadri, Chap. XIII. p. 1032 (A. S. B) and in the Sabdakalpādruma. The sacred group *panchabati* is described in the following passage of the Skandapurāna, which is reproduced in the Sabdakalpādruma from the Vratākhandā of the Chaturvarga Chintamani of Hemadri :—

অৰ্থং বটবৃক্ষঞ্চ বটধাত্রী অশোককম্ ।

বটীপঞ্চকমিত্ত্বাভং স্থাপয়েৎ পঞ্চদিক্ চ ॥

অৰ্থং স্থাপয়েৎ প্রাচি বিষমুত্তর ভাগতঃ

বটং পশ্চিমভাগেতু ধাত্রীং দক্ষিণতন্তথা ॥

অশোকং বহুদিক্ স্থাপ্য তপস্বীর্থং সুরেববি ।

মধ্যে বেদীং চতুর্হস্তাং স্তম্ভরীং স্তম্ভনোহরাম্ ॥

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প্রতিষ্ঠাং কারয়েত্ততাঃ পঞ্চবর্ষোত্তরং শিবৈ।
 অনন্ত ফলদাত্রী সা তপস্কাফলদায়িনী ॥
 ইয়ং পঞ্চবটী প্রোক্তা বৃহদ্ পঞ্চবটীং শৃণু।
 বিষবৃক্ষং মধ্যভাগে চতুর্দিক্ চতুষ্টয়ম্ ॥
 বটবৃক্ষং চতুষ্কোণে বেদসংখ্যং প্ররোপয়েৎ।
 অশোকং বর্জলাকারং পঞ্চাবংশতি সম্বিতম্ ॥
 দিগ্ বদিক্ আমলকীকৈব এটং পরমেশ্বরী।
 অংখঞ্চ চতুর্দিক্ বৃহৎ পঞ্চবটী ভবেৎ ॥
 যঃ স্করোতি মহেশানি সাঙ্গাং ইন্দ্র সমোভবেৎ।
 ইহলোকে মন্ত্রসদ্ধিঃ পাবৈ চ পবনা গতিঃ ॥

The group consists of the (1) Aswattha, (2) Vilwa, (3) Vata, (4) Dhatri (*amla*) and (5) Asoka, these are to be planted to the east, north, west, south and south-east respectively of a *red* or raised platform in the middle, four cubits in size and of beautiful shape, when the trees have grown for five years, the place has to be consecrated and religious austerities practised on such a spot are fruitful of endless rewards. A bigger type of this sacred grove is described in the same work, under the name of Vilvat-Pancha-Vati, as composed of a (1) Vilwa tree placed in the centre, single specimens of the (2) Vilwa Amalaki and (3) Aswattha in the four cardinal directions, a Vata tree at each of the four corners, and a circle of twenty-five Asoka trees surrounding the whole; the maker acquires the prowess of Indra; he is master of incantations in this world and obtains salvation in the next.

The ceremony of *pratishtha* or consecration for trees and groves is described in the Matsyapurana to be in its preliminaries the same as that for water reservoirs, Hemadri, Danakhandā, Chap. XIII, p. 1048 and Ashwalayana, *Grihyasutra*, Parishishtha, p. 344 (A. S. B.). The erection of the *mandap*, the appointment of priests and the collection of materials

is the same as in the case of the consecration of a reservoir. The trees which are the subjects of the ceremony are to be irrigated with holy water, beautified with rice-flour and *alakaka*, adorned with garlands and covered with cloths. The ear-boring ceremony is then to be performed for each with a golden needle and collyrium applied (as if to their eyes) with a golden pencil, and imitation fruits of silver placed upon the platform at the foot of each tree. A *kalasa* properly filled is to be installed for each, and *homas* offered for Indra and the other Lokapalas or guardians of the quarters of the globe and also in honour of "Lord of the Forest," *Vanaspati*, which is specially introduced because of the trees. Then a milch-cow, covered with white cloths, ornamented with gold, specially in her horns, and accompanied by a milking vessel of bell-metal, is to be released in the midst of the trees, with her face to the north, so that naturally she proceeds in that direction. The worshipper then is bathed by the priests from the auspicious waters of the installed water-pots to the accompaniment of music and auspicious songs. Having so bathed and attired himself in white cloths, the worshipper honours the priests with appropriate presents. The ground is sprinkled for four days with milk and a *homa* performed with *ghee*, barley and black sesamum. On the fourth day there is held a great festival and presents again offered to the priest. He who performs the Vrikshotsava or "Tree-festival," according to the above rule, has all his desires gratified and enjoys eternal exaltation. The man who has consecrated even a single tree, dwells in heaven till three *ayutas* of Indra. He procures the salvation of past and future generations, and obtains final emancipation from which there is no return.

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A place so dedicated for worship ceases to be private property according to Hindu religious ideas, and the case of reservoirs is included in the rule; see Jagannath's Digest, translation—Colebrooke, Book III, Chap I, sec 2, pl. 101, see also *Birendra-lushore Manukya v. Akram Ali* (1), *Bhudeb Mookherjee v. Kalachand Mallik* (2) and *Krishnayya v. Subbayya* (3). In this connection, it is important to bear in mind that to effect a valid dedication, it is not necessary to establish the image of an idol, all that is essential is that the religious purpose should be clearly specified and the property intended for the endowment set apart for that object, *Bhuggo-buttu Prossunno v. Gooroooprossunno* (4), *Bhupatinath v. Ramlal* (5), *Chandi Charan v. Haribola* (6) and *Asita Mohan v. Nirode Mohan* (7). This test is fulfilled in the case before us, and there is no room for any suggestion that the dedication was void for vagueness, as happened in the case of *Runchordas v. Parvati Bai* (8), where the bequest was to "dharam". We cannot further ignore the fact that the proprietor designated the property as Iswar Debutter Panchabati. No doubt, as pointed out in *Binode Bihari v. Manmatha Nath* (9), the designation *debutter* is not conclusive, though valuable evidence of the intentions of the founder, *Madhab Chandra v. Sarat Kumari* (10). On the other hand, we must bear in mind that if

there has been a valid dedication, a breach of trust on the part of a *shebait* or even of the donor himself will not invalidate or annul the trust or alter the original nature of the grant. In the words of Sir Robert Phillimore in *Jagat Mohini v. Sookheemonee* (11), a former abuse of trust cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he himself were formerly implicated in the same indefensible courses against which he is seeking to protect property. The misconduct of the trustees cannot be put forward as a valid reason for holding that the author of the trust had no intention of acting seriously or for determining his intention at the time when he founded the trust. If property has been set apart for religious purposes, that constitutes dedication, and such property must be treated as partaking of a trust or religious endowment, though the mere erection of a temple and the planting of a grove may not without consecration amount to such a setting apart as constitutes dedication, *Anath Nath v. Mackintosh* (12), *Piran v. Abdul Karim* (13), *Dakhni Din v. Rahim-unnessa* (14), *Ram Brahma v. Kedar Nath* (15) and *Ram Das v. Basanti* (16). In my opinion, the facts established in the present case show that there was a dedication of the land in suit for religious purpose and a valid *debutter* was thereby created. In this view, the appeal must be allowed, the decree of the District Judge set aside and that of the Subordinate Judge restored with costs in all Courts.

(1) 1 L. R. 39 Cal 439. s. c. 16 C. W. N. 304 (1912).

(2) 34 C. L. J. 315 (1921).

(3) 21 Mad. L. J. 724.

(4) 1 L. R. 25 Cal. 112 (1897).

(5) 1 L. R. 37 Cal 128: s. c. 14 C. W. N. 18; 10 C. L. J. 355 (F. B.) (1909).

(6) 23 C. W. N. 645 (1919).

(7) 20 C. W. N. 901, 919 (1919).

(8) L. R. 26 I. A. 71: s. c. 1 L. E. 23 Bom. 726; 3 C. W. N. 621 (1899).

(9) 21 C. L. J. 42 (1911).

(10) 15 C. W. N. 126 (1910).

(11) 14 M. J. A. 289 (306); 10 B. L. R. 19 (1871).

(12) 8 B. L. R. 60 (1871).

(13) 1 L. R. 19 Cal. 208 (1891).

(14) 1 I. R. 16 All. 412 (1894).

(15) 36 C. L. J. 478 (1922).

(16) 20 All L. J. 789 (1922).

CHANDRA MOHAN GANGULI v. JNANENDRA NATH BANERJEE.

RANKIN, J.—I agree that Gobinda Ganguly intended a full and complete dedication and that he did everything necessary to effect this. I see no objection in law to the validity of the dedication and agree in allowing this appeal with costs here and below as proposed.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 855 OF 1921.

WALMSLEY, J.	AYIMANNESSA BIBEE
SUHWARWARDY, J.	and ors., Defendants,
1923,	Appellants,
Heard, 2, May.	v.
Judgment, 10, May.	PANNA LAL SIL,
	Plaintiff, Respondent.

Construction of lease—"Mira-hortto" in tenancy, if imports permanency and heritability—Grant of right to plant trees and erect brick-built buildings, how far determines the nature of the tenancy—"Selling building" if imports selling building with the land

Where a lease granted right to plant and grow trees on the land, to erect brick-built buildings, and "acquiring mirashortto" to continue to make residence, and further gave the tenant the right to sell the buildings on payment of a fourth of the price to the lessor.

Held—That by the use of the words, "growing miras right," it was intended that the tenancy should be heritable to be enjoyed by the grantee from generation to generation. The word miras means inheritance or heritability. The right to plant and grow trees and erect buildings coupled with the acquisition of the miras right should point to one conclusion only, namely, that the lease was intended to be permanent and heritable. By "selling building" it is ordinarily understood selling building with the land on which it would be standing and not selling build-

ing materials; and the stipulation that a fourth of the price on such sale should be paid to the landlord is not inconsistent with the permanent nature of the tenancy.

NEMAI CHANDRA BOSE v MAHOMMED BASIR (1) referred to.

This was an appeal preferred on the 12th of April 1921, against the decree of G. P. Hogg, Esq., Additional District Judge of Zillah Hoogly at Howrah, dated the 16th of February 1921, affirming the decree of Babu Bijoy Gopal Chatterjee, Additional Subordinate Judge of Howrah in Zillah Hoogly, dated the 5th of March 1919.

The facts shortly stated are as follows—One Debi Charan granted a lease of 6 cottahs of land to one Felaram, who sold a portion of the land to the predecessor of the Defendant. Plaintiff brought the present suit on the allegations, *inter alia*, that the lease of Felaram was a *thicca* lease, and that the occupiers of the lease-hold were tenants-at-will. He accordingly prayed for recovery of possession on a declaration that the Defendant was a trespasser. The Defendant contended that the lease of Felaram was a permanent one. The lower Courts decreed the suit overruling Defendant's objection and the Defendant preferred the present appeal to the High Court.

Dr. Dwarka Nath Mitter and Babu Narendra Nath Chaudhuri for the Appellants

Babus Mohendra Nath Roy and Narendra Chandra Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SUHWARWARDY, J.—The facts of the case leading up to this appeal are as follows:—

One Debi Charan Ghose who was the owner of the land in suit granted a lease

(1) 9 C. L. J. 475 (1907).

AIMANNESSA BIBEE v. PANNA LAL SIL.

of 6 cottahs of land to one Felaram in 1265 (1858). In 1268 B. S. or 1861 Felaram sold 2½ cottahs (the land in suit) out of this 6 cottahs to one Jag Mohan who sold it in the same year to Kailash Bose. After Kailash's death it was inherited by his four sons on partition among whom it fell to the share of one of the sons on whose death it was inherited by his son. On the death of the last owner his grand-mother inherited it and sold it in 1905 to the present Defendant. It will be thus seen that there have been several transfers and successions within the last sixty years.

The Plaintiff's case is that the lease of Felaram was a *ticca* lease and all the several occupiers of the lease-hold were tenants-at-will. The Defendant contends that the lease was a permanent one. He further contends that as in 1897 the Plaintiff's predecessor who had succeeded to the interest of Debi Charan instituted an inquiry into the nature of the tenancy and that at that time the then tenant asserted a permanent right, the Defendant has acquired such right by adverse possession of it for more than twelve years.

The Plaintiff has brought this suit for recovery of possession on a declaration that the Defendant is a trespasser and for recovery of damages for use and occupation. Both the Courts below have decreed the suit and overruled the Defendants' objections.

The judgment and decree of the lower Appellate Court have been attacked before us on both the pleas taken by the Defendant, namely, that the Defendant's tenancy is a permanent one and that in any event the Defendant has acquired a permanent right by adverse assertion of such interest for more than twelve years.

I propose first to deal with the first question which concerns itself with the construction of the lease of 1858. Before

examining the document it is necessary to note certain facts which have been elicited in evidence. In the *kabala* executed by Jag Mohan in 1861 in favour of Kailash in the name of his son Gopal the tenancy was described as a permanent one and since then it has been so described in subsequent transactions and asserted as such by the tenant. It is not found that there has been any alteration in the rent since the creation of the tenancy. I gather from the judgment of the trial Court that the Plaintiff has not proved realization of rent. The Plaintiff in the plaint averred that Shashi Bhushan, a son of Kailash, obtained a fresh settlement of the land but the learned Subordinate Judge has found the point against the Plaintiff and the lower Appellate Court has not considered it at all. I have already referred to the fact on which the Defendant's second objection is founded that in 1897 the Defendant's predecessor asserted a permanent right in the land, no steps were taken by the landlord to contest the claim. I have also observed that there have been several transfers and devolutions. Now I proceed to consider the construction of the *patta* executed by Debi Charan Ghose in favour of Felaram on 6th August 1858. The most material portion of the document I quote in the words of the learned Judge:—

"With the trees you have no concern. Now all the trees you will plant there (will be) in your control, (if) on the land trees and buildings you prepare (lit. make ready) (and if) afterwards you sell (these) then to my estate you will pay a fourth, without a fourth and without information (to me) you will not be able to sell. Preserving the four boundaries of the land causing to come into being *mirashortto* constructing houses continue to make residence."

AYIMANNESSA BIBEE & PANNA LAL SIL.

The word in the original which stands for "buildings" in the translation is "*marat*" which ordinarily means a masonry building and it has been so understood by the trial Court. The learned District Judge feels much exercised over the word "*mirashortto jannama*" which has been translated as 'growing the right of *miras*' by the Subordinate Judge and "acquiring *miras* right" by the Court Translator. I have no doubt in my mind that by the use of these words it was intended that the tenancy should be heritable to be enjoyed by the grantee from generation to generation. The word *mirashortto* is a mis-spelling and from looking at the other portions of the document it is apparent that the scribe was not well conversant with written Bengali. The learned Judge has attempted to give an ingenious philological interpretation of the word which I regret to say does not appeal to me as correct or reasonable, even if that interpretation were accepted, it would not further the Plaintiff's case. The Courts below are greatly influenced by the fact that the expression *miras* taluk or tenure is not in vogue in that part of the Province, namely, the District of Hoogly. That may be so but the word *miras* is an Arabic word in common use in old documents and borrowed along with many other such words in the modern conveyancing Bengali. It means inheritance or heritability. The word *mourusi* which is a variation of the word *miras* is in common use even in this part of the country. The learned Judge admits that there is no right of re-entry on a breach of any of the conditions of the lease mentioned in the *patta*. That is a right which is ordinarily found in *ticca* leases. In my opinion the absence of this right of the landlord points to the conclusion that the contracting parties did not intend that it

should be reserved. The most important right granted to the lessee is that of erecting brick-built buildings on the land and it leaves no doubt in my mind as to the nature of the tenancy. It is not pretended that the land was agricultural and the lease on the face of it is for building and residential purposes. The learned Subordinate Judge, though his findings and reasonings are not consistent, observes that "the original lease was for building and residential purposes and the tenancy of *Kailash* is presumably heritable." If this is conceded it will not be straining the meaning of the language to hold that it imports permanency. If the tenancy was terminable at the option of the landlord, why was the right to plant and grow trees and erect buildings secured to the tenant? This right conferred on the tenant coupled with the acquisition of the *miras* right should point to one construction only, namely, that the lease was intended to be permanent and heritable. In construing the language of the lease, it makes no difference in my mind that no building has been erected on the land and this fact seems to have influenced the Judge to hold that the land was not originally let for residential purposes. I fail to understand how the learned Judge has come to this conclusion in the face of the words "constructing houses continue to make residence" found in the passage in the lease which I have quoted from his judgment. Then again the right is granted to the lessee to sell the buildings he would erect on the land, but there is no provision mentioned as to what would happen if the lessee continued to live in the building from generation to generation. By selling building it is ordinarily understood selling building with the land on which it would be standing. The learned Vakul for the Respondent however, argues that

AYIMANNESSA BIBEE v. PANNA LAL SIL.

by selling building was meant building materials. This seems to me a forced construction which I am unable to accept. The stipulation that a fourth of the price on such sale should be paid to the landlord is not inconsistent with the permanent nature of the tenancy; [*Nemat Chandra Bose v Mahommed Basir* (1)]. In the view I have taken of the construction of the document, it is not necessary to refer to those decided cases where the origin of the tenancy was unknown and the nature of the original letting was determined by the subsequent dealing with the property.

There is one other matter worth noting in this connection. It appears from the lease that at the time of the letting there were three tenants on the 6 cottahs of land let out occupying different portions of it paying Rs. 16-8 annas in all as rent and the rent reserved by the lease was the same amount, namely, Rs. 16-8 annas. It is further stated that "the profit and loss of the said land is the concern of the lessee." The lessee secures no advantage except the right to make profitable use of the land by letting it out at a higher rent or using it for building and residential purposes—a right not ordinarily granted to a temporary tenant.

In the above view on the first point it is not necessary to consider the second question urged by the Appellant.

The result is that this appeal is allowed, the decree of the Courts below is set aside and the Plaintiff's suit dismissed with costs in all Courts.

WALMSLEY, J.—I agree.

J. N. R.

Appeal allowed.

(1) 9 C. L. J. 475 (1907).

CIVIL REVISIONAL JURISDICTION.]

REV. No 61 of 1923.

SASANTA KUMAR

CHAKRAVARTI,

Petitioner,

v.

ASHUTOSH CHAKRA-

VARTI and ors.,

Opposite Party.

NEWBOULD, J.

SUHRAWARDY, J.

1923,

30, July.

Bengal Tenancy Act (VIII of 1885), secs. 93, 95—Common manager, appointment of, must be of the entire estate and not of a portion—Appointment of common manager in respect of properties some of which are portions of estates or tenures—Removal of common manager—Appointment of successor—Objection, if can be taken to the appointment of a new common manager on the ground that it was made in respect of portion of estate or tenure when such objection not raised to the appointment of the previous common manager

An appointment of a common manager must be to the entire estate or tenure and not to a portion thereof.

Where a new common manager was appointed and objection was taken to his appointment on the ground that he could not be appointed to a part of an estate or tenure, and the District Judge held that as the previous common manager had been appointed to the properties in question no objection could be taken to the new common manager being appointed to the same properties:

Held—That the District Judge proceeded on a wrong principle, if the original order was illegal in this respect this would not validate the second order.

The order of the District Judge, so far as it rejected the application objecting to the appointment of the common manager on the ground that the common manager had not been appointed to the whole estate or tenure, was set aside, and the District Judge was directed to deal with the application according to law.

BASANTA KUMAR CHAKRAVARTI v. ASHUTOSH CHAKRAVARTI.

INDU BHUSAN BOSE v. ANNAPURNA MITRA (1) and MOHINI LAL PAKRASI v. NOGENDRA NATH PAKRASI (2) referred to.

This was a Rule granted against the order made by the District Judge of Khulna (R. Garlick, Esq.), dated the 24th November 1922

The facts material to this report are these :—

The Petitioner was appointed common manager in 1918 under sec. 95 of the Bengal Tenancy Act by the District Judge of Khulna in respect of certain properties, some of which did not include the whole estate or tenure of which the Basabati Chakravartis were the co-sharers. He continued to act as common manager till the 19th September 1922 on which date he was removed from his post on the objection of his other co-sharers, and a new common manager was appointed in respect of the same properties by an order of the District Judge. The Petitioner objected to the appointment of the new common manager on several grounds.

He filed an application on the 24th October 1922 stating that there were some properties of which the Chakravartis were co-sharers and some other persons were the co-owners of the remaining shares. A list of such properties, and names of sharers and the extent of each share was appended to the said application. It was contended that the appointment of the new common manager was illegal inasmuch as the said properties did not include the whole estate or tenure of which the Chakravartis were the co-owners of certain shares.

The learned District Judge dealt with the aforesaid application in his order, dated the 25th October 1922 as follows :—

"The second petition related to some

(1) 6 C. L. J. 216 (1906).

(2) 30 C. L. J. 261 (1919)

properties in which the Chakravarti estate has shares and which he says cannot be managed by the common manager. I presume that Basanta Babu himself has been dealing with these properties up to now. The petition may, however, be shewn to the pleader of the other co-sharers for reply."

The learned District Judge finally passed the following order on the 24th November 1922 on the said application :—

"Basanta Babu's petition, dated October 24th about the share in the Chakravarti estate appears to have been quite unnecessary. There has been no difficulty while Basanta Babu himself was manager. The present manager will make collections from the same properties as the previous common manager."

The Petitioner thereupon moved the High Court under sec. 115 of the Civil Procedure Code and obtained the present Rule.

Ran Surendra Chandra Sen Bahadur and Babu Hemendra Chandra Sen for the Petitioner

Babus Dwarkanath Chakravarti and Gopal Chandra Chakravarti for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule has been granted on the application of Basanta Kumar Chakravarti who is a co-sharer in certain property and was formerly appointed common manager under sec. 93 of the Bengal Tenancy Act. The learned District Judge has on the objection of other co-sharers removed the Petitioner from the post of the common manager and appointed one Brojendra Lal Sen as the common manager of the estate.

The Rule was directed against three orders passed by the learned District

BASANTA KUMAR CHAKRAVARTI v. ASHUTOSH CHAKRAVARTI.

Judge. At the hearing of this Rule the only point pressed is that the learned District Judge by his order of the 25th November 1922 rejected an application objecting to the appointment of the new common manager on the ground that he could not be appointed to the properties since some of the properties did not include the whole estate or tenure of which the Chakravartis were the co-sharers. We think that in dealing with this application the learned District Judge proceeded on a wrong principle. He appears to have held that as the former common manager had been appointed to these properties, no objection can be taken to the new common manager being appointed to the same properties. But if the original order was illegal in this respect, this would not validate the second order. The attention of the District Judge is drawn to the decisions of this Court in the cases of *Indu Bhusan Bose v. Annapurna Mitra* (1) and *Mohim Lal Pakrasi v. Narendranath Pakrasi* (2) in which it was held that the appointment of a common manager must be to the entire estate and not to a portion thereof.

We set aside the order of the learned District Judge, dated 24th November 1922 so far as it rejects the petition, dated 24th October 1922 objecting to the appointment of the common manager on the ground that the common manager has not been appointed to the whole estate or estates or tenures and we direct that the learned District Judge do re-consider that application and pass orders thereon according to law.

We make no order as to costs in this Rule.

Rule made absolute;

H. C. S.

Case remanded

(1) 6 C. L. J. 216 (1906)

(2) 30 C. L. J. 261 (1919)

[CRIMINAL REVISIONAL JURISDICTION.]

Ref. No. 159 of 1922.

NEWBOULD, J.	HARISH CHANDRA
SUBHAWARDY, J.	CHOUHDURY,
1923,	Complainant,
24, January.	v.
	GIRIDHAR SARKAR
	and ors., Accused.

Indian Penal Code (Act XLV of 1860), sec. 186, conviction under—Warrant signed by sheristadar "by order," validity of—Resistance of warrant—Evidence Act (I of 1872), sec. 114 (e), presumption

Petitioners who resisted the execution of a warrant for attachment of moveables, which purported to be signed by the sheristadar of the Court "by order," were convicted under sec. 186 of the Penal Code

Held That the presumption under sec. 114 (e) of the Evidence Act applied to the case and the Petitioners were rightly convicted

DEPUTY LEGAL REMEMBRANCER v. MIR SARWAR JAN (1) distinguished

This was a Reference under sec. 438, Cr. P. C. made by Mr. C. Bartley, Sessions Judge, Dinajpur, recommending that the order of Babu R. M. Chakraverty, Deputy Magistrate of Dinajpur, dated the 7th August 1922, convicting the accused under sec. 186, I. P. C. and sentencing them each to undergo rigorous imprisonment for one month, may be set aside, and that a retrial may be directed in accordance with law.

The Reference was as follows:—

"The Petitioners have been convicted under sec. 186, I. P. C., in the under-noted circumstances

Warrants of attachment of the moveable property of two of them, in pursuance of decrees, were entrusted to a peon of the Civil Court for execution. The warrants

(1) 6 C. W. N. 845 (1902)

HARISH CHANDRA CHOUHURY v. GIRIDHAR SARKAR.

purport to be signed by the Officiating *sheristadar* of the Court, and there is nothing on the record to show that he was authorised to sign them on behalf of the Munsif.

The peon attached some cattle belonging to the judgment-debtors, and made them over to two servants of the decree-holder, from whom the Petitioners and others rescued them.

I am of opinion that the conviction is bad in law.

It had been held in the case of the *Deputy Legal Remembrancer v. Mir Sarwar Jan* (1), that where a warrant purports to be signed on behalf of the presiding officer of a Court by a person appointed to do so, there should be evidence, either on the face of the signature itself or otherwise, to prove the appointment. In that case a warrant of arrest issued under the corresponding section of the old Code, was held not to be good warrant, and a conviction for resisting its execution was set aside.

I am therefore of opinion that in the present case, the conviction under sec. 186, I P C cannot stand.

Babu Indu Prokas Chatterjee for the Accused.

Babus Monmotho Nath Mukherjee and *Satindranath Mukherjee* for the Complainant.

The JUDGMENT OF THE COURT was as follows :—

The facts of the present case can be distinguished from the facts of the case cited by the learned Sessions Judge in his letter of Reference, namely, the case of the *Deputy Legal Remembrancer v. Mir Sarwar Jan* (1). In that case the warrant signed by the *sheristadar* did not show on the face of it that the *sheristadar* had signed in the exercise of the authority delegated to him by the Judge. But here we find that the *sheristadar* who signed the warrant purported to make that signature "by order." We think therefore that the presumption under sec. 114 (e) of the Evidence Act can be applied to the present case, and we hold that the statement that appeared on the face of the warrant that the *sheristadar* signed "by order" can be presumed to be true, and that we should hold, in the absence of anything to suggest to the contrary, that he was actually the officer appointed by the Court to sign processes as required by cl. (2) of r. 21, Or. 21, C. P. C.

We accordingly refuse to accept this Reference and direct that the papers be returned. The accused must surrender to their bail and undergo the unexpired portion of their sentence.

N G

(1) 6 C. W. N. 845 (1902).

THE Calcutta Weekly Notes.

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MONDAY, NOVEMBER 13, 1922.

[No. 1.

Contents. NOTES

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REPORTS (See Index.)

Forewords for the new legal year.

Another year has rolled back into the lap of eternity. It seems to be only the other day when we came into existence but when we look back, we find that twenty seven years have slipped back behind us. Great events have happened during the period of our existence. We have suffered with the rest of humanity from the great war that has left the world poorer in men, money, morals and even in the ordinary comforts and necessities of life. We have been longing for peace and the peace of the world is not yet in sight. The world and its people seem to be in a state of flux. It is only justice and fair play that can restore peace and order in the West and the East. We in the East have always been for the orderly progress of the world. But this consummation will not be reached till the modern strife amongst the aggressive nations and classes for domination over the more peace-loving ones comes to an end. We cannot foresee when this will happen. Certainly not before this strife for power amongst the militant nations has exhausted them all. We predicted last year and repeat it again that the world peace will not be restored till full amity is restored between the West and the East. Even the most prosperous nations are being exhausted by this continued contest for the military and economic domination of the world. A war of selfishness will never restore peace and harmony. It is a change of heart, a change in the outlook of human life that can only afford salvation to human races. The rise and fall of Governments or of nations are mere bubbles in the ocean of life. It is love, charity, fellow-feeling and a regard for truth and justice that can

alone save humanity from their present and future sufferings. We have always held fast to this doctrine which once emancipated the world and are full of hope for the future that those who are now flushed with the success of brute force will soon see the error of their ways and take to retrace their steps and fall back on those immutable moral assets of the human heart which alone can restore peace externally and internally. All through this trying times we have always tried to adhere unflinchingly to the path of truth and justice and we shall continue to do so. In resuming our duties we have missed from amongst us many friends for whom we express our sorrow and to others we convey our greetings and best wishes.

Princes Protection Act.

A novel piece of legislation has been recently placed on the statute-book—we mean the Indian States (Protection Against Disaffection) Act. On the 23rd of September last, Sir William Vincent, in the Legislative Assembly, moved for leave:—

"To introduce a Bill to prevent the dissemination by means of books, news papers and other documents of matter calculated to bring into hatred or contempt or to excite disaffection against Princes or Chiefs of States in India or the Governments or administrations established in such States."

On the motion being negatived, His Excellency the Viceroy and Governor-General in exercise of the powers conferred by sub-sec. (1) of sec. 67B of the Government of India Act certified that the bill was essential for the interests of British India and recommended that it should be passed. Armed with the certificate, the bill came before the Council of State on the 26th and was passed after a strenuous debate.

Such, in short, is the history of the passage of an enactment which, we dare say, the rulers of Native States, in course of time, will come to look upon as the Magna Carta of their

rights over British subjects in British India. Apart from its merits, the question that naturally arises in connexion with the Act as, was there a real necessity for the application of the certificate procedure? His Excellency the Governor-General has undoubtedly the power to certify that a bill is essential for the safety, tranquillity or interests of British India or any part of it and to recommend that it should be passed. If His Excellency exercises the power in any particular case, it will be perfectly legal and no Court of Law will question its legality. But an act may be legal and yet go against the spirit of the constitution and that is exactly our complaint in the present case. Sub sec (1) of sec. 67B was obviously intended for the purpose of enabling the Government of India to pass measures which they consider necessary, but which they fail to carry through under the ordinary procedure. Can it be seriously contended in this case that the ordinary procedure failed them? The Assembly threw out the motion to introduce the bill by a majority of four votes. One could hardly say that that is a sufficient reason for the exercise of this extraordinary power. Other means were left open to the Government which they would have been well advised to try before resorting to the provisions of sec 67B, sub-sec. (1).

It was urged on behalf of the Government that the urgency of the measure had forced upon them the adoption of this extraordinary procedure. Indeed, the matter was felt to be one of such extreme urgency and importance that not even a few weeks' delay could be tolerated by them. And, so, the amendment moved by the Hon'ble Mr. V. G. Kale in the Council of State that the bill be considered early next year was refused. After a careful perusal of the published reports of the debate in the Council of State, we are bound to confess our inability to realise the urgency of a measure which the Government kept in hand till almost the very end of the sessions and for which, as was pointed out by the Honourable Sir Benode Chunder Mitter in the course of the debate, the Princes themselves could wait for a period extending from 1835 down to 1910.

The Act has set up permanently a relationship between rulers of Native States and British subjects analogous to that which subsists between the latter and His Majesty's Gov-

ernment. A measure of such exceptional character should not have been passed without a thorough and comprehensive discussion in all its bearings. That is what Mr. Kale and others pleaded for. The Government could have well acceded to their plea without, in any degree, impairing the interests of this country, or their honour or their prestige among the rulers of Native States.

The late Mr. Reginald Braunfeld.

We regret to have to record the death of Mr. Reginald Braunfeld, the oldest member of the Calcutta Bar, which sad event took place after a short illness, on the 3rd of November last. He was present at the Bar Library on Wednesday the 1st of this month when he was very hale and hearty and looked very cheerful and full of good spirits. He responded in a lively spirit to those who congratulated him on his vitality at his advanced age. The next day the members of the Bar were shocked to hear of his removal to hospital on account of cerebral hæmorrhage. He peacefully passed away on the following day. He was called to the Bar on the 13th April 1869 and was enrolled as an advocate of the Calcutta High Court on the 1st of February 1877. After some period of practice he practically retired from the profession and took to the more healthy occupation of agriculture and allied industries. He had a plantation of arrowroot and also started a business for the manufacture of condiments. He was a great friend of the labouring classes and actively supported their legitimate movements for improving their lot. Recently, the *laskars* found in him a true friend. He used to preside over their union meetings and encouraged them in their endeavour to improve their prospects. Although he had given up the legal profession, yet no member was more regular in the attendance of the Bar Library. He was respected and loved by all the brother members of the Bar and he will be greatly missed by them. He was a life-long bachelor. He died at the ripe age of 82 years.

The late Nawab Syed Sir Shamsul Huda.

After a career of varied distinction and usefulness Nawab Syed Sir Shamsul Huda, K. C. I. E., who had been acutely ill of late, passed away at his Calcutta residence on the 7th October last, at the comparatively early age of 61.

Starting life as a vakil of the Calcutta High Court, he took for years a leading part in the affairs of his own community, the city and the University and served with distinction in the Legislative Councils of the Province and of the Government of India. As a vakil he long enjoyed a leading practice. For tact, breadth of mind, fairmindedness and a shrewd yet well-balanced judgment which seldom failed to take in the essentials of the most complicated situation at a glance, he had hardly an equal and few indeed on this side of India to surpass him. His genial temperament won him many friends in nearly every walk of life. He filled several high offices but his services to the public will be chiefly remembered in connection with his appointment as a Member of the Executive Council during Lord Curzon's Governorship of Bengal. In this capacity, his countrymen found in him a staunch and powerful champion of their just claims and was trusted by Hindus and Mahomedans alike, which in itself was a significant tribute to his independence of outlook, catholicity and large heartedness. He continued enjoying the confidence of all sections of the people of the Province as a Judge after his transition to the High Court Bench. It was chiefly owing to failing health that he retired from the Bench, and later on abandoned the less onerous duties of the speaker of the Local Legislative Council which was the last office he was called upon to fill. Sir Shamsul Huda has passed away at a time when his countrymen have stood in the greatest need of that happy combination of qualities which make for leadership and which he possessed in a pre-eminent degree.

The late Babu Atulya Charan Bose and Mr. Sultan Alum.

In the late Babu Atulya Charan Bose, the Vakildar has lost one of its leading members and the Criminal Appellate Bench of the High Court a prominent and one of its most popular practitioners. Possessed of strong common sense, a sound knowledge of the law, a retentive memory and that far rarer quality, a keen sense of proportion, Babu Atulya Charan commanded the confidence of his clients equally with that of the Judges. His death came as a surprise to his brother practitioners, for to all appearance he enjoyed excellent health and looked younger than his age. We have also to record with sorrow the death of Mr. Sultan Alum, a senior attorney of the High

Court, a scion of a noble family and for long a familiar figure in the Courts. We offer our sincerest condolences to the bereaved families of the deceased.

GIFTS TO WOMEN.

(CONSTRUCTION OF HINDU WILLS AND DEEDS OF GIFT.)

By BIMALA CHARAN LAW, M.A., B.L., VAKIL,
HIGH COURT, CALCUTTA.

Questions of construction generally arise in cases of gifts to female donees; and the rule that is ordinarily laid down is "that in grants to females, specially to the wife of the grantor, the presumption is that the donor intended to convey merely a limited estate, unless there are distinct words to show that the interest given is of the absolute character." There is a considerable body of judicial decisions on the point though it is very difficult to deduce any uniform or consistent principle therefrom. The only rule of Hindu law that has any bearing on the point is that contained in *Dayabhaga* (4 I 18), which lays down that a gift by a Hindu husband of immoveable property to his wife cannot be alienated by the wife, and hence does not rank as *hēr stridhan*. Some of the cases purport to be based on this principle; but there are cases which make this rule applicable to all female donees and not to the wife alone. None of these cases, however, goes so far as to say that a female donee cannot take more than a limited interest; she can have an absolute estate if there are proper words to show such intention on the part of the grantor; but again there is conflict of opinion on the point as to how far the use of words like *malik* or owner are sufficient for this purpose. We propose to discuss these cases in their proper order and though it is not possible to harmonise them all, it will be seen that the trend of recent decisions is to construe a "deed of gift in favour of a Hindu female, on its own merits, without attaching any importance to the fact that the donee is a woman."

The case of *Shamsul Huda v. Shewakram* (1) is the earliest Privy Council case on this point decided in the year 1874. Here, a Hindu inhabitant of Behar executed a sort of testamentary document by which he left the properties to his widowed daughter-in-law,

Ranee Dhan Koer, as his heir. The said daughter-in-law had two daughters of her own but no son. The testator directed "that except Rance Dhan Koer none else shall be my heir and *malik*, and further more the said Dhan Koer and her daughters named above, and their children, who after their marriage, may be given in blessing by Almighty God shall be my heirs and *maliks*." Considering the document as a whole, their Lordships came to the conclusion that the testator intended to confer only a life estate on Dhan Koer. "In construing the Will of a Hindu," said their Lordships, "it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the distribution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that as a general rule at all events women do not take absolute estates of inheritance which they are enabled to alienate."

It must be noticed that there is nothing in this case from which the broad proposition can be laid down that whenever a Hindu makes gift to a female, he is presumed to give her a life estate only. The gift was here to Dhan Koer as well as to her daughters and their children and their Lordships did not regard the subsequent words as words of limitation but regarded them as indicative of the intention of the testator that Dhan Koer was not to take more than a life estate.

In the next year, the case of *Kollany Koer v. Lachmi Prasad* (1) was decided by the Calcutta High Court, and this case also depended upon the construction of a Hindu Will where a gift had been made to females. Mr. Justice Mitter in delivering the judgment remarked, "Therefore the primary matter for our consideration is the language of the Will, or the words in which it is expressed. As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and his daughter. He says that after his death they shall be *maliks*, and the entire estate shall devolve upon them. We must hold that the gift in question was an absolute estate unless it can be shown that by the Hindu law a gift to a female means a limited gift, or carries with it the effect of creating an estate similar to the

widow's estate under the Hindu law. I am not aware of any such provisions in the Hindu law, nor have we been referred to any authority in support of it."

Thus their Lordships laid stress on the word "*malik*" which in their opinion conveyed the idea of absolute ownership.

In *Kunjo Behari v. Premchand* (1), "the husband made a gift of moveable and immoveable properties to the wife. There was no such words as '*malik*,' used by the donor and their Lordships held that the wife took a life interest in the immoveable property and had no power of alienation over it. The Court relied upon the rule enunciated in the Tagore Lectures of 1878 that an immoveable property given by the husband to the wife does not constitute the *stridhan* property of the latter.

In *Punchoomony v. Troylucko* (2), the word "*malik*" was expressly used and the testator declared that his wife would be the *malik* of his properties both moveable and immoveable. This was followed by a declaration that the wife was to adopt a son who would become *malik* on his attaining majority. The Court held that the word "*malik*" did not necessarily mean "proprietor" and the widow took a limited estate under the Will.

In *Hirabai v. Lakshminabai* (3), the devise was to the wife as "heir." Sargant, C. J., held that the wife took a widow's estate. "The rule," said he, "must be well established that in the absence of express words showing such an intention, a devise to a wife does not confer an estate of inheritance but carries only a widow's estate as understood by Hindu law."

The next case of importance is that of *Hari-lal v. Bai Bewa* (4). Here a Hindu by his Will left his properties to his wife and directed that the wife would enjoy the property and would be an owner just as he was the owner. In spite of that the Court held that the wife took a limited estate, as the testator had not used any express words of inheritance nor had he expressly given the wife any power of disposition over the properties.

(To be continued.)

(1) I. L. R. 5 Cal. 661

(2) I. L. R. 10 Cal. 242

(3) I. L. R. 11 Bom. 573.

(4) I. L. R. 20 Bom. 276.

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The Princes Protection Act.

In our last issue, we commented on the procedure which was adopted in passing this Act. We shall now consider its main provisions. Sec 3 (1) provides that whoever edits, prints or publishes or is the author of, any book, newspaper or other document which brings, or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards, any Prince or Chief of a State in India or the Government or Administration established in any such State, shall be punishable with imprisonment which may extend to five years or with fine or both. Sub-sec. (2) of the same section is intended to protect what may be considered legitimate criticism. Sec 4 authorises the Government to forfeit offending publications and to detain them in course of transmission. The concluding section provides that no Court shall proceed to the trial of any offence under the Act except on a complaint made by, or under authority from, the Governor-General in Council.

It is admitted by all that a great deal of oppression and mis-rule exists in most of the Native States. It has also to be admitted that up till now the only place where stories of their mis-rule and oppression could be recounted and their administrative measures freely and openly discussed was British India and that the only people who could do it without fear of persecution were British subjects. The inevitable effect of the operation of the present Act will be to put the Princes and their Governments beyond the pale of all criticism, either by ourselves, or by their own subjects. This will be deplorable not only from our point of view but also—and

much more so— from the point of view of the Princes themselves. As the Hon'ble Mr. Ayengar pertinently remarked while speaking on the bill, "There are two classes—there are good administrations and bad administrations. A good administration does not require a bill of this sort and a bad ruler with a bad administration does not deserve a bill of this sort. Then acts should be exposed by the public press." The official members assured us again and again, in the course of the debate, that honest and legitimate criticism is protected. But this assurance means very little. For a line of demarcation cannot be drawn with any precision between disaffection and right criticism—the matter depending as the reports of seditious cases abundantly show, very largely on the political views of the trying Judge or Magistrate and upon the quantum of good sense he may happen to possess.

It was argued in defence of the present measure that the repeal of the Press Act of 1910 which gave a measure of protection to the Princes against attempts to create disaffection against them, threw on the Government the imperative duty of restoring to them that protection. It may be conceded that the Princes are entitled to some measure of protection. But it does not follow that it could be done only in one way, viz., by threatening the personal liberty of British subjects. Under the Press Act, there was no interference with personal liberty for any offence committed against the ruler of a Native State. The utmost that anyone was liable to suffer was the confiscation of the press which published the offending article and the forfeiture of the security he had deposited in respect of the press and of all copies of the offending article. Under the present law, he is liable to be charged on an offence analogous to sedition at the instance of a man who is not amenable to the jurisdiction of our Courts and to lose his personal liberty for five years.

"Upon the ground that malicious and scurrilous reflections upon foreign sovereigns or their representatives may tend to involve this country in disputes, etc., . . . it has been held that publications tending to degrade and defame such persons are indictable." (Russell on Crimes, Vol. I, Ch. IV). This is the Common Law in England. But English Judges in applying the law has always observed a salutary distinction between personal attacks on foreign sovereigns and attacks on their Government. In *Rex. v Antonelli* (1905, 70 J. P. p. 4), Phillimore, J., observes as follows "Libels which bring persons into hatred or contempt may apply to persons outside the dominions of the King, because they are liable to bring the peaceful relations between states to an end . . . Seditious libels are such as tend to disturb the Government of this country, and in my opinion a document published here, which was calculated to disturb the Government of some foreign country, is not a seditious libel, nor punishable as a libel at all. . . . To hold otherwise would be to hold that all strong language used against the Government of Turkey at the time of the Bulgarian rebellion was seditious libel and it would make many of our great statesmen guilty of seditious libel and those persons also who espoused the cause of Italian liberty" (The italics are ours). The present Act has done away with this distinction. The Indian Princes as well as their Governments will from now live behind the *purdah*—a form of protection which in some communities is considered necessary only in the case of women.

Bengal Tenancy Act, sec. 149.

Mr. Prafulla Kumar Mookerjee, pleader, Bankura, in a communication addressed to us, upon the scope and object of sec. 149 of the Bengal Tenancy Act, suggests that the notice referred to in that section should not be issued upon the third party whom the interpleading Defendant alleges to be his landlord unless the Defendant deposits in Court the full amount of the rent claimed by the Plaintiff. In the event of the Defendant admitting and depositing a part only of the rent claimed as the rent which is due from him in respect of the holding, how (Mr Mookerjee asks) is the Plaintiff to make good his claim for the balance, if the third party should institute no suit within three months for the rent deposited or having sued should fail to establish his claim?

Having looked closely into the terms of the section, we are unable to see that there is any foundation for Mr Mookerjee's apprehensions. The provisions of cl. (3) of sec. 149 are enabling so far as the Plaintiff is concerned, and he is not bound to withdraw the amount deposited, if it does not satisfy his just claims. He may proceed with the suit to a decree which will be contested if the Defendant chooses to contest the amount or *ex parte* if he does not. It would be anomalous if the Defendant who denies the tenancy in suit but admits that he pays rent for the holding to somebody else should be required to pay more than the amount he admits as due without an adjudication. The protection which the section would afford him would indeed be dearly purchased if that be the price which the Defendant must pay for it in every case in which he invokes its aid. No question of the Plaintiff losing the balance of his claim arises when the third party is successful in his suit.

There is, no doubt, the possibility of the third party claiming a larger amount as due to him than the Defendant admits. But there is nothing in cl. (3) of the section which prevents him from instituting a suit for the full amount of his claim and obtaining in such suit an order restraining the Plaintiff from taking out the amount deposited even if it should fall short of the full amount of his claim. We are satisfied that the section interpreted according to its obvious meaning will lead to no anomalies of the kind apprehended by our correspondent and we are decidedly not in favour of any amendment of its terms in the direction suggested by Mr. Mookerjee.

GIFTS TO WOMEN.

(CONSTRUCTION OF HINDU WILLS AND DEEDS OF GIFT.)

BY BIMALA CHARAN LAW, M.A., B.L., VAKIL,
HIGH COURT, CALCUTTA.

(Continued from p. iv.)

On the other hand in *Lala Ramjewan v. Dal Koer* (1), it was held by Trevelevan and Beverley, JJ., that the expression "*malik*" ordinarily implies an absolute gift and there is no authority for introducing into a Will the idea that a female ought not to get anything beyond an estate for her life-time. In this

case the testator provided that his daughters and his brother's daughters "shall be *malik*" and come in possession in equal shares of all his moveable and immoveable properties, though they would not be entitled on any account to sell or alienate their shares. Their Lordships held that the direction against alienation was void as a repugnant clause, and the devisee took absolute estate.

The same view was upheld in *Rajnarayan Bhaduri v. Ashutosh Chakravarty* (1), where the direction of the testator was that the wife would have the "*maliki*" as exercised by the testator after his devise and it was held that such a direction conferred an absolute and alienable estate upon the widow.

In *Toolsidass Karmakar v. Madan Gopal Dey* (2), the testator had expressly conferred a power of disposition upon the donee, and from that fact alone an absolute estate was presumed.

To the same effect is the decision of the Judicial Committee, *Jagneswar Naraindeo v. Ram Chander Dutt* (3), which shows that the use of the word *malik* is not conclusive, but if in addition to that description a power to sell or make a gift is conferred on the donee, the effect of the provision is to create an absolute interest.

The next case of importance is the case of *Mussamat Surjmoni v. Rabi Nath Ojha* (4), which went up before the Judicial Committee. In this case a Hindu executed a gift of immoveable property to take effect after his death to each of his two widows and his daughter-in-law, as owners with proprietary powers (*malik ba khud iktar*). One of his widows on coming into possession of her share made a Will disposing of it in favour of her brother. In a suit by the next heir of the donor questioning her power of alienation, it was held that the widow took a heritable and transferable interest. In delivering the judgment the Judicial Committee remarked:—

"This case of *Lalit Mohan Singh Roy v. Chakkanlal Roy* (5) seems to adopt and apply the same view of the word '*malik*' as was taken in the Calcutta case of *Kollanykoer v. Luchmi Prosad* (6) with the result that in order to cut

down the full proprietary rights that the word imports, something must be found in the context to qualify it. Nothing has been found in the context here, or the surrounding circumstances, or is relied upon by the Respondents but the fact that the donee is a woman, and a widow, which was expressly decided in the last mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word '*malik*' the context does seem to strengthen the presumption that the intention was that '*malik*' should bear its proper technical meaning." This case is very important as containing an authoritative pronouncement of the Judicial Committee on two points:—

1. That the word '*malik*' ordinarily signifies absolute ownership—unless there is something in the deed or Will to restrict its meaning, and

2. That the mere fact that the donee is a female, does not raise any presumption that the donor intended to use the word '*malik*' in a restricted sense.

The significance of the word '*malik*' was further considered by Mr Justice Mookerjee in *Amarendra Nath Bose v. Suradham* (1), where many of the earlier decisions were reviewed.

The conclusions arrived at by his Lordship were:—

1. The use of the word '*malik*' generally denotes ownership but it is not conclusive, and as held in *Shriabhakhan Bhakat v. Tarangini* (2) and in spite of the use of the word it can be shown from the document or from the surrounding circumstances that the donee was to take a limited estate.

2. But where the testator uses the words "*malik* like myself" or a power of disposition is conferred on the donee there it is to be taken as conclusive that the testator intended that the donee should take an absolute estate.

In *Basanta Kumari v. Kamakhya* (3), a deed of gift of unmoveable property was executed by a Hindu in favour of his sister. The direction was, "You shall pay the annual Government revenue, and get your name registered during your life-time; on your death, your husband, sons and grandsons and the heirs in succession will continue to enjoy

(1) I. L. R. 27 Cal. 44. affirmed I. L. R. 27 Cal. 649.

(2) I. L. R. 28 Cal. 499.

(3) I. L. R. 23 Cal. 679.

(4) I. L. R. 30 All. 84.

(5) I. L. R. 24 Cal. 584.

(6) 24 W. R. 55.

(1) 14 C. W. N. 455.

(2) 8 C. L. J. 20.

(3) I. L. R. 33 Cal. 23.

and possess." It was held that the intention of the donor was clearly to confer an absolute estate on the donee. "The use of expressions like these "that the donee was to enjoy the property from generation to generation," or "that the donee will use it, with her sons, grandsons and the like," is sufficient to show that the interest created is an absolute one [see *Narasimma v Billahesa* (1) and *Kanthammal v Alcenakhi* (2)].

Among recent cases, one of the most important is the case of *Radha Prosad v Ranimoni* (3). There was a gift to daughters and their respective sons, and the testator provided that in the event of one of the daughters dying, without leaving any male issue living, the share of the deceased daughter was to go to the surviving daughter and her son, to the exclusion of female issue in both cases. Further, in the event of the death of either daughter leaving son or son's son, the share of such daughter is to be paid to such son or son's son, share and share alike. From these circumstances the Court held that it was the intention of the testator that the daughters would take a Hindu widow's interest in the property. This case was commented upon in *Ramchandra v Ram Chandra* (4), where a most elaborate judgment was delivered by Sheshagiri Ayer, J. The facts of this case are briefly these:—On the occasion of the adoption of a son, a Mahatta Brahmin executed a Will by which after making some small grants in favour of strangers, he made a grant in *nam* as follows:—"Out of the remaining property my adopted son shall be entitled to enjoy one half of the property, out of the remaining half, my two wives shall take half and half." It was held that the wives took an absolute estate. Both the cases of *Shamsul Huda v Shewakram* (5) and *Radha Prosad v Ranimoni* were referred to in the judgment. Mr. Justice Sheshagiri Ayer said:

"I do not think that these two judgments are authorities for the proposition, that in all cases where gifts are made to females, a Hindu must be deemed to have given them an estate for life." In his Lordship's opinion under the particular circumstances of both these cases, the words giving the property to the children

of the devisee after her death were not regarded as a mere surplusage but were referred to as indicating the intention of the donor. It was held that ordinarily a Hindu would desire that his properties should remain in the possession of his descendants and that consequently the donor could not have intended to give absolute power of disposition to his daughters. Sheshagiri Ayer, J., further remarked that the Madras High Court had held in a long series of cases, e.g., the cases of *Samarasita v Venkateswar* (1), *Venkataraja v Kalaya* (2), *Bodhimuthaya v Narayanaswami* (3) and *Ramanuja v Sadagopachariar* (4) that no presumption arises from the fact that the donee is a female that the donor intended to pass only a limited estate; and the Privy Council in accepting the opinion of Muter, J. in *Kollanykoer v Luchmi Pershad* has expressly approved of that view.

In 1916, the case of *Fatchchand v Rupchand* (5) came up before the Judicial Committee. In this case their Lordships had to construe a Hindu Will where the wording was as follows:—

"I have bequeathed Mouza Khudda to Mussamut Goni. . . after my death she shall be owner in possession (*maliko-qubiz*) of the entire property in Mouza Khudda aforesaid." Their Lordships held that "there was no doubt whatever that in Indian Law the word, '*maliko-qubiz*' imports full ownership in property."

Sometime later the Allahabad High Court put a similar construction upon the words '*malik mustaqbil*' in the case of *Nanlalal v Jankissen Singh* (6). The two most recent pronouncements on the subject are contained in the decisions of *Bhandas v Bin Gulab* (7) and *Mussamut Soshimon v Sibnarayan* (8) both decided by the Judicial Committee in the year 1921.

(Concluded.)

(1) 1 L. R. 31 Mad. 179.

(2) 23 M. L. J. 223.

(3) 26 M. L. J. 606.

(4) 27 M. L. J. 829.

(5) 21 C. W. N. 102.

(6) 1 L. R. 40 All. 575.

(7) 26 C. W. N. 129.

(8) 26 C. W. N. 425.

(1) 31 I. C. 543.

(2) 43 I. C. 515.

(3) 1 L. R. 35 Cal. 846.

(4) 1 L. R. 42 Mad. 283.

(5) 2 I. A. p. 7.

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REPORTS (See Index.)

A new Judge from the English Bar and the Calcutta Bar.

We understand that Mr. Arthur Page, Bar-at-Law, has been appointed a Judge of the Calcutta High Court in the place of Mr. Justice Woodroffe. Mr. Page is a K. C. He was called to the Bar in June 1901 and used to practise in the Surrey circuit. As he is a Barrister of standing, we have every hope that he will turn out a success.

It is said that judgeships before this have been offered to some members of the Calcutta Bar but the offers have been declined. If this be true, we must say that this is contrary to the traditions of the English Bar. In England no member of the Bar, however busy, would refuse a judgeship. Refusal of a judgeship, when it proceeds from a desire for making more money at the Bar, is a very mean consideration. It must be remembered that lawyers practise in the law Courts by virtue of the license given them by the State and the High Court and the State have a right to requisition their services on the Bench. If temptations for inordinate gain stand in the way of recruitment to the Benches of the High Courts in India, the proper remedy would be to limit legal remunerations by legislation and the popular element in the legislature will be only too ready to do it. The country wants the Indianisation of the services. If the members of the Bar prove an obstacle to it, that would be an additional reason why the Indian Legislature would welcome such legislation. So we would ask our friends at the Bar to serve the State when they are required to do so, on a salary which is quite ample to keep one in comfort.

Admission of Advocates in the Calcutta High Court.

We have received some correspondence on the claims of vakils to be enrolled as advocates and as such being entitled to act and plead on

both the Appellate and the Original Sides of the High Court as is contemplated in Mr. Neogy's Bill. We are not prepared to lend our columns to any controversy on the question between the different sections of the profession. We have to hold the balance even between them and do not feel that we shall be justified in taking any sides. We have already said that we would not object even to a merger of the professions. But till that is done, we cannot say that the allocation of different classes of work amongst different classes of practitioners is in itself wrong or unfair. The vakils as a class are entitled to act and plead on the Appellate Side which is by far the more important and busier side of the High Court. The Solicitors can only act on the Original Side. The advocates are entitled to plead on the Original and the Appellate Sides. We have to respect vested interests. It would be unfair on our part to advocate the interests of one section to the detriment of others. But all the same we consider that it would be unfair to confine the three sections of the profession within water-tight compartments and shut out talent from finding its full play. So we have suggested that without any violent or drastic changes, transition from one to the other may be facilitated. We do not think that those directly or indirectly interested in the question can be competent judges in such a matter. It is only the Hon'ble Judges, who have no personal interest in the question, who may be relied on to decide in cases of such conflicting interests. In making the suggestions we have made, we consulted the leading members of all sections of the profession and also the author of the Bill.

Merger how may be brought about.

We have often suggested in these columns that the numerous subdivisions amongst legal practitioners in this Presidency should be reduced and some reform in the present practice with regard to their enrolment introduced. An indefinite growth of legal practitioners in the country is neither to the interest of the legal profession nor to that of the general public. We have maintained that the mere passing of a University examination should not be

a pass-port to practise in the law Courts. An academic knowledge of law is not sufficient to qualify oneself for the practice of the law. One must get sufficient training in drafting and in the practice and procedure prevailing in the law Courts and also in the conduct of cases or suits to be able to discharge one's duties satisfactorily. We have suggested before in these columns that even those who are desirous of taking to the practice of the law in the mofussil Courts should serve a period of apprenticeship or articleship with some lawyer of suitable standing and should pass examinations in drafting and in the practice of the law, before he may be enrolled as a pleader. This will benefit the legal profession in two ways. It will gradually reduce the congestion in the mofussil bar. Next, it will attract only such men to the legal profession as can wait for success.

It is highly desirable that members of the legal profession should have staying power. In Rome which gave birth to the modern system of legal profession, it was only such men who were given license to practise. In England the Inns of Court have maintained high fees and a three years' course irrespective of University degrees in law, with the very same object. In France and Germany a long period of apprenticeship is required for admission to the legal profession. In the latter country, lawyers have to serve a period of apprenticeship with the Judges and prepare the "case" before the hearing and to assist the Judges in the course of the hearing. In America no University degree would give a pass-port to practise. Law students get apprenticed to lawyer's offices for getting a technical knowledge of law to enable them to qualify for the profession. A talented man, though poor, would get an allowance from the firm he joins and the result has been that America has produced men like Abraham Lincoln.

If some efficiency check is placed on the indefinite growth of lawyers in this country, it would be to the benefit of the general public as well. For, needy lawyers are a curse to the country. It would be also to the advantage of the educated youths, because, those who cannot wait for success in the legal profession, would then take to more useful careers. Unlimited competition in the legal profession, unlike that in trade and commerce, is prejudicial to public interest

and to the honour and good name of the profession. In the High Court also, besides the university degree in law a period of practical training in drafting, practice and procedure in the various stages of a suit as also attendance in Court may be insisted on and after an uniform efficiency test in the practice of the law advocates may be enlisted. The requisite training and test may be insisted on in the case of English Barristers, Scotch and Irish Advocates also. In this manner all round proficiency may be secured amongst the Advocates of the High Court. It may then be left to the individual option of the Advocates to act or to plead, all distinctions between the different classes of practitioners being removed. In such matters we do not want any executive or legislative interference. The affairs of the law Courts should be left to the High Courts and outside interference with their legitimate administrative functions is far from desirable. But this is an ideal state of things to which we cannot work up at the stroke of a pen. All reforms have to combat with vested interests. It is only by revolutionary changes that we can get rid of vested interests in a day, otherwise we can bring about changes only by a process of evolution. In the latter case, progress proceeds along the path of least resistance.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

The Judicial Committee of the Privy Council resumed their sittings on Monday (October 23rd).

The list contains 26 Indian appeals of which 7 come from Bengal and 4 each from Patna, Bombay and Madras.

The record of business to date has been as follows:—Before LORD BUCKMASTER, LORD SALWESON, SIR J. EDGE, SIR L. JENKINS Monday, October 23rd.

Shiba Prashad Singh v. Rani Prayag Kumar Debi and ors, (Bengal).

The suit had been brought by the Respondents, widows of the deceased Rajah against the Appellant for possession of the Jharia Raj. The suit was decided mainly in favour of the present Appellant by the Subordinate Judge. The Respondents intending to appeal against this decision, obtained (*inter alia*) an interim injunction restraining the Defendant from alienating or otherwise dealing with the property pending the final determination of the suit.

The present application to the Board was to have that order varied.

Messrs. Upjohn, K. C., Dunne, K. C., DeGruyther, K. C. and Kenworthy Brown appeared for the Appellant.

Sn Geo. Lowndes, K. C. and Messrs. E. B. Raikes, B. Dubé and T. Ameer Ali for the Respondents.

The order was varied and the costs reserved.

October 21st and October 25th.

Before the same Board

Rani Jagadamba Kuar v. Wazir Narain Singh (Patna).

This was a suit relating to the succession to the Serampur Raj which was brought by the present Respondent's father alleging that female heirs were excluded. The Appellant contested the suit and alleged that the Respondent had become separated in interest from the rest of the family.

Messrs. L. DeGruyther, K. C., E. B. Raikes and Palat for the Appellant.

Messrs. A. M. Dunne, K. C. and Kenworthy Brown for the Respondent.

C. A. V.

October 26th and 27th

Harnath Kuar v. Indar Bahadur Singh (Oudh).

The Plaintiff-Appellant sued to recover property under a sale deed executed by the Respondent in 1880. A question was raised as to the construction of the sale deed and whether what was sold was not merely a *spes successionis*. The meaning and application of secs 2 and 22 of the Oudh Estates Act, 1869, and a question of limitation are also for determination.

Sir Geo. Lowndes, K. C. and Mr. Dubé for the Appellant.

Messrs. DeGruyther, K. C., J. M. Parikh and S. C. Chaudhuri for the Respondent.

C. A. V.

October 27th and 30th.

Sadasiva Mudaliar v. Md. Sait (Madras).

Certain contracts had been entered into by the manager of a Hindu joint family and a question is raised as to whether the contracts were binding on a member who had not executed it.

Messrs. Clauson, K. C. and B. Dubé for the Appellant.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Respondent.

C. A. V.

October 30th and 31st.

Bhujwan Prosad Singh v. Nathu Ram (Patna) was a suit on a mortgage bond executed by the "karta" of a joint Hindu family and raised the question whether the debt was contracted for legal necessity.

Messrs. DeGruyther, K. C. and Dubé for the Appellant

Mr. J. K. Roy for the Respondent.

C. A. V.

Two Courts were sitting to hear Indian appeals during the last few days of the month and the following judges comprised the second Court

LORDS ATKINSON, SUMNER, CARSON, PARMEOR and MR. AMER ALI

G. D. M.

8-11-22

Reviews.

THE COURT FEES ACT AND SUITS VALUATION ACT. By M. N. Basu. Eastern Law House, Law Publishers, College Square, N., Calcutta. 1922

This is a handy commentary on the Court Fees Act, with the amendments thereto passed up to date by the Central and the Local Legislatures, and on the Suits Valuation Act. The author who for some time past has been Reporter of Court-fee Stamps to the Calcutta High Court has fully availed himself of the experience he has gathered in his official capacity in preparing his notes, with the result that his commentaries are not mere collections of case-notes arranged in the form of a digest but are a searching analysis of the law laid down in those cases and show a co-ordination and logical disposition not usually found in the general run of annotated editions of statutes. We are pleased to note, in particular, the large amount of space devoted to the subject of valuation of suits and appeals for the purpose of determining the amount of Court-fees (*vide* notes on Valuation under sec 7 for suits and under Art. 1, Sch. I, for appeals). Much difficulty is experienced in practice in distinguishing suits merely for declaration and suits for declaration in which consequential relief is prayed for: the notes to sec 7 (iv) (c) and Sch. II, Art. 17 (iii) of the Court Fees Act will undoubtedly be of great assistance in solving them. The notes to sec 7 (ix) which concern Court-fees payable in mortgage suits and appeals arising therefrom are also deserving of special mention. The author does not fail to note the important con-

sequences which have followed from some not well-expressed amendments of the law made in a more or less haphazard fashion and sometimes without advertence to their remoter effects, e.g., those consequential on the amendment of the Civil Procedure Code which does not now permit mesne profits to be assessed in execution proceedings (*vide* notes to sec 11 of the Court Fees Act) and of Sch. II, Art 11 (*vide* notes under the heading "Rejection of Plaint" at p 203). The Appendices reproduce the recent provincial amendments, which it may be observed affect only the amount of Court-fees but leave the principles of the Act untouched, and the rules framed by the executive authorities and the High Courts under the Act, including the rules relating to process-fees. Altogether it is a most helpful commentary on a complicated enactment made still more so by piece-meal amendments. The get up of the book is praiseworthy.

TESTAMENTARY SUCCESSION AND ADMINISTRATION OF ESTATES IN INDIA. *Being the Fourth Edition of Henderson's Law of Succession, and the Second Edition edited by Alexander Kinney. Thacker Spink & Co., Calcutta and Simla. 1922. Price Rs. 32.*

Mr Kinney, by reason of his official position as Administrator-General and Official Trustee of Bengal, has had unequalled opportunities of specialising on the subject of this treatise. The subject has been growing not merely, as is usual with all legal subjects, by the accumulation of judicial decisions (Mr. Kinney notes that in the present edition he has added references to as many as 800 Indian and 1100 English cases), but also by changes in legislation which unavoidably perhaps have taken a more or less eccentric turn. The Editor has thought it advisable, and we agree with him, to embody the changes effected by the repealing and the amending Acts in the body of the principal statute instead of printing them separately *in extenso*. He has also to our mind been fully justified in excluding from this edition the Succession Certificate Act and the Administrator-General and Official Trustees Act. To include the whole of the statutory law of succession in one volume has come to be a practical impossibility, and we shall not be surprised to find this fissiparous tendency manifesting itself in future editions by the casting out of a number of other statutes and enactments. The volume—and for this no blame attaches to the present editor—is palpably getting unwieldy.

In the present edition the principal subject for treatment is the Indian Succession Act amended to date. Then follow (1) The Parsee Succession Act of 1865, (2) The Oudh Estates Act of 1869 including Lord Canning's Proclamation and the Amending Act of 1885, (3) The Hindu Wills Act of 1870, (4) The Hindu Disposition of Property Act of 1916, (5) The Native Christians Act of 1901, (6) The Legal Representatives Act of 1885, (7) The Fatal Accidents Act of 1855, (8) The Caste Disability Removal Act of 1850, (9) The Malabar Wills Act of 1898, (10) The (Bombay) Hindu Relief Act of 1886, (10) Succession Property Protection Act of 1841 and (11) The Regimental Debts Act of 1893 and the Regulations thereunder.

The present edition, we are told, has been in the course of preparation for five years. It is no doubt for this reason that we miss the decisions reported towards the latter part of this period. Mr. Kinney might have met the situation, as most authors similarly circumstanced do, by providing a supplement of recently decided cases noted under the respective sections. We do not also quite approve of the grouping of cases bearing on any particular point according to the reports in which they appeared—the method which the editor has followed in adding to the notes of some of the sections, where the cases to be added have been numerous, as for instance, sec 234 of the Succession Act. This arrangement besides being unscientific does not fit in with the character of the late Mr. Henderson's notes. Mr. Kinney reiterates in this edition the criticisms which he published in the previous edition on various provisions of the Act. The law, with reference as well to its general structure as to details, and particularly in view of its piece-meal extension at different times to communities other than those for whom it was originally intended and the manner in which amendments to various provisions of the statutes have been introduced, is in a most unsatisfactory condition. But there does not appear to be any immediate prospect of a fundamental change. The changes contemplated for fiscal purposes will not go far enough and will on the other hand not be an unmixed blessing. But this edition of the work and other works of Mr. Kinney's on related subjects will furnish ready material for undertaking a fundamental recasting of the law, should any such be in contemplation. The present edition is welcome from the point of view of practitioners as well as legislators.

THE Calcutta Weekly Notes.

Vol. XXV. 1.]

MONDAY, DECEMBER 11, 1922.

[No. 5.]

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The Goondas Bill.

The Goondas Bill, which was introduced into the Bengal Legislative Council on the 28th ultimo, seeks to invest the Government with very wide powers for the purpose of enabling them to deal effectively with the Goonda menace in Calcutta and its suburbs. That the menace from these *apaches* of the East is a real one and on the increase has to be admitted. During the last two years and more, these rogues and desperados have rendered life and property in the northern section of the town, particularly in Burra Bazar, absolutely insecure and by their threats and molestations have reduced to silence their neighbours who are well-acquainted with their activities. The result has been that the Police have experienced considerable difficulty in tracking them down. The rules of procedure and evidence which are meant to secure the acquittal of the innocent and conviction of the guilty have served them as a cover for protection.

Cl. 3 (1) provides as follows:—Whenever it shall appear to the Commissioner of Police that any person—(a) is a *goonda* or a member of a gang or body of *goondas*, (b) is not a Bengalee by birth, and (c) is residing within or habitually visiting or frequenting the town of Calcutta and that such person or that such gang or body is committing or has committed or is about to commit—(i) a non-bailable offence, or (ii) the offence of criminal intimidation or (iii) an offence involving a breach of the peace. . . . the Commissioner of Police

shall make a report to the Local Government who . . . after giving such person an opportunity of showing cause why an order . . . should not be made, may, if satisfied that such person is liable to be dealt with under the provisions of the sub-section, direct him to leave the Presidency of Bengal; and the order . . . shall be final.

The Bill as it stands frankly dispenses with all judicial forms and inquiries and leaves the fate of every non-Bengalee in Calcutta in the hands of the Government. We have always protested against assumption by Government of powers of a judicial character the exercise of which might affect the rights and liberties of the subject, and we should have raised our voice of protest in this instance but for the fact that the present measure is backed by a considerable body of public opinion. The citizens of Calcutta are prepared to submit to a possible encroachment on their personal liberty if that is the price they have to pay to be rid of the *goondas*. On this the Government may justly congratulate themselves. We trust that the confidence which is being reposed in them will not be found to have been misplaced and we look to the good sense and experience of the Commissioner of Police and the vigilance and independence of our representatives in the Council to see that these extraordinary powers are not abused.

The Bill has been referred to a Select Committee. We make the following suggestions for their consideration. (1) The Act being of an experimental character should be in operation for a limited period. (2) It should be applied to Howrah. (3) Some provision should be made in the Act for dealing with the Bengalee *goondas*. We do not suggest their deportation. The Government may be authorised to demand securities from them. (4) The order of deportation should specify the findings of fact on which it is based. (5) Determina-

tion of questions of nationality should not be left to the Government or the Police. An appeal should therefore lie from the order of deportation to the High Court on the ground that the deportee is a Bengalee. The Bill as it is framed does not give such right which should be expressly provided for.

FORUM OF A SUIT FOR MESNE PROFITS.

Suits for declaration of title to and possession of land coupled with a prayer for mesne profits are of frequent occurrence in this province. While the old Civil Procedure Code was in force, the successful Plaintiffs in such suits would have their mesne profits assessed in the execution stage. Under the present Civil Procedure Code mesne profits are to be determined in the course of the suit after the passing of the preliminary decree, if the Plaintiffs want to prosecute their claim for mesne profits. In such suits mesne profits both for the period before the institution of the suit as well as for the period till the date of recovery of possession can be claimed. The Plaintiff who institutes such a suit in a Court of Munsif, whose pecuniary jurisdiction to try a suit is limited, feels considerable difficulty as regards the selection of the Court in which his petition for assessment of mesne profits is to be presented. The decisions of the Calcutta High Court on this point are not uniform and are causing great difficulties to the litigant public.

It is proposed to examine the decisions on the point indicated above. In the case of *Rameswar Mahton and others v. Dulu Mahton*, I. L. R. 21 Cal. 550, the Plaintiffs got a decree for recovery of possession and mesne profits in a Munsif's Court. The land was valued in the plaint at Rs. 950 and mesne profits from the date of suit till the date of recovery of possession were claimed. On the date of the filing of the suit, the pecuniary jurisdiction of the Munsif was Rs. 1,000, but at the date of the decree his jurisdiction was raised to Rs. 2,000. No fixed amount of mesne profits was estimated in the plaint, but the prayer in the plaint was that the amount might be determined at the time of the execution of the decree. In the execution stage, the Plaintiffs prayed for the ascertainment of mesne profits and estimated them in their petition roughly at Rs. 1,500. The Defendants objected that the Court had no authority to assess mesne profits at any sum

exceeding Rs. 50, the pecuniary jurisdiction of the Court being limited to Rs. 1,000 only, and the value of the claim in the plaint being Rs. 950. The lower Courts upheld the objection of the Defendants but the High Court rejected the contention and held that the Munsif had jurisdiction to decree the claim of the Plaintiffs, though it exceeded his pecuniary jurisdiction. The learned Judges, Ghose and Rampini, JJ., who delivered the judgment, considered that the provisions of sec. 212 of the Civil Procedure Code (which corresponds to Or. 21A, r. 12 of the present Civil Procedure Code) authorise the Court to investigate as to the amount of mesne profits *pendente lite* for which there was no cause of action at the date of the filing of the suit. The learned Judges observed:—"We do not think that in such a case, the Court which has to determine the amount of mesne profits should be guided in the matter of jurisdiction by the amount which may be approximately claimed by the decree-holder in his application, or which may be determined on investigation. The amount of mesne profits would depend upon the length of time during which the Defendant, notwithstanding the decree, may choose to keep the Plaintiff out of possession. It may happen that the Defendant delivers up possession shortly after the decree, and in that event the amount recoverable by the Plaintiff would be small and might fall within the pecuniary jurisdiction of the Court, while if the Defendant does not so deliver up possession the amount may be much larger and exceed (the value of the suit being added to it) the jurisdiction of the Court. In most cases the Court would not be in a position to say whether it has jurisdiction or not until the enquiry into the amount of mesne profits has been completed, and it is not probable that the Legislature should have intended, after all the enquiry has been made, the Court should be deprived of jurisdiction, or should not be permitted to order payment of a larger amount than what, added to the value of the suit, would fall within its pecuniary jurisdiction, and that the Plaintiff should either be driven to another Court for the recovery of the amount exceeding the sum awarded by the Court executing the order, or should have no remedy at all in that respect." In this case the learned Judges did not decide whether if the amount of mesne profits claimed for the period before the institution of the suit, added to the value of the land, exceeded

the pecuniary jurisdiction of the Court, the Court would still have jurisdiction over the suit.

The above case was considered in the case of *Bhupendra Kumar Chakravartty v. Purna Chandra Bose*, 13 C. L. J. p. 132 : s. c. 15 C. W. N. p. 506. In this case the Plaintiff in his plaint claimed mesne profits not only for the period antecedent to the suit, but also for the period *pendente lite*. The original suit was fought up to the High Court. When the Plaintiff prayed for ascertainment of mesne profits in the execution stage, he laid his claim at a very large amount, far exceeding the pecuniary jurisdiction of the Munsif. Mookerjee, J., dissented from the rule of law laid down in the aforesaid case, but defended the decision on the ground that the Munsif, although he had not power to pass a decree for an amount exceeding Rs. 1,000 at the date of the institution of the suit, was invested with such power at the date of the decree, as his pecuniary jurisdiction was raised to Rs. 2,000. On a consideration of the secs. 18, 19, 21 of the Bengal Civil Courts Act, the learned Judge concluded that it is the policy of the Legislature that suits up to the value of Rs. 1,000 or in certain circumstances Rs. 2,000 should be tried by a Munsif and that suits of higher value should be tried by a Subordinate Judge. As regards the claims for mesne profits for the period antecedent to the suit and for the period *pendente lite*, the learned Judge adopted different principles. The learned Judge said:— "The mesne profits antecedent to the suit have accrued before the commencement of the suit and although the amount may not be stated with absolute certainty, the amount can be stated with some approach to approximation. When therefore a Plaintiff institutes his suit for possession and mesne profits antecedent to the suit in a Court of limited pecuniary jurisdiction, he may be rightly deemed to have limited his claim to the maximum amount for which that Court can entertain a suit. In fact, in such a case if the Plaintiff subsequently puts forward a claim in excess of the jurisdiction of the Court, he may justly be required to remit the excess, because he has with his eyes open brought his suit deliberately in a Court of limited pecuniary jurisdiction." It should be observed that in the view which the learned Judge took, he dissented from the principle of law, enunciated in the case of *Sudershan Das v. Ram Probad*, I. L. R. 33 All. p. 97 and followed his own decision in the

case of *Colap Singh v. Indra Kumar Hazra*, 9 C. L. J. 367 : s. c. 13 C. W. N. 493.

DHIRENDRA NATH ROY.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

To the greater convenience of Counsel and Reporters, only one Board is now sitting for the hearing of Indian Appeals. The two Boards which sat at the beginning of the month have cleared off a number of cases in the list and have no doubt contributed to the more expeditious despatch of business; nevertheless (in the humble opinion of your correspondent) the disadvantages are greater than the advantages. The following Judges have been sitting. LORDS BUCKMASTER, PHILLIMORE, SUMNER, ATKINSON, CARSON, PARMOOR, SALVESEN, SIR JOHN EDGE, SIR LAWRENCE JENKINS and MR. AMER ALI.

On November 2nd, special leave to appeal was granted in a case from Bengal, *Dhanna Mal v. Motisagar*.

The further hearing was continued on November 2nd and 3rd of *Sahdeo Narain Deo v. Kusum Kumari*, an appeal from Patna in which a claim is advanced to the Lachmipur Raj, involving the question whether adoption is permitted among the Gadidars in the Bareilly Chowrasa Gadis of which the Lachmipur Estate is one. The Gadidars claim to be Swajbansi Rapputs but the Plaintiff-Appellant alleges that they are of Bhuiya extraction and have only partially assimilated Hindu law. The Board have taken time for consideration.

Messrs L. DeGruyther, K. C., A. M. Dunne, K. C. and B. Dubé for the Appellants.

Sir Geo. Lowndes, K. C. and Messrs. Kenworthy Brown and G. Douglas McNair for the Respondents.

Subramanian v. Lutchman, an appeal from Lower Burma was further argued in November 2nd, 3rd and 5th. The points at issue are in regard to the validity of certain equitable mortgages.

The Appellants were represented by Messrs. Arthur Powell, K. C., Kenelm Pready and B. Dubé.

The Respondents, by Messrs. A. M. Dunne, K. C. and Kenworthy Brown.

Another appeal raising the question whether a mortgage suit was maintainable came from the Punjab. *Kishan Naram v. Pala Mal*.

On November 6th and 7th, one Board heard arguments in the appeal from Bombay, *Secretary of State for India v. Laxmibai*. The question in issue is whether Government are entitled to resume an estate held under a Saranjam grant.

Sir G. Lowndes, K. C. and *Mr. Kenworthy Brown* for the Appellants.

Messrs. DeGruyther, K. C. and *Parikh* for the Respondents.

The other Board presided over by Lord ATKINSON heard arguments in *Hurnandrai Fulchand v. Pragdhas Budsen* (Bombay). This was a suit for breach of contract to deliver dhuties. The defence alleges that the action of the Government necessitated by the war had prevented the mills from supplying the goods to the buyer.

Messrs. Upjohn, K. C., E. B. Raikes and *S. C. Chaudhuri* for the Appellants.

Messrs. Mackinnon, K. C. and *Porter* for the Respondents.

On November 7th was heard *Harichand Mancharam v. Gorind Luxman Gokhale* (Bombay). This was a suit for specific performance of a contract for the sale of land. The Defendant contended that the alleged contract was not a completed contract but merely preliminary negotiations.

Messrs. Upjohn, K. C., DeGruyther, K. C., Holman Gregory, K. C., E. B. Raikes and *Parikh* for the Appellant.

Messrs. Clauson, K. C., Tomlin, K. C. and *Gibson* for the Respondent.

G. D. M.

13-11-22.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before B. B. GHOSE and CHOTZNER, JJ. CRIMINAL REVISION No. 468 OF 1922. ARAN SARDAR and others, 1st Party, Petitioners v. HARASUNDAR MAJUMDAR and others, 2nd Party, Opposite Party, The 3rd August 1922.

Criminal Procedure Code (Act V of 1908),

sec. 145—Previous order under sec. 145—Fresh proceeding under sec. 145 in respect of the same land and parties, if valid.

The facts material to this report are as follows:—There was a proceeding under sec. 145, Cr. P. C., in respect of certain lands between the 1st party and persons now represented by the 2nd party which resulted in an order being made in favour of the 1st party on the 29th August 1919. The principal person of the 2nd party then was one N. N. Roy. The interest of N. N. Roy passed to one Harasundar Majumdar and he was now the principal person among the 2nd party. Harasundar having attempted to disturb the possession of the 1st party, the Subdivisional Magistrate of Manikgunge made an order in respect of the identical lands which were the subject-matter of the previous sec. 145 proceeding on the 18th May 1922, the material portion of which was as follows:—

"... The lands at present in dispute form part of the lands adjudged under the sec. 145 proceeding, but there is evidence of a *bona fide* dispute as to actual possession now. Therefore as I consider a breach of the peace to be imminent I hereby attach the whole of the lands included in sheet No. 1 Purulia under sec. 145, cl. (4) of the Criminal Procedure Code. Draw up new proceedings under sec. 145. Parties to adduce evidence as to possession on the 6th June 1922."

The 1st party thereupon obtained the present rule for quashing the sec. 145 proceedings:

Held—That the identity of the lands and the parties being established it was clearly the duty of the Magistrate to maintain the 1st party in possession under the previous order under sec. 145, Cr. P. C. and not to start fresh proceedings under that section.

The order of the Magistrate, dated the 18th May 1922, instituting fresh proceeding under sec. 145, Cr. P. C., was set aside.

Babus Manmatha Nath Mukerji and *Hiralal Sanyal* for the Petitioners.

Babus Dasarathi Sanyal and *Debendra Naram Bhattacharja* for the Opposite Party.

H. C. S.

Rule made absolute.

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[No. 6.]

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scope of their reference inasmuch as they were appointed only to elaborate a scheme for carrying out the separation. Assuming that such separation was desirable, the Committee have formulated a practical working scheme for giving effect to it. It should be noted however that in framing their scheme, they have unannouncedly accepted the principle that the separation should be as complete as possible, subject to the proviso that it should disturb existing conditions as little as possible.

Separation of Judicial and Executive Functions.

We welcome the 'Report of the Committee on the Separation of Judicial and Executive Functions' as the first step towards the termination of a controversy which goes so far back as 1853 or even earlier. Since then, for all these long years, Indian publicists have been protesting against the continuance of a system which sanctions the combination of judicial and executive functions in one and the same person, but to no effect. It is one of the unique features of British administration of justice in this country—which has no parallel either in England or the Colonies or on the Continent of Europe—that next to the District and Sessions Judge, the chief judicial officer in the District is the person who is responsible to the Government for the preservation of its law and order, viz., the District Magistrate and Collector, who not only tries criminal cases but also hears appeals from his subordinates and inspects and supervises the work of the Criminal Courts. Needless to say that the people have tolerated this overlapping of functions for the obvious reason that they have had no share in the making of the laws which govern them. Now that the Montague-Chelmsford scheme has imparted a measure of real legislative power to the people, we confidently look forward to the disappearance of this anachronism.

In order to carry out the separation of functions, the Committee have made the following recommendations:—

(a) The District and Sessions Judge, and not the District Officer, should hear appeals from Magistrates with second and third class powers.

(b) The inspection and supervision of Criminal Courts should be made not by the District Officer, but by the District and Sessions Judge.

(c) The present staff of subordinate magistracy should be divided into two branches, and one should be employed in purely judicial work and the other in purely executive and administrative work.

(d) Recruitment for the Bengal and Subordinate Civil Services should be made direct to the judicial branch and direct to the executive branch, no change from one to the other being permitted.

(e) As regards members of the Indian Civil Service, their selection of judicial or executive branch should be finally made at the expiration of six years' service.

(f) With regard to the powers which the District Magistrate and his subordinates exercise under the preventive sections of the Criminal Procedure Code (Chs. VIII to XII), the Committee have recommended that the initiation of proceedings should be left in their hands but that the hearing should be before a judicial officer except that in cases of emergency, it will be open to the District Magistrate and his subordinates to pass orders as well.

The Committee have not discussed nor have they pronounced any opinion on the desirability or otherwise of the separation of functions. That would have been beyond the

(g) Appeals under sec. 406 of the Criminal Procedure Code should be heard by the District and Sessions Judge.

In our opinion, these recommendations, if faithfully carried out, will go a long way in removing the evils of the present system. The separation of functions will be by no means complete as the Committee themselves have had to admit. But it will be a good beginning and we trust our countrymen will accept these changes as an earnest of further and more far-reaching ones. In estimating the cost which these changes will entail on the administration, the Committee have found that a non-recurring expenditure of Rs. 1,53,000 and a recurring expenditure of Rs. 4,48,650 will be necessary. These are indeed large sums, having regard to the present depleted condition of the provincial finance. But we hope that our countrymen will not be deterred by the fear of cost from following up these recommendations of the Committee and pressing their lawful claim. Should they fail to take advantage of them at the present moment, they may have to wait for years before they get another chance. In practical working, we expect, that it will be found that the recommendations may be carried out much more economically than now anticipated.

FORUM OF A SUIT FOR MESNE PROFITS

(Continued from p. xix.)

As regards the claims for mesne profits *pendente lite*, the learned Judge observed:—"As regards the latter there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation that they can be awarded in the suit even though they accrued subsequent to the institution of the suit." The learned Judges further observed:—"The rule laid down in *Rameshar v. Dilu* cannot possibly be extended to the case before us for two weighty and obvious reasons, viz., 1st, that the value of the claim of the mesne profits *pendente lite* which the decree-holder now invites the Court to investigate is much in excess of the value of a suit which a Munsif is generally competent or may be specially authorised to try; and secondly, that if the Munsif investigated the claim, there would be insuperable difficulty as to the forum of appeal, which could not be either the Court of the District Judge, who

can hear appeals only in suits of which the value does not exceed Rs. 5,000 or this Court because the Legislature never contemplated an appeal direct from the decision of a Munsif to the High Court." In this case the Plaintiff in the course of the hearing of the appeal before the High Court, gave up the claim for mesne profits antecedent to the suit and the High Court directed the return of the plaint in so far as it embodied a prayer for assessment of mesne profits *pendente lite* for the presentation to the Court of the Subordinate Judge. It should be observed that in this case the High Court adopted rather an unusual course in thus returning the plaint. From the judgment it does not appear what the High Court would have done, if the Plaintiff had not chosen to give up the claim for mesne profits for the period antecedent to the suit. It is also difficult to conceive what the High Court would have done, if the claim for mesne profits *pendente lite* alone did not exceed the pecuniary jurisdiction of the Munsif. This case again came to the High Court in a subsequent stage. Mr. Justice Mookerjee who delivered the judgment in the case, *Bhupendra Kumar Chakravartty v. Purna Chandra Bose*, 24 Indian Cases, p. 232, observed that if in the previous stage the Plaintiff had not offered to take back the plaint, his petition for assessment of mesne profits would have been liable to dismissal, as it was not within the competence of the Munsif to entertain a claim for mesne profits in excess of the limits of his pecuniary jurisdiction.

The case of *Bhupendra Chakravartty v. Purna Biswas*, 13 C. L. J. 132, was followed in the case of *Hiramat Dashya v. Annada Prosad Ghose*, 32 Indian Cases 788. In this case a Munsif whose pecuniary jurisdiction was limited to Rs. 2,000, decreed a suit for recovery of possession of an immovable property with mesne profits. The value of the suit with mesne profits claimed up to the date of the institution amounted to a gross valuation of Rs. 1,200, but the mesne profits *pendente lite* and thereafter up to the delivery of possession exceeded his pecuniary jurisdiction. In this case the High Court directed that the petition for assessment of mesne profits so far as it concerns the period antecedent to the filing of the suit would remain in the Court of the Munsif, while the plaint or application for the mesne profits subsequent to the filing of the plaint, would be returned for presentation in the Court of the Sub-Judge. It is difficult to

conceive how the same plaint would be retained in the file of the Munsif and at the same time returned for being filed in another Court. It may be observed that the learned Judges appear to have overlooked that in *Bhupendra Kumar Chakravarty's* case, the Plaintiffs abandoned the claim for mesne profits and thus enabled the High Court to return the plaint for mesne profits *pendente lite*. In the case of *Baikantha Nath Kundu v Mahananda Boral*, 24 C. W. N. 342, the Munsif following the case of *Bhupendra Kumar Chakravarty* in a case of similar nature returned the entire plaint containing the prayers for assessment of the mesne profits antecedent to the suit and *pendente lite*, but the question how the Court of the Subordinate Judge can be invited to deal with the enquiry as to mesne profits antecedent to the suit was not raised.

Two other decisions on the point require to be noticed. In *Jamiruddin Mollah v. Aswini Kumar Dutt*, 14 Indian Cases, p. 34, the Munsif passed a decree for mesne profits exceeding the limits of his pecuniary jurisdiction and the Defendant appealed to the High Court and raised the question. Jenkins, C. J., disposed of the matter thus:—"It is not suggested that the Munsif has no jurisdiction if regard be had to the value of the suit at the time of its institution, that is to say, if regard be had to the value of the property in suit and of the mesne profits that had then accrued due, but it is said that subsequent mesne profits have so swelled the value of the suit that the Munsif had no jurisdiction. Our attention has been called to certain cases which give some colour of support to the contention that by reason of subsequent events a case may pass beyond the jurisdiction of the Court in which it was properly instituted. Those cases are not direct authorities on the point now before us; and it is enough for us to say that the objection is taken at too late a stage, inasmuch as it is urged before us for the first time in this appeal from appellate order."

In the case, *Pancharam Tikadar v Kinu Halder*, I. L. R. 40 Cal., p. 56, a Munsif whose pecuniary jurisdiction was limited to Rs. 1,000 passed a decree for mesne profits for about Rs. 1,600 in the execution stage and the Defendant's objection on the ground of want of jurisdiction was disallowed by both the Courts below. In the High Court that objection was again raised, but the learned Judges rejected the contention and followed

the case of *Rameshar Maton v. Dilu Maton*, 21 Cal. 550 and declined to follow the case of *Bhupendra Chakravarty*. The High Court in this case attempted to distinguish *Bhupendra Chakravarty's* case on the ground that in the case before them the decree for mesne profits did not exceed Rs. 5,000 and also on the ground that in the earlier case the objection was raised immediately after the application for mesne profits was filed but in the case before them the objection was raised after the award of the Commissioner.

DHIRENDRA NATH ROY.

(To be continued)

Reviews.

GHOSH'S DIARIES FOR 1923. *Compiled by J. N. Ghosh M. C. Sarkar & Sons, Law Book Sellers and Publishers, 90/2A, Harrison Road, Calcutta.*

We have received several specimens of these well-known annuals. The first, the *Lawyer's Diary* for 1923, contains a large repository of miscellaneous information, of which not the least note-worthy are the two hundred years' calendar, rates of income and super-tax, tables of wages, interest, weights and measures, etc., scales of pleaders' fees, registration fees, court-fees, process fees, stamp duties, periods of limitation for suits, etc., tables of important statutes, a brief digest of recent cases, street and official directories, a number of legal forms, pages for keeping notes and accounts and various items of information relating to postal charges, the railway and the Calcutta Municipality. It is handy, well-got up and is priced Re. 1-4. The *Kohinoor Diary* is a superior edition of the same, being flapped, and is priced Re. 1-6. A full page pocket diary with flap containing much of the above information and priced Re. 1 is suited for general use. A smaller two days a page pocket diary with rounded edges is also for general use, quite handy and attractively got up. It is offered at 8 as which is the price also of the one day a page gem diary, a real gem of a diary. The reputation which these diaries have already acquired will be fully maintained by the publications now under notice.

THE TRANSFER OF PROPERTY ACT. *By Atul Krishna Roy, B.A., B.L. Third Edition. Calcutta: M. C. Sarkar & Sons. Harrison Road, 1922.*

We welcome this new edition of Mr. Roy's handy and popular annotation of the Transfer of Property Act. The case-notes have been brought up to date. In the Appendix of related statutory provisions, to those in the previous edition have been added the Bengal Settled Estates Act, the Hindu Disposition of Property Act and the Transfer of Property Validating Act, XXVI of 1917. We miss the provincial amendments of the Stamp Act. We also think that the effect of the Hindu Disposition of Property Act should have been discussed in the notes to secs 13, 14, 15, 16 and 20 of the Transfer of Property Act. The get up of the book is commendable.

THE LEGAL PRACTITIONERS ACT. By Kshatish Chandra Chakrabarty Smritibhusan M. A., B. L. M. C. Sarkar & Sons, 90/24 Harrison Road, Calcutta 1922.

We have nothing but praise for the manner in which the Act has been annotated in the little book under notice. The notes are brief but well thought out, which is what case-notes which are not mere digests of cases ought to be. They are brought up to date by means of an *addenda* of cases decided during the preparation of the book. The rules framed under the Act are given in an appendix. This compact and well-got up little book should satisfy the requirements of busy practitioners.

THE INDIAN COURT FEES ACT, VII OF 1870, AND THE SUITS VALUATION ACT, VII OF 1887. By Jahnabi Charan Bhaumik, B. L. Second Edition. M. C. Sarkar & Sons, 90/24, Harrison Road, Calcutta.

We had occasion recently to notice in these columns the first edition of this book. The present edition has apparently been called for by the advent of various Provincial Statutes amending the Act. The amendments, as we have said elsewhere, do not indeed touch the principle of the statute: they merely alter the scale of fees. But to practitioners and their clients the amendments are all-important. Mr. Bhaumik's notes are well-arranged, and having been brought up to date, both in the matter of case-notes and amending statutes, the edition should prove useful to legal practitioners. We notice that the changes effected in the table of fees in the schedules by the provincial enactments are shown for the three major provinces by re-

printing the schedules with the amendment embodied therein. This certainly makes for convenience of reference. The amendments in the sections are shown for these provinces in the bodies of the sections. The Bihar and Orissa Amending Act is printed separately. The rules and other matters of the same kind are given, as in the first edition. This edition, we are confident, will bear the test of use satisfactorily.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CHOTZNER, JJ. F. A. No. 79 OF 1922. RAGHUNATH SARMA DOLAI, Appellant v JIBAN CHANDRA SARMA, Respondent. The 7th July 1922.

Election of Temple Trustees—Right to vote whether dependent on entry in the voter's list—Provision of the English Ballot Act, whether applicable in this country.

The Appellant and the Respondent were rival candidates for election as *doloi* or head priest of the Madhab Temple situate at Haja in the District of Kamrup. According to the scheme, the *Bardcuries* or descendants of the original grantees were alone entitled to vote. The Appellant secured 101 and the Respondent 104 votes and the latter was held to be elected by the Commissioner of election as also by the District Judge. On appeal to this Court it was contended on behalf of the Appellant that the election was not valid inasmuch as certain persons were allowed to vote by the returning officer whose names were not in the voter's list. It was not denied that these men were *Bardcuries* but it was contended that the voter's list was exhaustive and the returning officer had no authority to revise it.

Held—That the right to vote was not dependent upon entry of the names in the voter's list and that the common law of England relating to parliamentary election ought not to be applied to the election of Temple Trustees of this country.

17 M. L. T. 331 followed.

Dr. S. C. Bysak and Babu Prakash Ch. Majumdar for the Appellant.

Babus Ram Chandra Majumdar and Bijon Kumar Mukerji for the Respondent.

S. C. C.

Appeal dismissed.

THE Calcutta Weekly Notes.

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REPORTS (See Index.)

Separation of Judicial and Executive Functions.

We are glad to find that our view that the scheme formulated by the Greaves Committee for effecting a Separation of Judicial and Executive Functions in Bengal should meet with general acceptance is endorsed by a correspondent who is evidently well-acquainted with district administration. We have much pleasure in publishing his letter below which offers many useful and practical suggestions. We also expressed the view that in working it would be found that the scheme will cost less than has been estimated from somewhat theoretical considerations. Our correspondent gives some concrete instances how the cost has been over-estimated. Economy may also be effected in other directions. If the Magistrate is relieved of his judicial duties we see no reason why the number of District Superintendents of Police and Deputy Superintendents of Police may not be reduced in this presidency, and in some districts their duties transferred to the District Magistrates. The Inspectors of Police, now-a-days, are a better class of men and the Magistrate would surely be able to do the duties of supervision of the District Police with their assistance. There may be some justification for having Superintendents of Police in some of the larger and heavier districts but not in all. Then there are ten Divisional Commissioners, who hardly perform any function which may not be transferred and distributed amongst the District Revenue Officers, the Board of Revenue, the Ministerial, the Revenue and other Departments. The Provincial Administration

used formerly to be carried on by a Lieutenant-Governor and his Secretaries and now we have three Members of the Executive Council and three Ministers and surely the executive functions of the Commissioners may be transferred to their portfolios and their judicial duties to Civil and Revenue Courts. We invite the attention of the Legislative Council to this important and long-deferred reform. The Members of Council will do well to put off many less important matters and devote their serious attention to this question. They need not be deterred by any question of cost. If they approve of the scheme, with such modifications as may be deemed necessary, it will require legislation by the Government of India for giving effect to it. So it will take a little time before the scheme can be put into operation. By that time the provincial finance may improve. We are sorry to find that Bengal is taking lying down the gross financial injustice done to her by the Meston Committee and the Government of India and the Secretary of State. In any case any additional expenditure will be fully justified in doing away with executive interference with the administration of criminal justice.

Removal of racial distinctions.

The Committee appointed last year for the removal of racial distinctions in the administration of criminal justice commenced its sittings early in January and, after examining witnesses, completed its report last May. The opinion of the Local Governments were taken on the report but the report has never seen the light. It was announced in the press that the recommendations of the Committee were submitted to the Secretary of State and that the Secretary of State was not disposed to proceed with it. A great deal of misapprehension exists in the public mind with regard to the powers of the Secretary of State with reference to Indian Legislation. He can exercise the right of the Crown to veto but that only after a law has

been passed in India. But he cannot withhold sanction to legislation except under cl. (3) of sec 65 of the Government of India Act, 1919, which runs as follows :—

“The Indian Legislature has not power, without the previous approval of the Secretary of State in Council, to make any law empowering any Court, other than a High Court, to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such subjects.”

— — — — —
This gives an insight into the nature of the recommendations that must have been made by the Committee. At present a European British subject committing any offence punishable with death in the mofussil cannot be tried before a Court of Sessions in the mofussil. If the recommendation is that the law should be so amended that they may be tried before a District and a Sessions Judge for such offences, the approval of the Secretary of State to such legislation is required. We presume, that it is because of this, that the recommendations of the Committee have been submitted to the Secretary of State for approval. In no other respect, previous sanction or approval of the Secretary of State is required for any Indian Legislation. The Code of Criminal Procedure may be amended by the Indian Legislature in every other respect. But the special procedure provided for the trial of European British subjects cannot be done away with because of the provision of the Government of India Act above referred to.

— — — — —
We have always urged that no distinction should be maintained in criminal law between European and non-European British subjects. This equality of status, which is assured by royal proclamations, can only be secured under such conditions. The privilege that the Europeans now enjoy of being tried by a jury of European majority often results in failure of justice and want of sufficient protection to the life, limb and honour of Indians, men and women. The Europeans object to being tried by the ordinary jury alleging that they imperfectly appreciate their manners, customs, ideas and thoughts. We have suggested that the governing principle of criminal law being equality in the eyes of the law, this can only be secured by giving an option to Europeans and Indians alike to waive the right of trial by

jury. In such cases they may be tried by Judge of competent jurisdiction. In all such cases an appeal should be allowed. We have more faith in a European Judge than in European jury in this country. The alternative suggestion that if the Europeans are allowed the privilege of being tried before jury in which Europeans are to preponderate a similar privilege may be extended to Indians is not worthy of serious consideration because it would go to perpetuate a very objectionable and mischievous principle in criminal law. I would, in fact, perpetuate the very principle of racial distinction for the removal of which the Committee was appointed. No civilized system of Criminal Jurisprudence recognizes any personal law in respect of crime and would not be agreeable to any such provision disfiguring the pages of criminal law in India.

FORUM OF A SUIT FOR MESNE PROFITS

(Continued from p. XXIII.)

There is a decision of the Patna High Court reported as *Dina Nath Sahai v Maya Waj Kuer*, 6 Patna Law Journal, p. 64, on the above point which seems to be of great importance. The appeal arose out of an application for ascertainment of mesne profits from the institution of the suit until the delivery of the possession in an action for ejectment against the Defendants. The question that arose for discussion was whether the Muns was competent to entertain the application in which the claim for mesne profits was laid for about Rs 7,000. The case of *Bhupendra Chakravartty* was cited at the hearing of the appeal and Das, J., who delivered the judgment dissented from the view of law laid down therein. The learned Judge has said in his judgment in connection with the contention that the plaint should be returned for presentation to the proper Court — “But for the view expressed by Mookerjee, J., I should not have thought that it could be argued for one moment that one portion of a suit could be disposed of by one Court and another portion by another Court.” . . . “In order to shorten litigation and to prevent multiplicity of proceedings, the Legislature has empowered the Court, when passing a decree for possession of property, to direct an enquiry as to mesne profits from the institution of the suit until the delivery of possession to the decree holder. I regard the provision of Or. 20, r. 1

of the Code as conferring jurisdiction on the Court having seizin of the action to ascertain the mesne profits accruing to the Plaintiff subsequent to the action." . . . "In my judgment there is no justification for the view that the Court having the seizin of the case, may pass a decree for possession of the property, and then if the claim for mesne profits exceeds its pecuniary jurisdiction, solemnly hand over the case to another Court having pecuniary jurisdiction over the subject-matter of the suit. I do not think we can separate the trial of a proceeding in the suit from the trial of the suit, for that there is no sanction in the Code." In connection with the contention that the Court of the Munsif, a Court of restricted jurisdiction cannot investigate a claim which exceeds its pecuniary jurisdiction, the learned Judge considered the provisions of secs 19 and 18 of the Civil Courts Act (Act XII of 1887) and observed "The argument that the Munsif is incompetent to investigate a claim which exceeds the pecuniary jurisdiction overlooks the saving clause in the sec 19 which preserves his jurisdiction to act under the Civil Procedure Code as one of the enactments for the time being in force." As regards the difficulty as to the forum of appeal, the learned Judge has said—"It is not a correct statement of the law that the District Judge can hear appeals only in suits of which the value does not exceed Rs 5,000. It is only correct in regard to appeals from a decree or order of a Subordinate Judge. So far as appeals from the decree or order of a Munsif are concerned, by the express provisions of sec 21, cl 2, they lie to the District Judge."

It is now clear that there is a conflict of decisions on the points discussed above. It is desirable that there should be a Full Bench decision on the points.

It should be observed that a Munsif in the mofussil whose pecuniary jurisdiction is limited has very often passed a decree for costs or a decree for interest *pendente lite* which added to the claim in a suit has often exceeded the pecuniary jurisdiction of a Munsif. But no question has ever been raised to the competency of a Munsif to pass such a decree.

DHIRENDRA NATH ROY.

(Concluded)

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

You truly reflect the opinion of your readers when you say in your remarks on the report of the Committee for Separation of Judicial and Executive Functions that "it will be a good beginning and we trust our countrymen will accept these changes as an earnest of further and more far reaching ones. We hope that our countrymen will not be deterred by the fear of cost from following up these recommendations of the Committee." The reform is so urgent that the country is prepared to bear any additional cost that may be necessary. You have also truly observed that in practical working the recommendation may be carried out much more economically than now anticipated.

As a humble citizen I think it my duty to point out the savings that might be effected from the estimated cost and I request the favour of your publishing this in your esteemed journal.

In the first place in para 15 of the report the average pay of a Sub-Judge has been taken to be Rs 1,000, but it must be much less, probably it will not exceed Rs 850 inasmuch as out of 48 Sub-Judges, 1 get Rs 1,200, 5 get Rs 1,000, and the remaining 39 get Rs 750 to Rs 850 per month.

In para 16 of the report the Committee have, according to the statements of the different District Judges, observed that there should be Additional District and Sessions Judges for different periods in the Districts of Bakarganj, Burdwan, Chittagong, Faridpur, Hooghly, Jessore, Khulna, Midnapore, Murshidabad, Noakhali, Pabna, Rajshahi, Tipperah and that there should be Additional Sub-Judges to cope with the increased work in the Districts of Dacca, Mymensingh and 24 Parganas. If a uniform principle be adopted, and Sub-Judges are required to do the additional work in all the Districts, the cost will be nearly half, possibly less than the cost of the Additional District Magistrates and Deputy Collectors empowered to hear appeals.

In para 18 of the report the Committee observe that in some cases the number of officers in head-quarters of Districts had to be increased simply on the ground that after division it would be found that $2\frac{1}{2}$ officers would be required for administration work and $2\frac{1}{2}$

officers for criminal work and so 3 officers had to be provided for each kind of work. But the Committee have observed in the same para. that it might be possible to employ in the trial of criminal cases both Sub-Judges and Munsifs and it will be found in the civil list that temporary or Additional Sub-Judges or Munsifs are sanctioned in many District head-quarters and they have their Court rooms and offices. So if the additional criminal work be combined with additional civil work of a particular station it will be often found that there would be no occasion to employ a full officer where only half is necessary. The same remarks will apply to Sub-Divisions.

In para. 19 of the report, the Committee have recommended the opening of treasury by Circle Officers in the absence of Sub-Divisional Officers. It may be noted in this connection that in many Sub-Divisions there was no second officer until recently and the treasury was opened only on fixed days in the week. I do not doubt that the public would prefer to have one Sub-Divisional Officer to postponement of the scheme on the ground of cost.

In the same paragraph the Committee have estimated that Rs 32,400 would be the additional cost for housing the Sub-Divisional Magistrates rent free on the same principle by which Sub-Divisional Officers are allowed to occupy houses rent free. In my humble opinion the same principle does not apply. Police Officers and Sub-Divisional Officers are provided with Government quarters to deal with urgent cases. The same principle will not apply to Magistrates who are after all Judges and we know that Munsifs have to pay house rent where there are Government quarters.

It is not entirely out of place to observe in this connection that when separation of the functions is effected the District Magistrates will have very little work to do as all their important functions have now vanished and it will be sheer waste of money to retain the District Superintendents of Police.

In conclusion, I cannot but quote the note of Raja Manmohan Nath Roy Chowdhury of Santosh when he says that "it is highly desirable that Government should carefully test the accuracy of those figures and see if economy could be effected by revising the daily routine of officers concerned and re-organising their work with an eye to economy and retrenchment."

Yours truly,
"CITIZEN."

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before NEWBOULD and SUHRAWARDY, JJ. CRIMINAL REVISION No. 859 of 1922. FAJAR PRAMANIK, Accused, Petitioner v. KING-EMPEROR, Opposite Party. The 23rd November 1922.

Criminal Procedure Code (Act V of 1898), sec. 247—Acquittal on charge under sec. 426, I. P. C., if bar to fresh trial under sec. 379, I. P. C., on the same facts—Further enquiry, order of, setting aside acquittal under sec. 426, I. P. C., with direction to proceed under sec. 379, I. P. C., if legal.

The Petitioner was originally summoned to answer a charge under sec. 426, I. P. C. During the pendency of the case the Magistrate acquitted him under sec. 247, Cr. P. C., on the ground of the absence of the complainant. The complainant thereupon moved the District Magistrate for a further enquiry into the complaint, and the District Magistrate set aside the order of acquittal and ordered a further enquiry, and, further directed that the prosecution should proceed under sec. 379, I. P. C., instead of under sec. 426, I. P. C. The Petitioner was thereupon tried, convicted and fined under sec. 379, I. P. C. :

Held—That the acquittal by the trial Magistrate on the charge under sec. 426, I. P. C., was a bar to the Petitioner being put on his trial again on the same facts which were relied on to support the charge under sec. 379, I. P. C., that the order of the District Magistrate was without jurisdiction, and that being so the proceedings from the date of the revival of the case were vitiated by want of jurisdiction.

The Rule was made absolute, and the fine, if paid, was directed to be refunded.

Babu Dinsh Chandra Roy for the Petitioner.

H C S

Rule made absolute.

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REPORTS (See Index.)

Pious obligation of son to discharge father's debt under the Mitakshara and the ruling in *Sahu Ram's* case.

For a decision so recent, Lord Shaw's judgment in *Sahu Ram Chandra v Bhup Singh*, [L. R. 44 I. A. 126 s. c. 21 C. W. N. 698, has been receiving more than its fair share of judicial notice. In that case a Mitakshara father mortgaged ancestral property for a present advance. It was not proved that the loan was taken for a family necessity, nor did the debt appear to have been incurred for an illegal or immoral purpose. According to the authorities if the mortgage had been executed to secure a past advance, the mortgage would have been binding on the ancestral estate, as it would be an alienation by the father of which the consideration was an "antecedent debt." But there was no debt in the case which could be described as antecedent, either in fact or in time, to the mortgage. The mortgage as such therefore did not bind the ancestral estate.

But in ordinary circumstances, a transaction like the above, though it may be invalid as a mortgage, would create a personal obligation on the mortgagor's part to pay the debt. In *Sahu Ram's* case, it so happened that at the date of the suit, the personal remedy against the mortgagor had become time barred. Take a case, however, where the personal remedy is not time barred. In such a case, is it open to the creditor to sue on the bond for a personal decree and execute the same by a sale of the ancestral property on the principle that the debt was at any rate antecedent to the sale and so, it being a pious obligation of the sons to

discharge such a debt, they ought to submit to the sale?

Although, as indicated above, the question did not arise in *Sahu Ram's* case on the facts of that case, the judgment in the case did deal with it and that because the Judicial Committee (as was expressly stated in the judgment) desired that the conflict of decisions which had arisen upon this point of Hindu law should be settled. The answer to the question will be found in the following passages in Lord Shaw's judgment —

"While the father, however, remains in life, the attempt to affect the sons' and grand-sons' shares in the property in respect merely of their pious obligation to pay off their father's debts and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debt is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely upon pious obligation fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive."

"Although the correct general principle be that if the debt be not for the benefit of an estate, then the manager should have no power either of mortgage or sale of that estate in order to meet such debt, yet an exception has been made to the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded. "To call a borrowing, made on the occasion of the grant of the mortgage an antecedent debt is to extend unduly and improperly the whole scope of the exception on that topic."

Assume, however, a case where there was no mortgage, but a simple debt contracted by the father. Is the position of the creditor any better than if he had lent on a mortgage which owing to absence of legal necessity and not being in consideration of an antecedent debt is invalid? It would be very anomalous if this should be held to be the case. The passage quoted appears clearly to exclude the right of the creditor to sell ancestral property in execution of a decree for such a debt, at least in the borrower's life-time. And yet in some recent cases in which *Sahu Ram's* case was

duly considered, the Calcutta, Bombay and Madras High Courts have laid down that the creditor has this right, the Judges who were parties to these decisions appearing to regard the passage in question as *obiter*. (*Vide Mukti Prakash v. Iswari Dei*, 24 C. W. N. 938; *Madhusudan v. Iswari Dayi*, 24 C. W. N. 949, *Dynamampati v. Vadlamannali*, I. L. R. 41 Mad. 136, *Hanmant v. Ganesh*, I. L. R. 43 Bom. 612) In *Chet Ram v. Ram Singh*, recently reported (27 C. W. N. 150), Lord Shaw, however, expressly re-affirms this passage as being operative and binding as a precedent and appears indeed to go further and hold, as in substance he does, that the doctrine of pious obligation cannot be invoked in the life-time of the father of the person sought to be charged. In this case a mortgage of ancestral property by the father for a present advance formed the consideration for a subsequent sale of the property. The Judicial Committee were of opinion that the sale could not be supported on the principle of antecedent debt simply because the mortgage was antecedent in point of time to the sale.

What then is the position of the long list of authorities referred to in the cases before the High Courts mentioned above in which creditors have been allowed to sell ancestral property for a personal debt of the father in his life-time? Lord Shaw stated in *Sahu Ram's* case with reference to these authorities: "They (the Judicial Committee) desire, in the first place, to make it clear that much, if not all, of the law upon this subject has arisen from the necessity of protecting rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good faith," and later on—"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head." Does this mean that except where a decree has already been obtained binding the ancestral property in terms or a sale has taken place of the entire ancestral property in terms, all these authorities are to be laid aside and scrapped as bad law? Whatever the answer to this general question may be, the

decisions of the High Courts referred to above can hardly stand as good law after Lord Shaw's latest pronouncement on behalf of the Judicial Committee in *Chet Ram's* case, expressly re-affirming the passage which have been explained away in these decisions as *obiter*. Of the Judges who were parties to these decisions, it is fair to add, however, that Kumarswami Sastriyar, J.'s assent to the position taken up in these cases with reference to the passage in Lord Shaw's judgment was qualified in the following manner: "While I am not prepared to hold that the decision in *Sahu Ram Chandra v. Bhup Singh* must be taken to overrule by implication the whole current of authorities during the past 35 years and to restore the state of the law to what it was prior to the year 1881, I am of opinion that the decision makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son only arises when the assets of the father are insufficient assuming that it arises at all during the life-time of the father. In other words, the pious duty is limited to the debts which the father is unable to satisfy out of his share or his self-acquired properties. This limitation introduced by the Privy Council is if I may say so with respect, entirely in accordance with Hindu Smrithis and safeguards the spiritual interest of the father and the temporal interests of his sons." And the texts which he cites seem fully to support this view.

Reviews.

THE COURT FEES ACT, 1870, WITH ALL PROVINCIAL AMENDMENTS AND THE SUITS VALUATION ACT, 1887, WITH EXHAUSTIVE COMMENTARIES. By P. Ramanathan Iyer, B.A., B.L. Published by the Madras Law Journal Office, Madras. 1922.

The author has brought much industry and insight to bear upon the preparation of this commentary on the two enactments in question. The most notable features of his notes are the synopses preceding the notes to each distinct provision of the statutes, the elaborate foot-notes and a full general index, all of which go to make the book handy for purposes of reference. The provincial amendments and the rules and notifications are all there, but we cannot make out what led the author or the publisher to omit suitable headings on the tops

of the pages where they are printed to indicate which are which, and this, we think, constitutes a serious drawback to its usefulness as a book of reference. In other respects the book is well got up.

THE LAND ACQUISITION ACTS WITH NOTES, RULES, ETC. By *Mahim Chandra Sarkar, Rai Bahadur. Second Edition by Subodh Chandra Sarkar, B. L. M. C. Sarkar & Sons, Calcutta. 1922*

This edition of the late Rai Bahadur Mahim Chandra Sarkar's handy commentary on the Land Acquisition Acts is well up-to-date, both in the matter of case notes, amendments by the Legislature and rules framed under Act I of 1894. The Amending Act, XIX of 1921, is reprinted at p. 142, though the effect of the amendments is duly embodied in the body of the main Act and discussed in the notes thereto. The printing and the get-up generally are commendable.

THE LAW AND PRACTICE IN INSOLVENCY AND BANKRUPTCY Being an exhaustive and critical commentary on the Provincial Insolvency Act, 1920. By *K. J. Rustomji, Barrister-at-Law, Lahore, Empire Law Publishing Society, Law Publishers, 1922. Price Rs. 11-4*

Mr. Rustomji's commentaries on this Act do not disappoint expectations. He makes the best use of the material afforded by English case-law and text-books which far exceed in bulk and importance what is furnished by Indian decisions, the Provincial Insolvency Act being a recent experiment of the Indian Legislature, though analogous provisions of the Presidency Insolvency Statutes have been on the Indian Statute book for a long time. We do not think Mr. Rustomji has exercised a wise discretion in excluding the rules framed by all but the Madras High Court and the Burma Chief Court. Less attention, we also think, has been paid to the get-up of the book than is justified by the present condition of the paper market though of course, neither of these defects takes away from the quality of the notes.

THE LAW OF INCOME TAX. Being Act XI of 1922, together with an Introduction and Appendices. By *P. Duraiswami Ayangar, B.A., B.L., Madras: Printed by the Associated Printers, Limited, 1922.*

The Income Tax Act has assumed great importance of late and Mr. Ayangar has taken time by the forelock in bringing out his 460 and

odd pages of excellent commentary on its provisions, besides an appendix which reproduces the Income Tax Acts of 1886 and 1918, the Super-Tax Acts of 1907 and 1920, the All India Committee's Report, the Proceedings of the Legislature, the Finance Act of 1922, Rules under the Act and a chapter on Accounts. Though lawyers may be inclined to look askance at it, we see no objection to the abundant use made by the author of the discussions in the Legislature upon individual provisions of the Act for elucidating these provisions. They are as pertinent for throwing light upon the intention of the Act as English decisions upon analogous provisions of English Statutes which necessarily constitute the bulk of the material upon which the author has had to depend for the substance of his commentary. Altogether the book is a thoroughly able and workmanlike performance, the printing and general get-up of the volume being equal to the best we have seen in the line.

THE INDIAN STAMP ACT (with the Amendment Acts of 1922) By *B. B. Mitra, B.L., B.L. M. C. Sarkar & Sons, Law Book-sellers and Publishers. 90/21, Harrison Road, Calcutta, 1922*

This is an unpretentious but quite useful annotation of the Indian Stamp Act. The commentaries are followed by several appendices containing notifications and rules of the executive Governments and lastly by a reprint of the Bengal Stamp (Amendment) Act of 1922. It ought to serve the legal practitioner for all ordinary purposes of reference as well as any edition of the Act.

STRIDHAN LAW IN HALF AN HOUR Bombay. Printed at the *Tatea Vivechaka Press, 1922. Price 10 as. N. M. Tripathi & Co., Book-sellers and Publishers, Kalbadevi Road, Bombay.*

Three charts stitched together display in a tabular form all there is to know about (1) what is stridhan, (2) woman's property and (3) the devolution of stridhan according to the various schools of Hindu law. Students and legal practitioners can do worse than invest the modest amount of capital indicated on the cover in these useful charts which are neatly printed on stout paper. We should like to see the author (who has elected to remain anonymous) try his hand in other analogous fields of which several occur to us at this moment.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

ORDINARY ORIGINAL CIVIL JURISDICTION.

Before GREAVES, J. (in Chambers). *SUIT*
No. 1309 OF 1914. *NIKUNJA MONI*
DASSEE and ors v. SUBAL CHANDRA
DE and ors The 4th January 1923.

Pending suit—Or. 22, r. 10, C. P. C.—Suit
having been settled, whether a purchaser of
Defendants' interest can apply for substitution.

The Plaintiffs instituted a suit (No 1305 of 1911) for partition of premises No. 5/2, Gorr Charan De Lane, Calcutta. They also instituted another suit (No 1309 of 1914) for a declaration that one of the rooms on the first floor in the said premises belonged to the Plaintiffs and some of the Defendants; and that the said room was entitled to support from the ground floor room of the Defendants Nos 1 and 2 (who were also Defendants in suit No 1305 of 1914), for damages, etc.

On the 22nd November 1919, pursuant to an order for sale in suit No 1305 of 1914, the Registrar sold the above premises to one Lakshman Charan De. On the 2nd of December 1919, the parties in suit No 1309 of 1914 applied for recording terms of settlement. The terms were recorded and, in pursuance thereof, Defendants Nos. 1 and 2 paid Rs 650 to the Plaintiffs and built a wall on their own land. On the 4th of January 1922, the purchaser applied in suit No 1309 of 1914 to be substituted in place of the Plaintiffs. The Defendants Nos 1 and 2 opposed.

Held, first—That the suit having been settled and the terms of settlement having been carried out, there was no pending suit and that therefore, no order for substitution could be made under Or. 22, r. 10 of the C. P. C.

Secondly—That three years having elapsed since the purchase by the applicant, the Court would not exercise its discretion in his favour.

Mr B. L. Mitter for the Applicant

Mr S. K. Chakravarti for the Defendants
Nos. 1 and 2.

P. K. C.

Application dismissed.

CIVIL APPELLATE JURISDICTION. Before C. C.
GHOSE and CHOTZNER, JJ. APPEALS FROM
APPELLATE DECREES NOS. 2864 AND 2865
OF 1920. *ABINASH CHANDRA SAR-*

DAR and another, Defendants-Appellants
v. SM. SARASHI BALA DASSI, Plain-
tiff-Respondent. The 7th December 1922

Report made by the Sadar Kanango in a
Letters of Administration case, if admissible in
evidence—Secs. 35 and 13 of the Indian Evi-
dence Act.

The Plaintiff Sm. Sarashi Bala instituted certain rent suits against tenants for recovery of rents. The case against the present Appellants was that in respect of one holding he was a *bhag* tenant and with regard to the other he paid rent in cash. The claim, however, was at an enhanced rate.

The defence was, he was never a *bhag* tenant and that he paid rents in cash at the rate of Rs 15, and with respect to the other, at the rate of Rs 13 per annum; and that there were previously rent suits in which the same claim was put forward and at the same rate, but both the Courts decreed the Plaintiff's claim at the rate admitted by the tenants.

Both the lower Courts in the present suits decreed the Plaintiff's suits at the rate claimed by her, relying mainly upon a report submitted by the Sadar Kanango in a Plaintiff's case for Letters of Administration.

Hence the appeals by the tenants-Defendants

Babu Manmatha Nath Ganguly for the Appellants—Both the lower Courts erred in law in relying upon the Kanango's report and decreeing the Plaintiff's suit.

This report is not at all admissible in evidence, it was a report made in a different case and for a different purpose; this cannot be used as a piece of evidence against me.

Babu Nagendra Nath Ghosh (with *Babu Panchanan Ghosh*) for the Respondent—This is admissible in evidence under sec. 35 of the Indian Evidence Act. It was made by a public officer in the discharge of his duties; it may be also admissible under sec. 13.

Reads the sections.

Besides, there is other corroborative evidence as found by the lower Appellate Court.

Babu Manmatha Nath Ganguly was heard in reply.

Held—The report was not admissible in evidence: Case remanded to the lower Appellate Court for re-hearing the appeal on condition that the Plaintiff pays the costs of these appeals to the Defendants within one month from the date of the arrival of the record.

S. C. C.

Appeals allowed;

Case remanded.

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In putting before our readers the facts of the True case and the observations of the above writer, we have no desire to sit in judgment on the verdict of the jury, but we do desire to raise the very important question as to what should be the mode of trial in a case where the plea of insanity is taken on behalf of the ac-

cused. The Judge as well as the jury undoubtedly find themselves in an extremely embarrassing position whenever they are called upon to decide on the evidence of experts, and particularly so, when it is of a conflicting character. For such evidence consists not of mere facts, but mostly of opinions together with the facts on which they are founded, and these facts again are not facts which lie within the range of every day experience, but are facts which belong almost exclusively to the experience of experts and, as such, not amenable to the test of verification by the ordinary man. Take a concrete case. A man is charged with having murdered another by administering strychnine to him. Evidence is given by the doctors on behalf of the Crown that post-mortem examination has revealed the presence of strychnine in the stomach and they suggest that the quantity found could not have been there unless it was introduced deliberately. The defence call experts who depose that the deceased was addicted to drugs, and that during his last illness, medicines of all kinds, including strychnine, were administered to him, and, they suggest that the quantity of strychnine found in the stomach could be well accounted for by these facts. In a case of this description, the jury will, in spite of the conflicting testimony of experts, come to the right conclusion, at any rate, in the majority of cases; because in arriving at their conclusion, they will look not only to the medical evidence, but also to other evidence which they can examine for themselves without the assistance of experts, e.g. the motive suggested for the commission of the offence by the accused; the opportunities he had in administering the poison to the deceased, his conduct during the last illness of the deceased and so on. Now take a case where the accused takes the plea of insanity. Evidence of experts will be adduced along with other evidence and the jury are expected to examine the whole evidence and decide on the guilt or innocence of the

accused The question is, are they competent to do it? It may be said that if they are competent to decide in the case of strychnine poisoning where they have to depend on expert evidence, why not in this case? A little reflection will show however that the two cases are absolutely different. In the former case, there are in evidence facts which can be tested by a layman without the assistance of experts and on which the jury may be expected to rely in arriving at their verdict. But in this case, there are no such facts. Whether you take the question of motive or the conduct of the accused when he did the act in question or his conduct before the act or after, the same question will arise, was the man insane? And in answering the question, the jury will have to depend on expert testimony. Of course, as the law stands now, they need not and that is what happened in the True case. The jury refused to believe the medical evidence. On the contrary, they believed that True's crime arose from wickedness and not insanity and, in coming to this conclusion, they were no doubt considerably influenced by the fact that he robbed as well as killed—a fact which apparently they could not explain otherwise than by assuming the man's sanity.

"It is a sorry spectacle to see a mad man hang," wrote Coke long ago. Should we allow the spectacle to be re-enacted in our days by leaving the fate of an accused in the hands of a body of men who, although themselves incompetent to form an opinion on his mental condition, may decline to follow the opinion of those who are the only persons competent to form one? "The modern intensive study of the insane," says the writer referred to above, "has shown the wisdom of a warning uttered by Dr. Mercier long ago that we can never be sure how far the penumbra of a man's insanity extends. Even where a 'partially insane' person shows deliberate malice and cunning in the commission of a crime, it is impossible to be sure that these qualities are not symptoms of his disease, springing from the same hidden source as an apparently unrelated delusion."

We recognise the difficulty of suggesting a mode of trial which will ensure justice to the accused and at the same time satisfy the judicial conscience of the public. The writer of the article referred to suggests that the Mac-

naghten tests should be abolished and that the jury should be presented with the plain and simple issue, whether the prisoner did the act with which he is charged under the influence of insanity. We have doubts whether this will suffice in every case. For, suppose, evidence is given on behalf of the accused that he was under the influence of insanity and this is not challenged by the Crown. The jury are not bound to accept the opinion of experts and may proceed to examine for themselves the facts on which it is based and come to the conclusion that their opinion is incorrect. Now suppose, rebutting evidence is given on behalf of the Crown. It is no reflexion on the intelligence of the jury to say that that will render an intelligent execution of their task well-nigh impossible.

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Sir Geo. Lowndes, K. C. and Mr. Dubé for the Appellant.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the 1st Respondent.

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Sir Geo. Lowndes, K. C. and *Mr. Dubé* for the Appellant.

Messrs. DeGruyther, K. C. and *Kenworthy Brown* for the 1st Respondent.

Mr. W. Wallach for the other Respondents.
Judgment was reserved.

Baikunta Nath Chatteraj v. Prasakamoy Deb (Bengal) which was heard on the 9th, 10th and 13th November raised the question of the validity of a Will.

Messrs. DeGruyther, K. C. and K. Brown for the Appellant.

Sir Geo. Lowndes, K. C. and J. M. Parikh for the Respondent.

Judgment was reserved

Sangat Kumari Das v. Amulyadhan Kundu (Bengal) was heard on the 9th November. The question in this case was whether a compromise was made with or without the consent of a *purdanashin* lady

Messrs. DeGruyther, K. C. and Dubé for the Appellant

Mr. Abdul Majid for the Respondent.

Judgment was reserved

Abdur Rahim v. Narayan Das Annora (Bengal) was heard on the 9th and 10th November. It was a suit by the *mutwalli* of a *wakf* to obtain possession of lands which had come into the possession of the Respondent under a decree on a mortgage executed by a previous *mutwalli*. The main question in the appeal was whether the suit was barred by limitation under Art. 134 of the Indian Limitation Act.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant

Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Respondent.

Judgment was reserved

Ikhtari Begum v. Duljan Ali (Patna), which was heard on the 13th November, concerned the construction of a *wakfnama* and the meaning to be given to the word *waris*.

Messrs. DeGruyther, K. C. and Abdul Majid for the Appellant.

Mr. S. Hyam for the Respondent.

Judgment was reserved

Foolcoonerbai v. Kesrisingh Rajmal (Bombay), which was heard on the 14th November, raised a question of construction of a Will.

Messrs. Clauson, K. C. and E. B. Raikes for the Appellant.

Messrs. DeGruyther, K. C. and K. Brown for the Respondent.

Judgment was reserved.

Ahmed Ebrahim Salepi v. Fatima Bibi (Lower Burma) was heard on the 14th and 10th November. The question was as to the construction of a Mahomedan Will whereby a testator had given an executor (the Appellant) power to charge 10 per cent. commission on all cash coming into his hands. The Respondent is a daughter and one of the heirs of the testator. Some of the heirs had consented to the terms of the Will in favour of the executor. The High Court held that the Respondent had not so consented and that so far as she was concerned the 10 per cent. commission in favour of the executor was inoperative.

Messrs. DeGruyther, K. C. and Parikh for the Appellant

Messrs. A. M. Dunne, K. C. and G. S. Sanders for the Respondent.

At the conclusion of the Appellant's argument the judgment of the Board was delivered by LORD PHILLIMORE and the appeal was dismissed.

The Board which sat on November 16th, 17th and 20th consisted of LORDS PHILLIMORE and SALVESEN, SIR LAWRENCE JENKINS and MR. AMEER ALI.

In *Verla Venkanna v. Merla Agasthia* (Madras), the suit was brought by the Appellants for an account of the produce of certain property since 1902 at which date a partition of the family property took place.

The Appellants contend that after this partition two branches of the family remained together, and that they are entitled to a share of the proceeds of the joint cultivation and joint loans.

The Courts in India have differed in their views.

Sir Geo. Lowndes, K. C. and Mr. Narasimham for the Appellants.

Messrs. I. DeGruyther, K. C. and Kenworthy Brown for the Respondent.

On November 20th and 21st The Board was composed of LORDS BUCKMASTER, PHILLIMORE, SALVESEN, SIR LAWRENCE JENKINS and MR. AMEER ALI.

In *Kamulammal v. T. B. K. Visvanathiswami Naicker*, an appeal from the High Court at Madras, the question is raised as to the share in his father's estate to which an illegitimate son of a Sudra is entitled to succeed.

30-11-22

The Appellant is represented by *Messrs. L. DeGruyther, K. C. and B. Dubé*. The first Respondent (the illegitimate son) by *Messrs. C. J. Mathew, K. C. and Ingram*, other Respondents by *Mr. Kenworthy Brown*.

The hearing is concluded and their Lordships are considering the advice that they will tender to His Majesty.

Judgment was delivered on 21st November in *Nur Mahomed Peerbhoy v D H Motiwalla* (Bombay). The appeal was allowed in part.

Mr. Abdul Majid applied to a Board composed of LORDS BUCKMASTER, PHILLIMORE, SALVESEN, SIR L. JENKINS and MR. AMEER ALI for a re-hearing of the appeal from the Punjab, *Sabz Ali Khan v Kharr Md. Khan* (L. R. 49 I. A. 74). He alleged his client's (Respondent's) ignorance of the fact that the appeal was ready to be heard and stated that for this reason the Respondent was not represented when the appeal was argued before the Judicial Committee.

Messrs. DeGruyther, K. C. and H. N. Sen who opposed the application were not called upon, and the application was dismissed with costs.

On the same day *Sir George Lowndes, K. C. and Mr. E. B. Raikes* applied for special leave to appeal to the Privy Council in the case of *Asutosh Lahiri v Manindra Chandra Nandi*. The value of the property was below Rs. 10,000 but leave was desired on the ground of a substantial question of law of general interest being involved, the question being whether there could be adverse possession by the agent of the person claiming title. *Messrs. DeGruyther, K. C. and B. Dubé* opposed the application and leave was refused.

In *Jai Indra Bahadur Singh v. Bibi Raj Kuar*, special leave was applied for on similar grounds by *Mr. Kenworthy Brown*, but leave was refused.

Special leave was granted in the case of *Miss Sudhansu Bala Hazra* who had applied for enrolment as a pleader in the District Court of Patna. *Sir George Lowndes, K. C. and Mr. B. Dubé* represented the Petitioner. In granting leave the Board intimated that notice should be given to the Secretary of State who should be represented at the hearing.

An interesting judgment was delivered last week by the Judicial Committee in the case of *Ward & Co., Ltd. v. The Commissioner of Taxes* on appeal from New Zealand. The Appellants carried on the trade of brewers and maltsters and the question for determination was whether expenses incurred by them in propaganda was a permissible deduction in computing the assessable income derived by the Appellants from their trade. A special poll was taken of the Parliamentary electors of New Zealand upon the question whether prohibition of the sale of intoxicating liquors should be introduced. Prior to the taking of the poll the Appellants incurred an expenditure amounting to over £2,000 with a view to defeating the proposal for prohibition and in the result the proposal was negatived by a small majority. The Appellants contended that the expenses were incurred in the production of their assessable income. The Court of Appeal of New Zealand held that the expenditure was incurred not for the production of income but for the purpose of preventing the extinction of the business from which the income was derived and that it could not therefore be deducted under the provisions of the New Zealand Land and Income Tax Act. The decision of the Court of Appeal was upheld by the Judicial Committee.

On November 24th, VISCOUNT HALDANE, LORDS PARMEOR, CARSON, SHAW and WREN-BURY commenced the hearing of an appeal from Allahabad, *Gopi Lal v Lakhpat Rai*, which raised the question of whether a patent had been rightly granted to the manufacturers of a special kind of "Banslochan" and whether the patent had been infringed. The arguments were heard on November 24th, 27th and 28th and judgment has been reserved.

Mr. L. DeGruyther, K. C. for the Appellant.

Mr. T. Watson for the Respondent.

Judgment was delivered in the appeal *Sadasiva Mudaliar v Fakir Md. Sait & Sons* (Madras).

G. D. M.

Mr. W. Wallach for the other Respondents.
Judgment was reserved.

Baikunta Nath Chattoraj v. Prasahamoyi Debi (Bengal) which was heard on the 9th, 10th and 13th November raised the question of the validity of a Will.

Messrs. DeGruyther, K. C. and K. Brown for the Appellant.

Sir Geo. Lowndes, K. C. and J. M. Parikh for the Respondent.

Judgment was reserved

Sangat Kumari Dasi v. Amulyadhan Kundu (Bengal) was heard on the 9th November. The question in this case was whether a compromise was made with or without the consent of a *purdanashin* lady

Messrs. DeGruyther, K. C. and Dubé for the Appellant

Mr. Abdul Majid for the Respondent.

Judgment was reserved.

Abdur Rahim v. Narayan Das Annora (Bengal) was heard on the 9th and 10th November. It was a suit by the *mutwalli* of a *wakf* to obtain possession of lands which had come into the possession of the Respondent under a decree on a mortgage executed by a previous *mutwalli*. The main question in the appeal was whether the suit was barred by limitation under Art. 134 of the Indian Limitation Act.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant

Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Respondent.

Judgment was reserved

Ikhtari Begum v. Diljan Ali (Patna), which was heard on the 13th November, concerned the construction of a *wakfnama* and the meaning to be given to the word *waris*.

Messrs. DeGruyther, K. C. and Abdul Majid for the Appellant.

Mr. S. Hyam for the Respondent.

Judgment was reserved.

Foolcooverbai v. Kesrisingh Rajmal (Bombay), which was heard on the 14th November, raised a question of construction of a Will.

Messrs. Clouston, K. C. and E. B. Raikes for the Appellant.

Messrs. DeGruyther, K. C. and K. Brown for the Respondent.

Judgment was reserved.

Ahmed Ebrahim Saleji v. Fatima Bibi (Lower Burma) was heard on the 14th and 10th November. The question was as to the construction of a Mahomedan Will whereby a testator had given an executor (the Appellant) power to charge 10 per cent. commission on all cash coming into his hands. The Respondent is a daughter and one of the heirs of the testator. Some of the heirs had consented to the terms of the Will in favour of the executor. The High Court held that the Respondent had not so consented and that so far as she was concerned the 10 per cent. commission in favour of the executor was inoperative.

Messrs. DeGruyther, K. C. and Parikh for the Appellant

Messrs. A. M. Dunne, K. C. and G. S. Sanders for the Respondent.

At the conclusion of the Appellant's argument the judgment of the Board was delivered by LORD PHILLIMORE and the appeal was dismissed

The Board which sat on November 16th, 17th and 20th consisted of LORDS PHILLIMORE and SALVESEN, SIR LAWRENCE JENKINS and MR. AMEER ALI

In *Merla Venhamia v. Merla Agasthia* (Madras), the suit was brought by the Appellants for an account of the produce of certain property since 1902 at which date a partition of the family property took place

The Appellants contend that after this partition two branches of the family remained together, and that they are entitled to a share of the proceeds of the joint cultivation and joint loans

The Courts in India have differed in their views

Sir Geo. Lowndes, K. C. and Mr. Narasimham for the Appellants

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Respondent

On November 20th and 21st. The Board was composed of LORDS BUCKMASTER, PHILLIMORE, SALVESEN, SIR LAWRENCE JENKINS and MR. AMEER ALI.

In *Kamulammal v. T. B. K. Viswanathiswami Naicker*, an appeal from the High Court at Madras, the question is raised as to the share in his father's estate to which an illegitimate son of a Sudra is entitled to succeed.

The Appellant is represented by *Messrs. L. DeGruyther, K. C. and B. Dubé*. The first Respondent (the illegitimate son) by *Messrs. C. J. Mathew, K. C. and Ingram*, other Respondents by *Mr. Kenworthy Brown*.

The hearing is concluded and their Lordships are considering the advice that they will tender to His Majesty

Judgment was delivered on 21st November in *Nur Mahomed Peerbhoy v D. H. Motiwalla* (Bombay). The appeal was allowed in part.

Mr. Abdul Majid applied to a Board composed of LORDS BUCKMASTER, PHILLIMORE, SALVESEN, SIR L. JENKINS and MR. AMER ALI for a re-hearing of the appeal from the Punjab, *Sabz Ali Khan v Kharr Md. Khan* (L. R. 49 I. A. 74). He alleged his client's (Respondent's) ignorance of the fact that the appeal was ready to be heard and stated that for this reason the Respondent was not represented when the appeal was argued before the Judicial Committee.

Messrs. DeGruyther, K. C. and H. N. Sen who opposed the application were not called upon, and the application was dismissed with costs.

On the same day *Sir George Lowndes, K. C. and Mr. E. B. Raikes* applied for special leave to appeal to the Privy Council in the case of *Asutosh Lahiri v Mamdra Chandra Nandi*. The value of the property was below Rs. 10,000 but leave was desired on the ground of a substantial question of law of general interest being involved, the question being whether there could be adverse possession by the agent of the person claiming title. *Messrs. DeGruyther, K. C. and B. Dubé* opposed the application and leave was refused.

In *Jai Indra Bahadur Singh v Bibi Raj Kuar*, special leave was applied for on similar grounds by *Mr. Kenworthy Brown*, but leave was refused.

Special leave was granted in the case of *Miss Sudhansu Bala Hazra* who had applied for enrolment as a pleader in the District Court of Patna. *Sir George Lowndes, K. C. and Mr. B. Dubé* represented the Petitioner. In granting leave the Board intimated that notice should be given to the Secretary of State who should be represented at the hearing.

30-11-22.

An interesting judgment was delivered last week by the Judicial Committee in the case of *Ward & Co., Ltd. v. The Commissioner of Taxes* on appeal from New Zealand. The Appellants carried on the trade of brewers and maltsters and the question for determination was whether expenses incurred by them in propaganda was a permissible deduction in computing the assessable income derived by the Appellants from their trade. A special poll was taken of the Parliamentary electors of New Zealand upon the question whether prohibition of the sale of intoxicating liquors should be introduced. Prior to the taking of the poll the Appellants incurred an expenditure amounting to over £2,000 with a view to defeating the proposal for prohibition and in the result the proposal was negatived by a small majority. The Appellants contended that the expenses were incurred in the production of their assessable income. The Court of Appeal of New Zealand held that the expenditure was incurred not for the production of income but for the purpose of preventing the extinction of the business from which the income was derived and that it could not therefore be deducted under the provisions of the New Zealand Land and Income Tax Act. The decision of the Court of Appeal was upheld by the Judicial Committee.

On November 24th, VISCOUNT HALDANE, LORDS PARMOOR, CARSON, SHAW and WREN BURY commenced the hearing of an appeal from Allahabad, *Gopi Lal v. Lakhpat Rai* which raised the question of whether a patent had been rightly granted to the manufacturer of a special kind of "Banslochan" and whether the patent had been infringed. The arguments were heard on November 24th, 27th and 28th and judgment has been reserved.

Mr. L. DeGruyther, K. C. for the Appellant.

Mr. T. Watson for the Respondent.

Judgment was delivered in the appeal *Sadasiva Mudaliar v. Fakir Md. Sait & Sons* (Madras).

G. D. M.

THE Calcutta Weekly Notes.

Vol. XXV I.]

MONDAY, JANUARY 22, 1923.

[No. 10]

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Plea of Insanity and Trial by Jury.

In our last issue, we noticed some of the difficulties which a jury have to face in trying a case where the plea of insanity is taken on behalf of the accused. To minimise these difficulties as well as to ensure the return of a correct verdict, it has been suggested that the judge, instead of troubling the jury with any of those tests which are usually applied in determining the responsibility of the accused, should put to them the plain and simple issue, whether he was insane or not. In our opinion, this will not meet the ends of justice in every case. In the first place, the jury on the facts placed before them may find the prisoner to be not insane contrary to the opinion expressed by the doctors on the same facts. In the second place, insanity is a term of very wide significance covering all forms of mental disease and all stages thereof. The jury in a particular case may find the prisoner to be insane meaning thereby nothing more than that he is afflicted with some mental derangement, although the fact may be that the affliction is not such as would make him immune from all responsibility for his actions.

Some alienists have advanced the suggestion that in these cases judicial trials should be dispensed with altogether; and that the Crown should be left to exercise its own judgment and that it may, after consulting expert opinion and its law officers, if so advised, drop the prosecution. This procedure will meet the ends of justice in most cases, but we cannot recommend its adoption, as we are afraid that in some instances it will expose the Government to the charge of partiality and will be made from time to time an occasion for rais-

ing the cry of "one law for the rich and another for the poor."

We place before our readers two alternative modes of trial in cases where the defence of insanity is taken. Our first suggestion is that the trial should be as now before a judge and a jury, but that the judge should be left with an absolute discretion to leave the case to the jury or not. If he is satisfied on the evidence that the accused is insane, he should ask the jury to return a verdict of "not guilty" or of "guilty but insane," but in case he is not so satisfied, he should allow the case to go before the jury. There is thus to be said in support of this procedure that the judge, being himself a professional man, is in a better position to appreciate expert evidence than the jury and further that he is not liable to be influenced by extra-judicial considerations as the latter may be. Our second suggestion is that in these cases, the jury trial should be entirely abolished and that the trial should be before a special tribunal of judges assisted by doctors. The verdict should rest with the judges, but in sifting the expert evidence, they will have the assistance of independent expert advisers; and although they will not be bound to accept the views of the latter, we have no doubt that the judges will not fail to attach to them their due weight and importance. In our opinion, this will be a great improvement on the present system.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

30-11-22

November 24th, 25th and 27th. LORDS BUCKMASTER and PHILLIMORE, SIR JOHN EDGE and SIR LAWRENCE JENKINS and LORD SALVESSEN heard the arguments in *Rajani Kanta Pal v. Jaga Mohan Pal*, an appeal from Bengal in a partition suit, where the question for determination is the extent of the shares to which the claimants are entitled.

Sir Geo. Lowndes, K. C. and Parikh for the Appellant.

Messrs A. M. Dunne, K. C. and C. Bagtam for the Respondent.

November 27th *Mt Hafizan Bibi v. Mt Suba Bibi* (Allahabad), before the same Board, raised the question as to the amount of dower to which the Appellant was entitled.

Mr Narasimham for the Appellant.

Messrs. Montgomery, K. C. and A. Majid for the Respondent.

Judgment was reserved.

Chalikam Venkatanarayanam Garu v. Rajah Vatsaraya Venkata S. J. Bahadur Garu, an appeal from Madras, was heard on November 28th and 30th by the same Board and judgment was delivered by LORD BUCKMASTER at the conclusion of the arguments, the appeal being allowed in part.

Messrs. Upjohn, K. C., Narasimham and C. V. Rao for the Appellant.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Respondent.

The questions in issue related to the interest due on a mortgage and whether or not there had been a tender of an instalment.

14-12-22

The Judicial Committee have concluded the sittings for this term but a Board is occasionally convened in order to hear applications and deliver judgments.

The following is the record of business since November 24th.

Gopi Lal v. Lakhpat Rai (Allahabad), a patent appeal mentioned in my last "Notes" was heard on November 24th, 27th and 28th. Judgment was reserved.

On November 24th, judgment was delivered in the suit of *Sadasira Mudaliar v. Haji Md.* Suit dismissing an appeal from Bengal. The judgment was delivered by SIR JOHN EDGE.

Rajani Kanta Pal v. Jaga Mohan Pal (Bengal) was heard by a Board composed of LORDS BUCKMASTER and PHILLIMORE, SIR JOHN EDGE and SIR L. JENKINS on November 24th, 25th and 27th. The questions for determination relate to the shares divisible between co-parceners in a partition suit. *Sir Geo. Lowndes, K. C. and Mr. L. M. Parikh* for the Appellant and *Messrs. A. M. Dunne, K. C. and C. Bagram* for the Respondent.

Mt. Hafizan Bibi v. Suba Bibi, an appeal from Madras, was argued before LORDS BUCKMASTER and PHILLIMORE, SIR J. EDGE, SIR L. JENKINS and LORD SALVESEN on November 27th and 28th by *Mr. Narasimham* for the Appellant and *Messrs. Montgomery, K. C. and A. Majid* for the Respondent. The question for determination was the extent of dower to which the Appellant was entitled under the Hanafi School of Mohammedan Law. Judgment was reserved.

On November 28th, judgments were delivered by the Board in the following cases — *Harnath Kuar v. Inder Bahadur Singh* (Oudh), appeal was allowed in part.

Kushen Naram v. Pala Mal (Punjab), appeal was dismissed.

Md. Solaiman v. Kumar Birendra Ch. Singh (Bengal), appeal was allowed.

Chalikam Venkatanarayanam Garu v. Vatsaraya Venkata Subaradayamma Jagapati (Madras) was heard on November 28th and 30th by a Board presided over by LORD BUCKMASTER who delivered judgment at the conclusion of the arguments allowing the appeal in part. The suit was brought by the mortgagee to enforce his security. The mortgagor contended that he had offered to redeem the mortgage but that the mortgagee had refused the tender and was therefore disentitled to interest from the date thereof. *Messrs. Upjohn, K. C., Narasimham and C. V. Rao* for the Appellant and *Messrs. DeGruyther, K. C. and Kenworthy Brown* for the Respondent.

Kumar Naresh Narayan Roy v. Secretary of State (Bengal), an appeal which related to the reformation of an island in the river Padma, was heard on November 30th, December 1st and 4th. *Messrs. Dunne, K. C. and Wallach* for the Appellant contended that the land in dispute was a reformation *in situ* of his zemindary and could not therefore be re-assessed by Government. *Messrs. DeGruyther, K. C. and Kenworthy Brown* appeared for the Respondent. Judgment was reserved.

On December 1st, judgment was delivered allowing an appeal from Bengal in *Sara Kumari Dasi v. Amulyadhan Kundu*.

On December 4th, judgment was delivered by LORD PHILLIMORE dismissing an appeal from Pafna in *Sahdeo Narain Deo v. Kusun Kumari*.

The Judicial Committee having finished their Indian list of appeals for this term have been delivering judgment in a large number of appeals in which after hearing judgment had been reserved.

On December 8th, judgment was delivered in two cases, *Secretary of State v. Laxmibai* (Bombay) and *Baikunta Nath Chatteraj v. Prasannamoyi Debva* (Bengal), in each case the appeal was allowed.

Application for special leave to appeal to the Privy Council was made by *Sir George Lowndes* and *Mr. Parikh* in the case of *Maharaj Bahadur Singh v. Seth Hakim Chand* (Patna).

The suit out of which the application arose concerns a dispute between the Sitambari and Digambari Jains relating to the temples and dharmshala on Parasnath Hill. Both sides obtained certificates of appeal to the Privy Council, but the Petitioner was six days late in depositing security. Leave was granted.

On December 11th, judgment was delivered in *Ram Prasad Singh v. Nathu Ram* (Patna), *Merla Venkanna v. Merla Agasthiah* (Madras) allowing the appeal in each of these cases.

On December 20th, the following judgments were delivered

Ram Jagadamba Kumari v. Th. Wazir Narain Singh (Patna).

Appeal allowed in part.

M. Subramanian v. M. L. R. M. Latchman (Lower Burma)

Appeal dismissed.

Hurnandrai Fulchand v. Pragdas Budhscap (Bombay).

Appeal allowed.

Foolcooverbai v. Rai Saheb Keshrisingh Rajmal (Bombay).

Appeal dismissed.

Hazi Abdur Rahim v. Narayan Das Anroza (Bengal).

Appeal allowed.

Bibi Akhtari Begam v. Dihan Ali (Patna)

Appeal allowed.

Harichand Mancharam v. Govind Luxman Gokhale (Bombay).

Appeal dismissed.

Kamulammal v. T. B. K. Visvanathaswami Naicker (Madras).

Appeal dismissed.

Mt. Hafizan Bibi v. Suba Bibi (Allahabad).

Appeal dismissed.

The High Court rises to-morrow for the

X'mas vacation and the next sittings of the Privy Council are expected to commence about the 23rd January.

21-12-22

G. D. M.

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
Sir,

The following point is sent to you for discussion in your much esteemed journal with the hope that it will be published therein.

Under ss 31 and 32, as framed by the Honble Calcutta High Court, under sec 6 of Act XVIII of 1879 (Legal Practitioners Act), it is laid down that pleaders and muktears having been admitted as such to practice in Courts cannot enter into any trade or other business without notice to the High Court.

In s 32, it is stated that "any person who, having been admitted as a pleader or muktear, shall accept any appointment under Government or shall enter into any trade or other business, shall give notice thereof to the High Court which may thereupon suspend such pleader or muktear, or pass such orders as the said Court may think fit."

The question has been raised whether pleaders and muktears can act as directors, inspectors or auditors of Banks and other Limited Companies dealing in money-lending business and following commercial pursuits, on receipt of certain percentage of profit or annual lump sum as the case may be.

From the purport of the High Court circular order as laid down in the above rule, it apparently seems that pleaders and muktears after their admission to practise as such are not to be allowed to enter into any trade or other business.

Now-a-days many Banks and Limited Companies are floated in the country for various purposes. Many of them, especially those which are located in towns, are generally managed by pleaders who act as their directors, both managing and general.

If pleaders and muktears are likely to be debared from entering into any trade or other business as is apparently indicated by the above rule, they cannot and ought not to act as managing or ordinary directors in the executive body of directors of those Banks and Limited Companies whose avowed object is commercial, pure and simple. If they so act,

then such service of pleaders and muktears is likely to come under the category of trade or other business as contemplated by the rule quoted above.

Of course, the rule speaks of the discretionary power of the High Court, if it is notified to it, but seldom are such notices given to the High Court in actual practice as appears from the letter of the Registrar of the High Court to whom the matter was referred.

Indeed, many of the vakils and barristers of the High Court are seen to act as directors of many of Joint Stock Companies at Calcutta but the rule referred to does not make any mention of them, it only occurs under the heading of the penal provisions of the circular orders as are applicable to pleaders and muktears.

Therefore, it is desirable that some inquisitive reader of your journal should take up the subject and discuss it *in extenso*. The attention of the Bench and the Bar should also be drawn to the point for the settlement of it. If necessary, either the rule, if it appears to be anomalous, should be modified, or such service by pleaders should be discouraged as it appears to be contrary to the legal rule.

RADHARAMAN SAHA,
Pleader.

PATNA,
19-12-22

To
THE EDITOR, "CALCUTTA WEEKLY NOTES"
SIR,

May you please allow me a little space in your esteemed journal for the purpose of discussing an important question of almost every day occurrence in mouffasil Courts.

The question as to how an instrument of obligation, executed in pursuance of an order of a Court in order to stay execution proceedings, etc., is to be stamped was once raised by one of your learned correspondents in 26 C. W. N. (n) 96. The question itself does not seem to have been very happily framed and the answer published at p. 108 (notes) is also of no practical use, because the real question that requires an answer is whether such an instrument can be said to be executed in pursuance of an order of a Court and whether as such, it, at all, requires to be stamped.

In 21 C. W. N. 1150 an Appellant prayed for stay of execution and the Appellate Court

ordered stay of execution on his furnishing security to the satisfaction of the Court below. The question therefore was whether such a bond executed by a party to a proceeding can be said to be executed in pursuance of an order of a Court within the meaning of Sch. II, Art. 6 of the Court Fees Act. Their Lordships, however, in the case above referred to, answered the question in the negative, since as in their Lordships' opinion the parties were at their liberty to execute the bonds or not for their own benefit, they cannot be said to be executed in pursuance of an order of a Court. Their Lordships, it seems, have drawn a distinction between bonds which a person has an option to execute or not for his own benefit and bonds which a person is bound to execute under orders of Court not for his own benefit but either of the Secretary of State for India or of any one else. With all deference to their Lordships' judgment, we confess we are unable to see the distinction. It is inconceivable how and under what circumstances can a party to a proceeding in a Court of justice be compelled to execute a bond not for his own benefit but for the benefit of the Secretary of State or of any one else. It is humbly submitted here that neither the Code of Civil Procedure nor even the Code of Criminal Procedure authorises any Court to compel persons to execute any bonds without at the same time leaving them their option to execute "them or not as they please." In every possible case, at least under the Code of Civil Procedure, a party has his option and if he executes the bond he does so for his own benefit.

The same question went up to their Lordships of the same High Court in a more recent case reported in 68 I. C. 730. It was in connection with a claim case and the claimant furnished a bond. It is curious, however, that their Lordships in this case did not see any distinction such as was found in 21 C. W. N. and following some earlier Madras decisions such a bond was held to be given in pursuance of an order of the Court within the meaning of the Court Fees Act and, as such, exempt from any stamp duty under the Stamp Act.

I remain,

Sir,

Yours truly,

SATISH CHANDRA DHAR,
Pleader

NARAIL,
15-12-22.

THE Calcutta Weekly Notes.

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[No. N.]

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REPORTS (See Index.)

The Bengal Retrenchment Committee and Judicial Administration.

The Retrenchment Committee have applied the axe to whatever they consider superfluous in the administrative machinery of the province and have shown a reduction in the annual budget of a little under two crores of rupees which will not only wipe out the present deficit, but leave a surplus. To attempt an examination of their recommendations will take us outside the scope of our journal, but we cannot refrain from noticing those which have been made in connexion with the judiciary, particularly in view of the fact that they have already brought forth a considerable amount of adverse criticism. The more important of the Committee's recommendations are as follows:—

(a) The enhancement of the powers of the Munsifs to try suits up to Rs. 2,000 in value and of selected Munsifs to try suits up to Rs. 5,000 in value.

(b) The hearing by Sub-Judges of insolvency, succession, probate, administration and will cases and by experienced Munsifs of small succession cases.

(c) The disposal of a larger proportion of sessions cases by Assistant Sessions Judges and the vesting of Deputy Magistrates and Sub-Judges with the power of trying sessions cases.

(d) Extension of the Small Cause Court Procedure and the trial thereunder of rent suits not exceeding Rs. 50 in value.

(e) Addition of 30 working days in the year which will increase the out-turn of work by more than 12 per cent.

(f) The ultimate staff should consist of 21 Sessions Judges, 15 Assistant Sessions Judges, 40 Sub-Judges and 240 Munsifs.

(g) The scale of pay for Munsifs should be reduced from Rs. 350—Rs. 700 to Rs. 275—Rs. 600 and the maximum pay for Sub-Judges should be reduced from Rs. 1,200 to Rs. 750.

These recommendations, we are told, have been made with the object of reducing expenditure "by the substitution of cheaper agencies, by the extended use of summary procedure and by the elimination of unnecessary work." Reduction of expenditure is at the present moment a pressing financial necessity. But we doubt the wisdom of employing cheaper agencies or summary procedure in the administration of justice. The Sub-Judges and Munsifs are a capable and hard-worked body of public servants and we can assure the Government that the public will not view with approval any reduction in the scale of pay they enjoy at present. An idea seems to be entertained in some quarters that the subordinate judiciary is staffed by second class men and that the scale of pay proposed by the Committee is good enough for them—at any rate, sufficiently attractive. This is a misconception. Many promising young men in the legal profession have to accept service for no other reason than that they cannot afford to wait. It will be nothing short of meanness if the Government were to take an unfair advantage of their helpless position and exploit them in the service of the State on an inadequate pay. They should get not only a living wage, but a wage which will secure to them the ordinary comforts and decencies of life and above all place them beyond temptation. The present scale of pay appears to be the irreducible minimum.

It is unfortunate that the Committee in making their recommendations for the recruitment of officers for trying sessions cases should have gone out of their way in making an invidious distinction between the executive and the judicial officers as to their relative qualifications as judges. We should like to know if any reliable evidence is forthcoming from the records of the Committee in support of their observation, viz., "of the two, we would prefer Deputy Magistrates to Sub-Judges for this work, as the latter are more disposed to decide on the balance of evidence rather than on probabilities," or whether the evidence was supplied by the members themselves out of their own experience

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION Before MOOKERJEE and RANKIN, JJ APPEAL FROM APPELLATE DECREE No 805 of 1920, ESAHAKUDDIN LASKAR and others, Defendants-Appellants v KAJEM SHEIKH and others, Plaintiffs-Respondents. The 25th August 1922

Pleading and proof, variance between, when fatal to suit - Nature of the principle

Plaintiffs brought this suit for recovery of possession of land on establishment of title. Plaintiffs' case was that the lands in suit formed a portion of their *jama* and were comprised within the boundaries of their holding and that the southern boundary of their holding was the river Kumar. The Defendants pleaded that the lands in suit were not included within the holding of the Plaintiffs, but were *chur* lands which were settled with the Defendants. The Court of first instance dismissed the suit. Upon appeal the District Judge decreed it. The following portion of his judgment will be found material. "It is contended in appeal that assuming that the lands in suit are accretions formed by alluvion they must be held to form part and parcel of the occupancy *rai-yati* holding of the Plaintiffs, by virtue of the provisions of sec. 4 of Reg. XI of 1825. Decisions quoted in 21 Cal. 233, and 13 C. W. N. 267 are cited. Against this it is contended that Plaintiffs made no such

contention in their plaint, that on the contrary they denied strenuously that the lands are accretions at all and that they are not entitled to have their title established on any such grounds in the present suit. *Prima facie* there is much to be said from the point of view of the Respondents, but the test would appear to be whether Plaintiffs now make any prayer or ask for any relief that was not made or asked for in their plaint, and whether the question is anything but a pure question of law. Now it is perfectly clear that the relief sought for by the Plaintiff is the same, i.e., the establishment of their title and the recovery of possession. Similarly it was not contended for the Respondents that they would be in a position to adduce any evidence, which would render this new contention of the Plaintiffs nugatory. A reference to the Commissioners' map will show that the plaint lands can be accretions to the *jama* except that of the Plaintiffs. Both sides admit the same *malik*. There is therefore no question of dispute between two estates as to the ownership of the alluvial lands. The matter is therefore purely one of law. The accretions were annexed to the Plaintiffs' holding and are to be considered as part and parcel of that holding."

Defendants in second appeal contended that as the Plaintiffs never claimed the lands as accretions formed by alluvion, the lower Appellate Court erred in law in allowing the Plaintiffs to make out entirely a new case not made in the plaint, and in holding that the lands in suit were to be treated a part and parcel of Plaintiffs' holding.

Held—That the Plaintiffs were entitled to a decree though not on proof that the lands in suit lay within the original boundaries, but on proof that the river had receded and the land which had emerged accreted to the Plaintiffs' holding, and the decree of the lower Appellate Court was affirmed.

There is no universal rule that every variance between pleading and proof is fatal. In applying the principle the whole of the circumstances must be taken into account, and the question is in ultimate analysis one of circumstances and not of law.

It will not be proper to decide against the Plaintiffs on a view which may be obviated by an amendment of the pleadings in a case where the parties have been allowed to go to proof. 20 C. W. N. 297 at p. 303 and L. R. 42 I A. 103 at p. 108 referred to.

Maulavi A. K. Farul Huq for the Appellants.

Babu Kshettra Mohan Ghosh for the Respondents.

H. C. S.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION Before SANDERSON, C J and RICHARDSON, J. M. A No 328 of 1920 RANI SYAMA SUNDARI DEVI v SHREE RAJ GOPAL ACHARYA GOSSAMI The 27th July 1922.

Limitation—Sec 48 of Civil Procedure Code—Extension of time by compromise.

On the 14th December 1905 the Appellant obtained a money decree against the predecessor in interest of the Respondent. On the 30th September 1907 an application for execution was presented, which was dismissed for default. In the beginning of 1910 another application for execution was presented. In the course of this execution a *solenama* was filed by the parties on the 30th June 1911, which provided for the payment of the decretal amount in seven annual instalments, that in case the instalments were regularly paid the decree-holder would not be able to execute the decree, but on failure to pay any of the instalments the balance would become due and the decree-holder would be able to realise it by executing the decree of the 14th December 1905. The *solenama* was filed in the executing Court, which recorded on it the following order: "Filed, the parties have come to terms, the execution case is dismissed." This order was made on the 1st July 1911. The judgment-debtor paid six instalments but refused to pay the last instalment, whereupon on the 16th September 1919 the decree-holder applied for execution. The judgment-debtor contended that the application was barred under sec 48 of the Code of Civil Procedure. The trial Court upheld the said objection and dismissed the application. The decree-holder preferred an appeal to the High Court.

Babus Ram Chunder Mozumder and Rupendra Coomar Mitter for the Appellant.—There was a suspension of limitation from July 1911 to March 1918. The decree-holder could not have executed the decree during that period as there was no default up to then. (See *Maharaja Sir Rameswara Prasad Sing v. Homeshwar Prasad Sing* L. R. 48 I. A. 17: s. c. 33 C. L. J 109). The compromise

effected in 1911 has the force of a decree. It can be therefore executed (Sec 1. I. R. 20 Cal 20, 24 W. R. 193, 21 W. R. 310; 12 W. R. 71; L. R. 5 P. C. 516).

D. Dwarka Nath Mitter and Babu Harendra Krishna Saradikary for the Respondent were not called upon.

Held—That an application for execution of the decree was barred under sec 48 of the Code of Civil Procedure

S. C. C.

Appeal dismissed.

CRIMINAL REVISIONAL JURISDICTION Before NEWBOULD and SUHRAWARDY, JJ. REV No 921 of 1922 SITA NATH MUCHI and ors, Accused, Petitioners v. THE KING-EMPEROR The 22nd December 1922.

Criminal Procedure Code (Act V of 1898), secs 121 and 367—Appellate judgment, contents of—Applicability to cases under secs 110 and 118, Cr P C.

This was a Rule against an order of Mr H G Blomfield, District Magistrate of Nadia, dated the 16th August 1922 dismissing the appeal preferred by the Petitioners against an order of Mr D M Sen, Sub-Divisional Magistrate of Meherpur, dated the 30th June 1922, directing the Petitioners under sec. 118, Cr P C to execute bonds of Rs. 200 each with two sureties, each for Rs 200 to be of good behaviour for one year. In default of execution of such bonds, to suffer rigorous imprisonment each for one year under sec 123, Cr P C.

The judgment of the District Magistrate on appeal was as follows:—"I have gone through the record and the careful judgment of the trying Magistrate, and I say at once that I find no reason whatever to interfere with his decision which seems to be well-considered and just and in fact the only possible one. There is a mass of good evidence against all five accused which I have taken the trouble to verify more specially in the case of Akul Sheikh whose association with the four Hindus might seem *prima facie* unnatural and open to question. There is ample evidence against him also born of general repute and of actual participation in a large number of thefts and burglaries in the neighbourhood. The arguments urged and the rulings quoted by the learned pleader for the defence are the veriest *crambe repetita* of defence speeches in sec. 110, Cr. P. C. cases. Moreover they were ably answered by the Court Inspector who appeared on behalf of the

Crown. I uphold the order of the trying Magistrate and dismiss the appeal."

Babu Mrityunjay Chattopadhyay for the Petitioners.—The judgment of the Court of appeal below is not in accordance with law inasmuch as it contravenes the provisions of sec 121 read with sec. 367 of the Criminal Procedure Code. The learned District Magistrate in his explanation says that secs. 121 and 367, Cr. P. C. are not applicable to cases under secs. 110 and 118, Cr. P. C. With due respect, I submit that he is entirely wrong in that view.

No one appeared to show cause.

Held—That secs. 121 and 367 applied to judgments in cases under secs. 110 and 118 of the Cr. P. C. and that the judgment in this case was not in accordance with law.

S. C. C. *Rule made absolute;*
Appeal directed to be re-heard.

CRIMINAL REVISIONAL JURISDICTION Before NEWBOLD and SCHRWARDY, JJ. CRIMINAL REVISION No 672 OF 1922 SYED SADEK REZA, second party, Petitioner, v. SACHINDRA NATH ROY and others, first party, Opposite Party. The 21st November 1922.

Criminal Procedure Code Act V of 1898), secs 115 and 350—Finding of possession under the Survey Act and in record-of-rights under Bengal Tenancy Act, value of, if binding on the Magistrate, or only piece of evidence—Order based on evidence partly recorded by another Magistrate and partly by himself, legality of—Sec 350, proviso (a), if applies to 145 proceeding

This Rule was directed against an order under sec 145, Cr. P. C., declaring the 1st party to be in possession of certain *chui* land. The Petitioner was a member of the second party, and it was contended on his behalf that the Magistrate had no jurisdiction to go behind the orders passed in his favour both under the Survey Act and under the Bengal Tenancy Act and that these orders were binding on the Magistrate and he was bound to hold that after the decision in the proceeding under the Survey Act, the second party were in possession. There was a case of boundary dispute under sec 41 of the Survey Act between the first party Sachindra Nath Roy and others and the second party Syed Sadek Reza and others, and it was decided in favour of the

second party in June 1918. The settlement record-of-rights, finally published in August 1918, also shewed that the land covered by the proceedings were recorded to be in possession of the second party. The second party relied upon these and it was contended that the aforesaid decision under the Survey Act had the force of a Civil Court decree and the Magistrate had no jurisdiction to go behind it.

The present 145 proceedings were started on the 26th December 1920. The Magistrate in considering the effect of the decision of the boundary dispute case held "The case was decided on 2nd June 1918. The disturbance is said to have taken place in December 1920. There was a long interval between the decision and the cause of action in this case, so the question of possession should be entered into and that decision cannot be relied upon without investigation."

Another point was taken by the Petitioner as to the Magistrate's jurisdiction and this was based on sec 350, Cr. P. C. The Magistrate, who passed the order under sec 145, Cr. P. C., did not himself record the whole of the evidence. He based his decision partly on the evidence recorded by another Magistrate before whom the proceedings were commenced.

Held—That the orders relied on by the second party were not binding on the Magistrate, and he had jurisdiction to consider the evidence before him and come to a finding on the question of possession as he had done.

The finding of the Magistrate that the first party were now in possession was in itself a finding of change of relationship since the decision under the Survey Act. The Magistrate's order could not be said to have been made without jurisdiction because he had not expressly stated that the presumption arising from this entry had been rebutted. His finding was in fact a finding that the presumption had been rebutted.

Held also—That the application of proviso (a) to sec 350, Cr. P. C., is limited to criminal trial and does not extend to a proceeding under sec 145 Cr. P. C. The said proviso did not compel the Magistrate to start the enquiry *de novo*.

Babus Manmatha Nath Mukherji and Hemendra Kumar Das for the Petitioner.

Babus Dasarathi Sanyal, Narendra Kumar Basu, Anilendra Nath Roy Chowdhury and Prina Nath Dutt for the Opposite Party.

H. C. S.

Rule discharged.

THE Calcutta Weekly Notes.

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MONDAY, FEBRUARY 5, 1923.

[No. 12.]

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REPORTS (See Index.)

The Bengal Retrenchment Committee's Report and the Judicial Administration of Bengal.

We have received a number of communications from members of the legal profession upon the recommendations of the Bengal Retrenchment Committee regarding the judicial administration of the province. Most of them contain valuable criticisms of these recommendations, and are offered with first-hand knowledge of the subject. These recommendations, so far as we can judge from the language of the communications we have received upon the subject, have not only created dissatisfaction but even aroused indignation. As, however, we consider it desirable that the recommendations of the Committee should be discussed on their merits soberly and with restraint, we refrain from publishing these letters *in extenso*. The substance of the criticisms contained in these letters appears, however, to be both sound and reasonable and as in general they accord with our own views on the subject, we think, we should present them for consideration to our readers.

These adverse criticisms are in the main directed against para 112 of the Report, which runs thus: "A further matter of general complaint which we feel obliged to refer to is the dilatoriness of the Courts (meaning thereby the Munsifs' Courts). We have been told they spend insufficient time in the actual hearing of suits, and too much time in chambers. We understand that it is now permissible for an officer to write all his judgments in Court hours, and, if this is so, it must mean a serious encroachment on the time he can

devote to the hearing of cases. It would be interesting to have a record of the hours of attendance at Court and of the period actually spent on the Bench. We are satisfied there is need for speeding up work and for more supervision. The efficient disposal of cases implies administration and supervision, as well as judicial knowledge and judgment. If it is correct that the number of judicial officers required is determined mainly by the amount of pending work, we think it overlooks the importance of the sufficiency of the work done. The evidence we have received certainly points to the fact that insufficient work is done, and when, in consequence, arrears accumulate, extra officers are appointed to deal with them. Economy and public convenience require that cases should be disposed of with expedition as well as ability."

The charge against the Munsifs that they spend too much time in chambers and too little on the Bench and that the time which should be devoted to the hearing of cases is seriously encroached upon in writing judgments is categorically denied, and from the enquiries that we have made appears to be without foundation. These officers have to perform a considerable amount of administrative work which can be transacted conveniently only in chambers. If the suggestion is that Munsifs spend more time in chambers than is strictly required for this kind of work or that they spend more time proportionately on this kind of work than on hearing cases in Court, we doubt very much if a single witness will come forward to support it. As to writing judgments in Court, a great many orders must be passed immediately and reasons must be given for passing them, and embodied in the orders themselves. Munsifs are not provided with Bench clerks to take down orders from dictation and orders which must be passed immediately must also be written down immediately. In short cases, it is always an advantage to deliver the judgment immediately if important details are not to slip out of the Judge's mind, and reserving too many matters for consideration will inevitably lead to confusion and inferior work.

It must always be left to the discretion of the individual officer as to what orders he should pass immediately and what others should be reserved for consideration. If the idea is that from 11 A.M. to 5 P.M. the Munsif shall sit tight on the bench only listening, and by way of diversion taking notes, and then proceed at the end of the day to write out all his judgments and orders in candle light, it, absolutely is self-evident. To conform to the notion of a Munsif's duty, it would be incumbent upon the officer to carry heaps of records home at the end of the day year in and year out, assuming it to be a reasonable demand, for the salary he is paid, that he should not give himself any rest or recreation even out of Court, after the day's grinding mental strain in attending to evidence and arguments in Court. Both these charges, it is justly urged, owe their genesis to a total failure on the part of the members of the Committee or their informants to appreciate the nature of the functions performed by these officers. It is a fact moreover that very little time is in reality spent by Munsifs in chambers and very few judgments strictly so called are written during Court hours and judgments in important cases are as a rule written out of Court and on holidays.

"The evidence we have received certainly points to the fact that insufficient work is done." Since the Committee say so, we must presume that they had some sort of evidence before them. But this evidence has not been published. It might, for aught one knows, have been malicious and interested gossip. Our information, on the other hand, as is borne out by the complaints we have repeatedly voiced in these columns, is that the supervising authority which deals out praise and blame and awards or withholds promotions for the work done by Judicial Officers in the mofussil lays inordinate stress upon the quantity of output totally ignoring the quality. The suggestion that "efficient disposal of cases" suffers through want of supervision is by no means the least amazing statement made in the course of this single paragraph. Are the members of the Committee aware of the real cause of the phenomenal advance in the number of cases disposed of by the Munsifs from 1912 to 1921, the figures whereof the Committee quote in para. 106 of the Report? It was due to "supervision" and "supervision" too of that questionable kind which mistakes haste

for expedition and the lack of which the Committee lament. The comments and communications which appeared in the 24th volume of this journal (*vide pp. cxxi, cxxix, cxxviii, cxxxi*) will throw instructive light upon this matter. The alleged insufficiency of work done and absence of supervision to which it is attributed are a myth.

The Committee apparently never cared to enquire as to the conditions under which the requisition of an extra officer to dispose of accumulations is made. The requisition, if we are correctly informed, is invariably made by the District Judge who has to submit a statement of the work done by the existing staff with a certificate that it is working to its full capacity and the recommendation is finally made to the High Court after the closest scrutiny. It seems, to say the least, extraordinary that a body of officers, proverbially the most hard-worked, should come in for such uninformed and uncritical castigation at the hands of a Committee constituted as the Bengal Retrenchment Committee was, after they had successfully run the gauntlet of such highly competent commissions of enquiry as the Public Services Commission and the Greaves Committee.

"Munsifs, by general consent, are being paid more than an economic wage," say the Committee in para. 397. This "general consent" needs definition. It probably means the consent of those who think with the Committee that Munsifs shirk work in Court and skulk in chambers. "Give a dog a bad name and hang him" is a well-known adage. But if you are going to enhance the pecuniary jurisdiction of the Munsif in order to put upon him a large part of the work which now occupies the time and energies of Subordinate Judges (as the Committee have proposed to do) then it does seem in the highest degree ungracious, if instead of paying him some part of a Sub-Judge's salary, you proceed to cut down the salary he is now getting, on the plea that for the (Munsif's) work he is now doing he is getting more than an economic wage.

But the statement in the Committee's recommendations concerning judicial administration which has chiefly arrested attention is where they say that they would prefer Deputy Magistrates to Sub-Judges to do Assistant Sessions Judge's work "as the latter by train-

ing are more disposed to decide on the balance of evidence rather than on the probabilities." (para. 102). Deputy Magistrates would thank the Committee for the compliment (for some compliment must be implied in the preference) more heartily if they knew exactly what this sentence is intended to convey. Are Deputy Magistrates credited by the Committee with a sort of heaven-sent intuition which enables them to get at the truth without reference to the evidence? Or does it mean that Sub-Judges are by fate specially condemned to a sort of constitutional inability to see through perjured testimony? Or is the Committee out to revive that penchant for "*assul hal*" which went so materially to the making up of the covenanted *ma-bap* of the District of a generation ago? If, on the other hand, the suggestion is that the training which the Deputy Magistrates receive teaches them in some mysterious manner to sift evidence by quality, whereas the training which Sub-Judges receive somehow makes them lose sight of this fundamental principle of weighing evidence, and that the latter therefore are habitually left to weigh evidence by quantity alone, it ought not to have found a place in a report which is expected to be taken seriously, for we cannot believe that anybody with any pretensions to judgment will attach the slightest importance to it.

Correspondence.

To

THE EDITOR, 'CALCUTTA WEEKLY NOTES.'
SIR,

Being encouraged by your favourable comments on my suggestions in the issue dated 1st January 1923 of your esteemed journal, and also being pressed by several of my friends, I was tempted to prepare the details of a scheme for combining civil and criminal works in Mofussil stations which would effect a saving in the number of officers employed on the lines of my suggestions, for publication in your most esteemed journal, but on further considerations I postpone the effort. The first of these considerations is that the space in your journal may not admit of the publication of any detailed scheme and the next consideration is that the readers of your journal are too intelligent to require any further assistance to understand the principles of my suggestions. As for the Government, they need only accept the principles, the pre-

paration of details would present no difficulties. An outsider is at a disadvantage in preparing an accurate scheme according to his idea, for some figures are always necessary to prepare details, and he cannot get access to those figures except with the permission and help of Government. However, a single illustration will explain my suggestion on para. 18 of the report of the Greaves Committee in my letter published in your journal dated 1st January 1923. We shall begin where the Committee have begun.

In Proppur (Bakarganj) there are three Munsifs and according to the Table of the Report there is criminal work for 1½ officers. Similarly in Patuakhali (Bakarganj) there are four Munsifs and there is criminal work for 1½ officers. As a matter of fact four Munsifs are not permanently employed in Patuakhali and one of them is sent on deputation elsewhere and three Munsifs are not sufficient in Proppur and an additional Munsif is occasionally required at that station. So, if the Government accept my suggestions, they have simply to employ four Munsifs in each of the stations, Proppur and Patuakhali, when it will be seen that by the addition of ½th criminal work in Proppur the fourth Munsif may be permanently necessary, also owing to the addition of half criminal work at Patuakhali the fourth Munsif of that station need not be deputed elsewhere. Moreover, if the principle be accepted there can never be extra cost incurred on this behalf. For if it be found that the additional criminal work of a station combined with the additional civil work of that station exceeds the work of one full officer, it will be expedient to employ a Munsif to work for a portion of the year to clear off the arrears of civil work, the criminal work being never allowed to accumulate by special orders of the Honorable High Court.

Now the situation has, to some extent, been altered by the publication of the Report of the Bengal Retrenchment Committee and if the Government accept the recommendations of that report to increase the powers of Munsifs to Rs. 2,000 and even to Rs. 5,000, increase in the number of Munsifs will be inevitable with a corresponding decrease in Subordinate Judges. Any reduction in their numbers is unthinkable as has been ably demonstrated in various contributions published in your esteemed journal (*vide* 21 C W N. pp. 121n, 129n 133n 163n) commencing from the editorial on "Sweating of the Subordinate Judi-

ciary and its Evil Effects " Thus there will be fresh distribution of officers in each station and the Government have got another opportunity to combine additional civil and criminal work of a station I have carefully avoided any proposal to vest Deputy Magistrates with civil powers as such a proposal has nowhere been recommended by the Committees, and would certainly be viewed as retrograde.

In para. 94 of the Report of the Bengal Retrenchment Committee, we see that the Committee waived the possibility of separation of judicial and executive functions as outside the scope of their deliberations and so we do not find in that report any proposal for the abolition of the posts of Superintendents of Police.

However this proposal arises directly from the separation of judicial and executive functions and the country should urge the District Officers to take up the control of the Police when the District Boards, the Municipalities, and the entire criminal work have been taken away from their hands. By the elimination of this useless burden only, the savings will exceed any additional expenditure for the much-needed reform.

Yours truly,
CITIZEN.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

ORDINARY ORIGINAL CIVIL JURISDICTION. Before PAGE, J. SUIT No 2016 OF 1920. JADAV CHANDRA MITTER and ors. v. ROMESH CHANDRA BOSE. The 29th January 1920.

Rules and Orders of the High Court (Original Side), Chap. XXVI, rr. 9, 32 and 72 - Payment by attorney of excess fees to counsel, if recoverable, when disallowed by Taxing Officer and no review of his decision by Court.

The Plaintiffs instituted this suit to recover a sum of Rs. 1,082 from the Defendant, a solicitor of this Court, who had acted for the Plaintiffs in another suit and had been paid by them various sums of money for the purpose of prosecuting that suit. The Defendant admitted liability for a sum of Rs. 1,724, but as regards the balance of the claim, pleaded that the same was irrecoverable, as having been paid by him to counsel engaged in the other suit under instructions from the Plaintiffs. It was found in evidence that the Defendant had paid

the whole of the sum to counsel with the knowledge and approval of the Plaintiffs though without their written authority; that the fees paid were in excess of the scale of fees laid down in r. 32 of the taxation rules; that the whole of the excess fees paid had been disallowed by the Taxing Officer; and that there was no application by the Defendant to any judge for a review of the decision of the Taxing Officer:

Held—That the solicitor being an officer of the Court was entitled to retain whatever monies the rules of the Court allowed him to retain, but that he had no right to retain any sum disallowed by the Taxing Officer.

P. K. C.

Suit decided

CRIMINAL REVISIONAL JURISDICTION. Before NEWBOLD and SCHRAWARDY, JJ. CRIMINAL REVISION No 1005 OF 1922. JAGAT CHANDRA GHOSH, Accused, Petitioner v. KING-EMPEROR. The 4th January 1923.

Legal Practitioners Act (XIII of 1879), sec. 36 -Touts—Order by Fourth Presidency Magistrate including the name of a person in the list of touts for Calcutta Police Court, Northern Division, if legal—Jurisdiction

This Rule was directed against an order, dated the 4th July 1922 passed by Mr. J. N. Sirkar, Fourth Presidency Magistrate, Calcutta, under sec. 36 of the Legal Practitioners Act, including the Petitioner's name in a list of touts. By this order the Petitioner's name was added to the list of touts for the Court at Jorabagan (Calcutta Police Court, Northern Division). It is to be noted that the Court at Jorabagan is subordinate to the Chief Presidency Magistrate and consists of several Courts, presided over by several Presidency Magistrates, one of whom was the Fourth Presidency Magistrate, Mr. J. N. Sirkar, who passed the order complained of.

Held—That the order was bad as having been made without jurisdiction, inasmuch as the powers of a Presidency Magistrate was limited by sec. 36 of the Legal Practitioners Act to his own Court and the Courts subordinate thereto.

The Rule was made absolute, and the order of the Fourth Presidency Magistrate directing that the Petitioner's name be included in the list of touts for the Jorabagan Court was set aside.

Babu Santosh Kumar Bose for the Petitioner.
H. C. S. *Rule made absolute.*

THE Calcutta Weekly Notes.

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[No. 18.]

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Habeas Corpus.

Suppose a man is kept under detention outside the Presidency Towns, what remedy does the law provide for an immediate inquiry into the circumstances of his detention and for his immediate release, if the detention is found to be illegal? In the well-known case of *Amir Khan*, Norman, J., held "that the Supreme Court had power to issue writs of *habeas corpus* to persons in the Mofussil and that the same power is continued to the High Court" [6 Bengal Law Reports, p 392 (1870)] Under sec 491 of the Criminal Procedure Code, the High Courts are empowered to issue writs in the nature of *habeas corpus* to persons within the limits of their respective Ordinary Original Civil Jurisdiction. It is a doubtful point whether the legislature, by the use of the words "within the limits of its Ordinary Original Civil Jurisdiction," has by implication abolished the common law jurisdiction of the High Court to issue writs in the mofussil. Be that as it may, the present Code of Criminal Procedure does not expressly give any Court power to issue writs of *habeas corpus* outside the Presidency Towns.

Sec. 100 of the Criminal Procedure Code provides: "If any Presidency Magistrate, Magistrate of the first class or Sub-Divisional Magistrate has reason to believe that any per-

son is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant . . . and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seem proper." It may be said that this section provides in a different form the same remedy as sec 491. But a comparison of the two sections will show that sec 100 is not so wide in its operation as the other section. Besides, the discretion to issue a search warrant is left to an executive officer. And lastly, the applicant has to satisfy the Court that the detention is under such circumstances that it amounts to an offence—a burden by no means easy to discharge, having regard to the fact that in most cases the applicant is not likely to have any first-hand information as to the circumstances of the detention, particularly in those cases where the detention is by a police officer.

Sec. 61 of the same Code provides that "no police officer shall detain in custody a person without warrant for a longer period than under all the circumstances of the case is reasonable and such a period shall not . . . exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court." But suppose this salutary provision of law is not observed, that does not vitiate the trial nor does it give jurisdiction to a Magistrate to call upon the police officer to produce the prisoner. For not observing the law, he may be departmentally punished, or he may be liable to be prosecuted in a Criminal Court or sued in a Civil Court for damages. But it is obvious that these remedies, though they may exercise some pressure upon him to produce the prisoner before a Magistrate within

reasonable time, are no substitute for a writ in the nature of *habeas corpus*.

For these reasons, we welcome the provision in the Racial Distinctions Bill empowering High Courts to issue writs in the nature of *habeas corpus* to all places within their Appellate Criminal Jurisdiction. During the early days of the East India Company, only those who resided in the Company's settlements (which in course of time have grown up into our Presidency Towns) and British subjects outside the settlements were governed by the common law and they alone could claim the writ of *habeas corpus* as a matter of right. Since the transference of the Government of the whole country to the Crown, there exists no reason for perpetuating this distinction between the Mofussil and the Presidency Towns.

The Bengal Retrenchment Committee's Report and the Judicial Administration of the Province.

We are receiving more criticisms on the recommendations of the Bengal Retrenchment Committee with reference to the judicial administration of the Province. We do not consider it necessary to publish all of them *in extenso*, but some of the points raised appear to us to be of sufficient importance to merit discussion in our editorial columns.

Our attention has been drawn to para. 110 of the report of the Committee which states: "The executive holidays for the year 1923 amount to 91 days including Sundays, leaving 274 working days. We think this number of holidays is excessive, but the Civil Courts enjoy 22 holidays in addition and work for only 252 days. We have recommended elsewhere that the executive holidays be reduced by 10, and we consider there is no real justification for granting the Civil Courts a greater number of holidays than the executive side. By this proposal the Civil Courts would work 32 days more in a year, and their out-turn of work would be increased by more than 12 days." In making this recommendation for equalising the number of holidays for both branches of the Provincial Service, the members of the Committee obviously overlooked the fact that in consideration of the

larger number of holidays enjoyed by judicial officers, they are not, under the existing rules, entitled to leave on full pay. If this recommendation of the Committee should be accepted, judicial officers will have to be granted leave on full pay on the same terms as executive officers. Applications for such leave will be made at all times of the year; and new officers will have to be found to carry on the work of officers on leave. The "out-turn" will certainly improve but at the cost of increasing the cadre of the service—and this certainly will not make for retrenchment. The recommendation in para. 110 seems to us to be extremely superficial and unsound. In this connection may we inquire if it is the rule for executive officers to have a day off on last Saturdays? If so, then executive officers have about 12 more holidays to their credit.

With reference to the recommendation in para. 397 of the Report for reducing the pay of Munsifs, the communication of "Fairplay" published in another column gives figures which will be found instructive. In our last issue, we alluded to the unfairness of piling up Sub-Judges' work on Munsifs with a view to reducing the number of Sub-Judges and at the same time reducing the scales of pay of the Munsifs. It must be obvious to the most superficial that this recommendation means to Munsifs stoppage of promotion as well as reduction of pay, though the work will be heavier and more responsible. Upon this particular recommendation, the point of view of the litigant public should not be lost sight of. They are now being made to pay not merely for the maintenance of the machinery of law Courts but towards the working expenses of the general administration. If this be so, then so far as the manning and equipment of the judicial administration are concerned, the litigant public have the right to insist that they get good value for their money and that the judicial administration be not pinched and starved and third rate service meted out to them in order that a large surplus may be left for the general purposes of administration.

One correspondent writes: "The Committee recommend that the powers of Munsifs be raised to Rs. 5,000 and their maximum pay be reduced to Rs. 600. Already an officer cannot become a Sub-Judge before the age of

50, and if the powers of Munsifs be increased to Rs. 5,000, nearly half the present number of Sub-Judges will remain Munsifs in consequence, and so an officer would be a Munsif up to the age of 52 or 53 at a pay of Rs. 600. At that age the members of the executive service would be drawing Rs. 850 to Rs. 1,000, but the Committee have nothing to suggest as regards them." "From the figures given in the report of the Public Services Commission," the same correspondent goes on, "it will appear that the High Court confirmed on appeal 83 per cent of the decisions of Sub-Judges compared with 74 per cent of the decisions of District Judges." Does this, one feels disposed to ask, point to special incapacity on the part of these officers to decide cases on evidence?

Correspondence.

PAY OF MUNSIFS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES"
SIR,

There is an impression abroad that Munsifs are now getting more than Deputy Magistrates. The following figures, which have been compiled from the civil list corrected up to 1st July 1922 conclusively demonstrate how erroneous this impression is and it should, for the sake of justice to a hard-working class of public servants, be removed.

Average pay which Munsifs drew on		Average pay which Deputy Magistrates (who have not been promoted from the ranks of Sub-Deputy Magistrates) drew on	
	1-7-22.		1-7-22.
Officers in their 33rd year	Rs. 350		Rs. 450
" " 34th year	" 368		" 462
" " 35th year	" 420*		" 503
" " 36th year	" 397		" 560
" " 37th year	" 453		" 550
" " 38th year	" 467		" 569
" " 39th year	" 510		" 600
" " 40th year	" 530		" 631
" " 41st year	" 547		" 625
" " 42nd year	" 586		" 658
" " 43rd year	" 615		" 650
" " 44th year	" 635		" 700
" " 45th year	" 663		" 733
" " 46th year	" 700		" 850

* This figure is due to an officer having been appointed Munsif at an unusually early age.

This table shows that Munsifs in their 33rd to 46th years are drawing on an average Rs. 93 per mensem less than Deputy Magistrates of these ages. But in the case of I. C. S. officers, those who are on the judicial side are allowed Rs. 150 per mensem more than those on the executive side as judicial allowance. The reasons which justify this judicial allowance in the case of I. C. S. officers should also justify Munsifs getting more than Deputy Magistrates, but though they are getting less there has strangely been an unjust cutery against them.

FAIRPLAY.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION Before CHATTERJEE AND CUMING, JJ. S. A. No. 2677 OF 1920 MAHENDRA NATH BOSE and ors., Appellants v ABINASH CHANDRA BOSE, Respondent. The 26th January 1923

Suit for cesses—Whether maintainable only against some heirs of original tenants—Whether such suit is one for rent or for damages—Or 2, r 2, C. P. C., whether a bar.

One Kshantakali who had a life-interest in some lands made a permanent *mourasi* settlement of five annas share of zemindari right with her brothers, Bidhubhushan, Matilal and Ramlal. The then presumptive reversioners, Brojogopal and Aghorenath, joined in the settlement. Besides rent, the three brothers agreed to pay revenue and cesses. Thereafter Brojogopal died in 1313 B. S. and Kshantakali in 1323 B. S. Bidhubhushan, Matilal and Ramlal also died leaving behind them two, two and six heirs respectively. These heirs of the original tenants failed to pay cesses which were realised by the Government from Aghorenath by certificate. Aghorenath thereupon sued these ten heirs of the original tenants for the recovery of the amount of cesses which he had to pay by reason of their default. The defence *inter alia* was, that the suit was not maintainable by Aghorenath alone, Brojogopal's heir being a neces-

sary party : that the suit was barred by Or. 2, r. 2 of the Civil Procedure Code, inasmuch as cess was rent and the Plaintiff in a previous suit for rent omitted to include the claim for cess.

The Court of first instance decreed the Plaintiff's suit against all the Defendants. On appeal it was contended that one of the two heirs of Matilal was not properly represented and two of the ten heirs of Ramlal were not properly served with notices, and the suit was not maintainable against some of the heirs of the original tenants and further that the suit was barred by Or. 2, r. 2, C. P. C. The lower Appellate Court held that the decree could not stand against the three Defendants not properly represented or served, and decreed the Plaintiff's suit as against the remaining seven Defendants, who preferred this Second Appeal to the High Court.

Babu Priyamohan Chatterjee appeared for the Appellants.

Babu Mrityunay Chattopadhyay appeared for the Respondent.

Held—(1) That Brojogopal had only a contingent interest in the property, and his heir was not a necessary party.

(2) That the liability of the original tenants was joint and several and the suit could be brought against any one of the original contractors. *Krishnadas v. Kalitara*, 22 C. W. N 289, *Beradar Singh v. Bacha Mahato*, 5 Pat L. J. 32, followed. *Kasikinkar v. Satyendra*, 12 C. L. J. 642, distinguished. The Plaintiff was therefore entitled to a full money decree against the heirs of Bidhubhushan alone.

(3) That the suit for recovery of cesses was not one for rent but for damages and was consequently not barred by Or. 2, r. 2, C. P. C.

S. C. C. Decree of the lower Appellate Court varied

The properties in suit belonged to one Lal mohon which was inherited by his widow Joy mani. She died in 1911. On the 15th June 1918 Defendants Nos. 2 to 6 claiming to be entitled to the properties as reversioners of Lal mohon sold the properties to the Plaintiff who thereupon sued the Defendant No. 1 for recovery of possession. The defence was two-fold, viz, (1) that the Defendants Nos. 2 to 6 were not reversioners of Lal mohon, and (2) that the conveyance by Defendants Nos. 2 to 6 to the Plaintiff was without consideration and was not a *bonâ fide* transaction. The Defendants Nos. 2 to 6 filed a written statement admitting the receipt of consideration and stating that the transaction was a *bonâ fide* one. The Defendant No. 4 also deposed to the same effect. The first Court found that the Defendants Nos. 2 to 6 were not reversioners and that the conveyance was without consideration and not a *bonâ fide* transaction. On appeal the learned Additional District Judge held that the Defendants Nos. 2 to 6 were the reversioners of Lal mohon but did not go into the question of the genuineness of the conveyance. A decree was passed by him in favour of the Plaintiff. The Defendants on appeal to this Court contended that there ought to be a remand as the lower Appellate Court left the aforesaid question undetermined:

Held—That in view of the decision of *Lala Acharam v. Raja Kazim Hossain*, 32 I. A. 113, 27 All. 271, the question as to the *bonâ fides* and validity of the conveyance was one between the vendor and the vendee only which could not be raised by a third party.

Dr. D. N. Mitter and Babu Bhupendra K. Ghosh for the Appellant.

Babu Rupendra K. Mitter for the Respondents.

2 S. C. C.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION, Before WALMSLEY AND B. B. GHOSE, JJ. S. A. No. 2802 OF 1920 ANADIPADA DAS. Defendant, Appellant v. RHUBAN MOHAN MAITI, and ors, Plaintiffs, Respondents. The 15th January 1923.

Vendor and vendee—Question as to the bonâ fides and validity of conveyance, if can be raised by a third party.

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The Racial Distinctions Bill.

The distinctions under the Criminal Procedure Code in favour of Europeans have all along been condemned by Indian publicists as a serious defect in the administration of criminal justice in this country. To remove these distinctions, on the 15th of September 1922, the Legislative Assembly adopted a resolution recommending to the Government of India the appointment of a committee to consider what amendments should be made in the Criminal Procedure Code with reference to those provisions which differentiate between Indians and Europeans. The recommendation was accepted by the Government who appointed a committee to report upon the modifications of law which they recommend should be adopted. The committee which included judicial authorities and representatives of the Bar and of the interests mainly affected submitted their Report in July 1922.

The proposals of the committee, as our readers are aware, represent a compromise between the interests mainly affected. They recognise that cases do arise in which racial considerations are involved. For these cases they propose the adoption of a special procedure for the trial of offences outside the Presidency Towns and with regard to the existing distinctions they propose that the privileges enjoyed by Europeans should either be accorded to Indians or that they should be taken away.

The Racial Distinctions Bill which is in-

tended "to provide for the removal of certain existing discriminations between European British subjects and Indians in criminal trials and proceedings" abolishes some of the privileges of a minor character which Europeans enjoy under the existing law, but it retains their most important privilege, viz., that of being tried by a mixed jury and it seeks to satisfy Indian public opinion by extending that privilege to Indians. Cl. 13 of the Bill provides as follows:—For sec. 275 of the said Code the following section shall be substituted, namely:

(1) In a trial by jury before the High Court or Court of Session of a person who has been found to be a European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist in the case of a European British subject, of persons who are Europeans or Americans and in the case of an Indian British subject, of Indians.

The proposed amendment invests Indians and Europeans with the right of being tried by a jury of which the majority will consist of members of their own community. Europeans will no longer boast of special privileges nor will Indians have any reason to complain of differential treatment. But in trying to establish equality before the law, the authors of the proposed amendment have forgotten to consider one very important question. Is it likely to secure the punishment of the guilty and the acquittal of the innocent? Indians when they protest against the right of the European to be tried by a mixed jury do so, not merely because it is in the nature of a special privilege, but also and primarily because the exercise of the right in many cases leads in their opinion, to miscarriage of justice. By extending the privilege to Indians, you do not get rid of the real grievance or its causes; you only multiply it, with this difference that the grievance will cease to be

confined to Indians alone, but will be shared by Europeans as well. For ourselves we think that the change proposed lays down a principle, (though not for the first time), which is capable of doing infinite mischief to the cause of Indian nationality as well as to sound and impartial administration of justice. If an Indian or a European can claim to be tried by a majority of the members of his own community, what prevents a Sikh or a Mahomedan from claiming a similar right? Once the principle is accepted, logically there is no limit to its extension. But then it may be said, if communal representation is permissible in Council Chambers, why not communal justice in our Law Courts?

LONDON NOTES (FROM OUR CORRESPONDENT)

24-1-23

The Hilary sittings of the Privy Council opened yesterday when the greater part of the day was spent in the hearing of petitions. A strong Board had been constituted, presided over by VISCOUNT HALDANE. The other members were LORDS ATKINSON, SUMNER, WREN-BURY and SALVESEN.

Judgment was delivered in the following Indian cases: *Rajani Kanta Pal v Jagamohan Pal* (Bengal) (appeal allowed in part) and *Kumar Naresch Narayan Roy v Secretary of State* (Bengal) (appeal allowed).

Considerable public interest was taken in an application by *Zaghul Pasha*—who was represented by Messrs *Upjohn, K. C.* and *James Wylie*—against an order of the Government of Gibraltar directing his confinement.

Mr *Upjohn* contended that there was a common law right common to all civilised communities which prevented the arbitrary imposition of restrictions on the life and liberty of the subject and urged that the ordinance under which *Zaghul* was said to have been confined was *ultra vires*. The Attorney-General (*Douglas Hoag, K. C.*) and Mr *H. M. Gireen* represented the Crown. The matter was adjourned after argument so that the parties might make enquiries and inform the Court as to the present system of law in Gibraltar.

Special leave to appeal *in forma pauperis* was refused in *Pulla v. The King* (Ceylon).

Mr. J. M. Parikh obtained special leave to appeal to the Privy Council in the case of *Shri Sachidanand Vidya Shankar Bharati Swami v. Sri S. V. Narasimha Bharati Swami* (Madras). The contest was between two claimants to the priesthood of a temple. Leave had been refused by the High Court on the ground that the order passed by them, and from which an appeal was desired, was merely interlocutory. The applicant contended that the order was final and that unless an appeal were allowed he would not in the future be enabled to raise a most material question.

In *Lalit Mohan Singha Roy v King-Emperor*, Messrs *A. M. Dunne, K. C.* and *Kenworthy Brown* applied for special leave to appeal against a conviction for murder. The appellant had twice been acquitted by a jury. The principal ground of complaint was the admission in evidence by the Court of part of a document in which the prisoner confessed the murder to a policeman. Leave was refused.

The list for this term does not appear to contain many cases of substance and it is possible that a supplementary list will be issued. The Indian appeals are 16 in number: 4 each from Bengal and Bombay, 3 from Patna, 2 each from the Punjab and Oudh and 1 from Lower Burma.

G D M

Correspondence.

To.

THE EDITOR, "CALCUTTA WEEKLY NOTES" SIR,

Already so many criticisms have appeared in the press regarding the report of the Retrenchment Committee that one should be loath to make another to add to them. But there are certain matters of so great moment in the report that further examination of them from different points of view will not be out of place. I will limit myself only to the judicial service about which I possess some knowledge.

First of all, I refer to the Committee's recommendation for reduction of the number of Sub-Judges by increasing the jurisdiction of the Munsifs to suits up to the value of Rs 5,000. Here there is a confusion of ideas. What is a Munsif? What is a Sub-Judge?

Do they belong to the same class so that the duties and responsibilities of one may be transferred to the other without altering the classification? We have to look to the Civil Courts Act for the answer. It will be seen from that Act that the Munsifs and Sub-Judges are constitutionally different classes of Officers with different duties and responsibilities, just as District Judges and Sub-Judges are Officers of different classes with different duties and responsibilities. The fact that one class is wholly or partially recruited from another class does not affect the question. The classification is clear and distinct and the boundaries of each class are clearly marked by the specification of its powers. So that he is not a Munsif who exercises the powers specially reserved for the Sub-Judge, and he is not a Sub-Judge who exercises the powers specially reserved for the District Judge. When therefore you invest a Munsif with jurisdiction which, by law, is specially reserved for the Sub-Judge, you really make him a Sub-Judge although you choose to call him by another name. And when this misnomer is meant only to give the Munsif a smaller salary it amounts to a dodge and a mean device to deprive the Munsif of what the law entitles him to claim in consideration of the greater responsibility and more onerous duty devolved upon him by the change. To ask to change the law does not alter the ugly character of the suggestion. Needless to say, that the suggestion, if acted upon, will have a very demoralising effect upon the judicial service as a whole and seriously undermine the very foundation upon which the efficiency of that service has, up to now, been maintained. Give the Munsifs extended jurisdiction, if you will, but treat them as Sub-Judges and give them the higher pay and the higher dignity which they deserve. Do not do anything that will tend to degenerate the service and impair its efficiency ultimately to shatter the confidence which the people have in the business of the Civil Courts. Curiously enough, the Committee recommend reduction of the salary of the Munsifs while recommending extension of their jurisdiction! A very fit reward indeed! It is difficult to understand the mentality of the Committee. If the sole consideration is to be the substitution of more expensive machinery by cheaper agency, why, the entire class of Subordinate Judges may be eliminated by extending the

powers of Munsifs, and by the same process, the District Judges and District Magistrates may also be eliminated by substitution of inferior agencies with enlarged powers. The policy is destructive in its essence.

Now it will be apparent from the above that the Subordinate Judges are a superior and distinct class of Officers not to be confused with the Munsifs nor to be compared with the Deputy Magistrates who stand upon a different constitution. Their status and jurisdiction, continuous, in many respects, with those of the District Judges, entitle them to claim a salary approximating the salary of the District Judges. Although they have got only scant justice so far, the superior character of their status has always been recognised in the shape of higher pay, higher even than that of the executive service which, only lately, was raised to Rs. 1,200 a month in pursuance of the recommendation of the Public Services Commission. But the Retrenchment Committee would have that salary reduced to the ridiculously low sum of Rs. 750 a month, utterly forgetting the principle laid down by the Public Services Commission and approved by them in another part of their report (*vide* p. 128) namely, that the Government will pay its Officers such salary as will "maintain them in such a degree of comfort and dignity as will shield them from temptation and keep them efficient for the term of their services." Apparently the Committee have failed to appreciate the character and importance of the works of the Sub-Judges.

One word more and I have finished. In the matter of appointment of Assistant Sessions Judges the Committee remark that they prefer Deputy Magistrates to Sub-Judges for this work, because, in their opinion, the Sub-Judges "by their training, are more disposed to decide on the balance of evidence rather than on the probabilities." This is an astounding remark. So far as we are aware none of the members of the Committee had ever had any occasion to sit in judgment over the decisions of Sub-Judges or of the Deputy Magistrates either to be able to give an opinion on the point. Neither does it appear from their report that they had any such evidence before them in the course of their enquiry. The Grievances Committee or the High Court, the real arbiters in this matter, never expressed any such opinion. As such it is a private and irresponsible opinion of the mem-

bers of the Retrenchment Committee which should not have found place in their report and posed as a valuable discovery which should guide the Government in making appointments in this respect. Curiously, however, the Committee do not, as they cannot, tell us how the Deputy Magistrates are to decide the intricate civil suits which come up before the Assistant Sessions Judges, the embryo District Judges of the future. That would have enlightened the public.

SYAMA CHARAN UKIL BANERJI,
Late Sub-Judge

Howrah,
The 9th February 1923.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHITTING, J. APPEAL FROM APPELLATE DECREE No 1706 OF 1920. PREM CHAND MANDAL and others, Defendants, Appellants v OFFICIAL TRUSTEE OF BENGAL, of the estate of Manik Lal Seal, Plaintiff, Respondent. The 22nd March 1922.

Rate of rent—Decree by a co-sharer landlord, if evidence—Res judicata

The facts material to this report are these :—

This appeal arose out of a suit for rent. Plaintiff sued the Defendants for rent for the years 1321 to 1324. His case was that he was a co-sharer landlord owning 4 as share, that the jama for the 16 as share was Rs. 114 odd and therefore he was entitled to recover for the four years in suit Rs. 121-12-2½ gds. The defence, *inter alia*, was that the rent in the 16 as was Rs. 66 odd. The Court of first instance decreed the suit in full. On appeal, the Subordinate Judge of Midnapur gave a decree to the Plaintiff at the rate of Rs. 19 odd with cesses, etc.

It appeared that Hari Mohan Dalal, a co-sharer landlord, brought a suit for rent for his four annas share, which was decreed on the 28th August 1919, and it was decided in that suit that the rate of rent in the 16 annas was Rs. 66. In that suit the present Plaintiff was

made a *pro forma* Defendant. It may be pointed out that the present suit was decided on the 22nd June 1918, that is, more than a year before the other suit was decided. In the present suit the other co-sharer landlord was not made a party.

On appeal by the Defendants it was contended that the judgment in the other suit operated as *res judicata* and was admissible in evidence as to the rate of rent.

His Lordship overruled the contentions and held as follows

"The present suit was decided on the 22nd June 1918, i.e., more than a year before the other suit was decided. Obviously therefore the principle of *res judicata* does not apply.

"But the Appellants contend that the judgment in the other suit would be admissible in evidence. It has been held in a series of cases, *Surendra Nath Pal Chowdhry v Braja Nath Pal Chowdhry* (I. L. R. 13 Cal. 352, F. B.), *Tepu Khan v Rajani Mohan Das* (I. L. R. 25 Cal. 522, F. B.) and *Abdul Ali v Raj Chandra Das* (10 C. W. N. 1084), that a decree obtained by a co-sharer landlord is not admissible in evidence as to the rate of rent in a suit brought by another co-sharer landlord. The Appellants as against these decisions rely on the ruling in the case of *Byomkesh Chakravarti v Jagadishwar Rai* (22 C. W. N. 304). It is, however, to be noted that this decision was made *ex parte* and no reference was made to the three decisions I have referred to above. The lower Appellate Court, I think, was quite right in refusing to admit this judgment in the suit of 28th of August 1919. The appeal fails and is dismissed with costs."

Mr. S. C. Maity with Babu Apurba Charan Maokherjee for the Appellants.

Babu Santosh Kumar Bose for the Respondent.

H. C. S. Appeal dismissed.

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provisions of this chapter, then, notwithstanding anything contained in sec. 418 or sec. 423, sub-sec (2) or in the Letters Patent of any High Court, an appeal may lie on a matter of fact as well as on a matter of law.

(2) Notwithstanding anything contained in the Letters Patent of any High Court, the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court

The Racial Distinctions Bill.

The Racial Distinctions Bill which was passed by the Legislative Assembly on the 21st instant has created a valuable right in favour of an accused tried in the High Court Sessions, *viz*, the right to appeal on matters of fact as also of law from the verdict of the jury. Under the existing law, he enjoys no such right. Cls. 25 and 26 of the Charter expressly say that there shall be no appeal from any sentence or order passed by the High Court except when a point or points of law are reserved by the judge or except when the Advocate-General certifies that there has been an error in the decision of a point or points of law. The reports show that this restricted right of appeal could be availed of in a comparatively small number of cases.

Cl. 24 of the present Bill amends sec. 449 of the Criminal Procedure Code as follows—

(1) Where (a) a case is tried by jury in a High Court or Courts of Session under the provisions of this chapter, or (b) a case which would otherwise have been tried under the provisions of this chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or (c) a case is tried by jury in the High Court in the Presidency Town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a Presidency Town, have been triable under the

Sub-cl (2) which has been obviously inserted for correcting perverse verdicts by juries, amounts to a confession that the machinery of mixed-jury set up by the Bill is liable to abuse. In fact, this is admitted, though not in so many words, by the mover of the Bill in his statement of objects and reasons "It is essential," says the Hon'ble Mr. Hailey, "that an appeal should lie in certain of these cases of acquittal by jurors the majority of whom are of the same nationality as the accused is the gravamen of the charge against the present system." In our opinion, the authors of the Bill would have been well-advised not to provide for an appeal at the instance of the Local Government from an order of acquittal. On principle, a man should not be in peril of his life or liberty more than once. Having been acquitted by the jury, he should not be brought up again before a Court of Appeal merely because the Government apprehend that there has been a miscarriage of justice. But apart from any question of principle, this provision will defeat one of the main objects of the Bill. For, it requires no foresight to predict that whenever the Government should prefer an appeal from an acquittal, or the Court of Appeal reverse the order of acquittal, there will invariably follow an agitation based more, or less on, racial considerations, the ultimate result of

which will be to create distrust against the Government and their law-advisers as well as to weaken the authority of the Law Courts in the estimation of the people.

Under the Criminal Procedure Code, European British subjects are vested with more extensive rights of appeal than Indians. These rights are retained for them, but by cls 21 and 22 of the Bill, they are given to all convicted persons. The remaining more extensive rights of appeal enjoyed by European British subjects are withdrawn by cl. 23 and their right to appeal at their option either to the High Court or the Court of Session is abolished by cl. 20. These provisions are a great improvement on the existing law; not only because they are meant to equalise the status of Europeans and Indians, but also because they ensure justice being done to the accused, and will, in course of time, improve the judicial tone and temper of the Subordinate Magistracy.

PRODUCTION OF DOCUMENTS IN COURT.

(By Mr. Surendra Nath Roy, Munsif,
Netrokona, District Mymensing.)

With reference to the observation on my article on the above-mentioned subject by Mr. Khettra Nath Singh, I beg to state that the entire question hinges upon the interpretation of the words "first hearing." I respectfully differed from the interpretation put upon them by Greaves, J., in the case of *Toran v. Raj Chandra* (50 Ind. Cas. 296), and I think these to mean the date on which the suit is fixed for hearing in the summons in cases which are for final disposal and the date next after the settlement of issues in cases where summonses are issued for settlement of issues. Mr. Singh relies upon the interpretation put by Sir Jwala Prasad in a case reported in 6 Pat. L. J. 650 at p. 655, where the learned Acting C. J. says: "It would appear that after the institution of the suit when the summons is issued upon the Defendants calling upon them to appear upon a particular date, that date is the first hearing of the suit," and comes to the conclusion that the documents are to be filed on that day. He subsequently justifies the practice of the *mofussil* Courts to give fixed time to the parties after that date for filing documents, adding "it is not repug-

nant to the provisions of the Civil Procedure Code, though not expressly sanctioned by it."

On this point I beg to observe that Sir Jwala Prasad based his interpretation upon cases where summonses are issued for final disposal, and he took no notice of the cases where summonses are issued for settlement of issues. In the first mentioned class of cases the date of first hearing must be the date mentioned in the summons and the suit can be dismissed for default on that date for the non-appearance of the Plaintiff or decreed *ex parte* for the absence of the Defendant, provided 14 days have elapsed in the case of rent suit and 7 days in the case of Small Cause Court cases since the service of summons on the Defendant. But in the case of latter class of cases, the suit cannot be dismissed for default on the date mentioned in the summons for the non-appearance of the Plaintiff on that day, but if the Defendant does not appear on that day, it must be adjourned to some other day for *ex parte* final disposal, and it is on that day that the suit can be dismissed for non-appearance of the Plaintiff or decreed *ex parte* for Defendant's non-appearance. Thus it can be generally said, that the date of first hearing must be the date on which the suit can be taken up for trial for the first time.

In the case of cases for which summonses are issued for settlement of issues, the Defendant can file written statement on the day mentioned in the summons and issues may be fixed on that day, and as such suits cannot be heard on that day they will, if need be, be adjourned to some other day, and on which day the parties can produce their documents. The parties will feel no inconvenience in so doing as they both knew the pleadings of both the parties, and the provisions of Or. XIII, r. 2, C. P. C., may be strictly followed. But it is not so in the case of suits in which summonses are issued for final disposal. In this case the date mentioned in the summons is the date of first hearing of the suit, and according to the strict interpretation of Or. XIII, r. 2, C. P. C., the documents should be filed on that day, unless the Court for reasons to be recorded in writing, extends the period. Mr. Singh very properly points out the impracticability of filing documents on that day though his remark applies only to cases where summonses are issued for final disposal. But it seems that the legislature has overlooked this practical impossibility when it

drafted the Or. XIII, r. 2, C. P. C., in such general terms. Of course the legislature has given discretionary power to Court to extend the time for filing documents, which can be done under the salutary restraint of recording reasons in writing. It thus appears that it is not the intention of the legislature generally to extend the time. Suits in which summonses are issued for final disposal form the bulk of the cases that come before the mofussil Courts, and it was, of course, not the intention of the legislature, that the Court would be required to extend the time after recording reasons in writing in each case. This is clearly an oversight of the legislature, and it should be supplemented by a new law on the subject by the legislature or a general letter to be issued by the High Court of Calcutta instructing all Sub-Courts in this matter.

Correspondence.

ACQUISITION OF OCCUPANCY RIGHT BY AN UNDER-RAIYAT.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES"

SIR,

I shall be much obliged if you will be good enough to insert the following in your much esteemed "Notes" —

The question whether an under-raiyat can acquire occupancy right deserves some consideration in view of some very conflicting sections of the Bengal Tenancy Act.

It seems apparent from some sections of the Act that under-raiyats can acquire occupancy right. Sec. 113 (after the Amending Act of 1898) speaks of "the holding of an under-raiyat having occupancy right" and "not having occupancy right." Illustration (2) to sec. 183 distinctly shows that an under-raiyat may acquire a right of occupancy by custom or usage, and that his acquisition of the right is not inconsistent with the provisions of the Bengal Tenancy Act.

The legislature no doubt in distinct terms says that the acquisition is not inconsistent with the provisions of the Act. But it is difficult to understand how the amended part of sec. 113 and the above illustration to sec. 183 can be reconciled with secs. 20 and 21 of the Act.

Sec. 20 requires that a person, in order to be a settled raiyat, must hold land as a raiyat situate in any village continuously for 12 years. Sec. 21 says that a settled raiyat shall have occupancy right in all the lands held by him as raiyat in that village. Now, a person may acquire an occupancy right in any of the following ways—(1) by being a settled raiyat (sec. 21), (2) by inheritance (sec. 26) and (3) by purchase of a transferable occupancy holding [ills. to sec. 183 and sec. 178, sub-sec. 3, cl. (d)]. Of these three ways, the first mode only is original and the other two are derivative only, i.e., only when the right is once acquired by being a settled raiyat, another can get it by inheritance or by purchase. If we trace the history of any occupancy holding we are sure to reach a time when it was held by a settled raiyat.

In view of the above facts and under the following circumstances, how can it be said that an under-raiyat can acquire occupancy right? The length of time for which a raiyat can demise his land to the under-raiyat is at most nine years. Even if the under-raiyat holds over, and the raiyat landlord receives rent from him, the nature of the tenancy is not changed and he continues to be an under-raiyat. If the under-raiyat by remaining on the land after the expiry of the term becomes a trespasser, then as such he can never acquire occupancy right. The under-raiyat by holding over for 12 years cannot acquire the status of a settled raiyat under sec. 20 as he is still an under-raiyat, while sec. 20 requires a raiyat.

If the under-raiyat happens to be a settled raiyat of the village, then also he cannot acquire the right of occupancy in respect of the under-raiyat under sec. 21, as he is not a raiyat a term clearly distinguished from the term "under-raiyat" in sec. 4. No doubt, it may be argued that as in the definition of "Holding" under the Act, only raiyat's land is included, and as the tenancy of an under-raiyat also has been designated as "holding" in secs. 121 and 113, under-raiyats are included in the class of raiyats.

Thus we see that an under-raiyat cannot acquire occupancy right under sec. 21. If that is so, there can be no question of acquisition by inheritance or purchase. An under-raiyat's occupancy right is an unthinkable thing. Of course sec. 183 saves custom. But

the body of the section says "the custom or usage or customary right should not be inconsistent with the provisions of the Act." Is not a custom or usage entitling an under-*raiyat* to acquire occupancy right totally inconsistent with the provisions of sec. 21 inasmuch as it enables an under-*raiyat* to acquire occupancy right whereas sec. 21 enables only a *raiyat* to do so and by necessary implication prevents persons other than *raiyats* (hence under-*raiyats*) from acquiring the right? The illustration which is one of the main grounds of argument in favour of the under-*raiyat* seems scarcely consistent with the body of the section to which it belongs when it says "The custom or usage that an under-*raiyat* should, under certain circumstances acquire a right of occupancy is not inconsistent with and is not expressly or by necessary implication modified or abolished by the provisions of the Act." The question was raised in *Krishnakanta v. Jadu Kashya* (19 C. W. N. 914) but was thought unnecessary for the decision of that case.

Truly Yours,

RAMANIRANJAN BHOWMIK.

"JAGAT KUTIR."

Chandpur, Tippera.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY and B. B. GHOSE, JJ. S. A. No. 1219 of 1921 PIYARI SUNDARI DAS, Defendant-Appellant v. RADHAKRISHNA DATTA and another, Plaintiffs-Respondents The 20th February 1923.

Suit on a mortgage-bond—Attesting witnesses not appearing in spite of summons and warrant—Whether processes of the Court exhausted—Or 16, r. 10, C. P. C.—Whether Plaintiff entitled to give secondary evidence of attestation—Indian Evidence Act (I of 1872), sec. 68.

The Plaintiffs, Radhakrishna Datta and another, instituted a suit against the Defendant, Piyari Sundari, to enforce a mortgage-bond

alleged to have been executed by her for Rs. 395. The Defendant contended *inter alia* that the bond was not genuine. The Munsif of Kushtia decreed the Plaintiffs' suit holding that the Defendant had herself put her seal on the mortgage-bond after understanding the contents thereof, and that the attesting witnesses not appearing although processes were taken out against them, attestation had been proved by other persons present at the time of the execution. On appeal by the Defendant, the Subordinate Judge of Nadia, affirmed the aforesaid decree. The Defendant thereupon preferred this second appeal to the High Court.

Babu Mrityunjay Chattopadhyay for the Appellant contended that attestation had not been legally proved, sec. 68 of the Indian Evidence Act was imperative, cited *Tula Singh v. Gopal Singh*, 1 Pat. L. J. 369. Merely taking out summons and warrant against the witnesses did not exonerate the Plaintiff, nor justify an apprehension that the witnesses would prove hostile. The warrant was returned unserved. Processes of the Court were not exhausted.

Babu Radhabinod Pal for the Respondents argued that the Plaintiffs were entitled to prove attestation by other evidence when the witnesses did not appear in spite of summons and warrant. The Plaintiffs did all in their power and exhausted the processes of the Court to enforce their attendance. Read sec. 69, Indian Evidence Act.

Held—(i) That the provision of sec. 68 of the Indian Evidence Act was imperative.

(ii) That merely taking out summons and warrant against the attesting witnesses was not exhausting all processes of the Court as contemplated by Or. 16, r. 10, C. P. C.

S. C. C. Appeal allowed; Case remanded to the Court of first instance.

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[No. 16.]

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REPORTS (See Index.)

The Legislative Assembly and Council of State.

The Bill to amend the law relating to the right of hereditary priests to claim emoluments in respect of religious ceremonies which had been passed by the Assembly came before the Council of State on the 27th instant and was thrown out. This is the first time that a Bill passed by the Assembly had been thrown out by the Council of State and, we believe, is an indication of the struggle that will soon commence in earnest between the two Chambers for supremacy. Mr. Asquith had to fight for years before he succeeded in passing an Act which secured the supremacy of the House of Commons. The Legislative Assembly will have to engage in a similar fight, sooner or later, if it is to serve any useful purpose in the scheme of legislation.

Comradeship between the Law and the Press.

Mr. Justice Eve, in responding to the toast of "the Bench" at a dinner of the Press Club, remarked that there was a great deal in common between the two professions of law and journalism. "We are both out," he said, "to guide, instruct, and, incidentally to live on, the public. Our most attractive attribute is extreme modesty. You live by advertisement; we exist on our merits. It is yours to flaunt at my matutinal meal the gigantic circulation of your paper and to take away my appetite by informing me how many of the registered readers (names and addresses suppressed) have been chewed up in the last twenty-four hours, and of the enormous amount which you are

about to disgorge to their executors, administrators and assigns—a piece of information which I venture to think contains a harmless *suppressio veri*, for I understand that the ultimate payer is not the newspaper, but the indemnifying insurance company. We, on the other hand, shun publicity. I should be afraid to say what amount of time is wasted in Lincoln's Inn and more particularly in the Temple, by Barristers and others running after their friends in the Press to ask them to refrain from mentioning that they have been retained to defend some notorious criminal or in an interesting divorce suit. But, seriously speaking, within the space of half a mile are the permanent head-quarters of the Law and the Press and I make bold to say that in no area of similar extent on the face of the earth could you find two professions in which there are more or as many brave comrades, generous rivals, good sportsmen, loyal friends and tough opponents than our two professions" (*The Law Journal*).

The late Sir William Garth.

We regret to have to record the death of Sir William Garth, one of the most eminent names associated with the Calcutta Bar. He was born in 1854 and called to the Bar in 1877. In 1885, he joined the Calcutta Bar where his abilities soon brought him to the forefront of the profession. He left Calcutta shortly after the war broke out and started practising before the Privy Council. He was knighted and made a King's Counsel in recognition of the position he had attained in the profession. While here, members of the Bar found in Sir William a loyal colleague as well as a staunch defender of the position and privileges of the Bar whose traditions he most worthily maintained. Though he enjoyed a large practice he could always find time to plead without a fee the poor man's case, and we are told that even when he succeeded in getting costs for his client, he would not take anything for himself.

The late Nawab Sirajul Islam and Babu Lalit Mohan Banerjee.

On Saturday, the 25th of February last.

death removed at the ripe age of 78, another prominent citizen of Calcutta and up to 1909, a familiar figure in the High Court, Nawab Sirajul Islam Khan Bahadur. He was enrolled as a vakil in 1873 and retired from practice in 1909. He served his community in the Legislative Council of Bengal, in the Calcutta Corporation and in the Calcutta University and a number of other public bodies. The late Nawab had charming manners, was polite and accommodating to a degree and enjoyed the friendship of persons of all classes and communities and of all ages. The vakil bar has also lost a practising member in Babu Lalit Mohan Banerjee, who was closely associated with the public life of his native village of Bally, at the prematurely early age of 44.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

In *Gopi Lal v. Lakhpat Rai* (appeal from Allahabad), of which a note appeared at p. xxvi, the Appellants were represented by *Messrs. L. DeGruyther, A. C. and Trevor Watson* and the Respondents by *Sir A. Colefax, K. C. and Mr. J. Whitehead*, and not as stated in that note.

The hearing of Indian appeals was commenced on February 5th by a Board composed of LORDS DUNEDIN, ATKINSON and WRENBURY.

The first case to be taken was an appeal from Bombay, *Keshavlal Bros & Co. v. Dwanchand & Co.* The suit out of which the appeal arose was instituted by the Appellants against the Respondents for damages for breach of a contract to deliver coal. The defence pleaded was that the contract became impossible of performance owing to the action of the Government in commandeering collieries, and the further point was raised that under the emergency regulations coal could only be given to a named consumer, and there was no evidence that the latter had suffered any damage.

Sir John Simon, K. C., Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Appellants.

Sir Geo. Lowndes, K. C. and Mr. Douglas McNair for the Respondents.

The hearing was concluded on February 6th and judgment has been reserved.

On February 6th, was heard the appeal of *B. Framji Commissariat and another v. Manilal Jugalidas*, an appeal from Bombay which

raised the question whether the Appellants were entitled to easements of light and air in respect of certain windows on their property in Chowpatty Road.

Messrs. Upjohn, K. C., Lowndes, K. C. and E. B. Raikes for the Appellants.

Messrs. Clauson, K. C. and Gavin Simonds for the Respondents.

Judgment was reserved.

On the same day the hearing commenced of another Bombay appeal, *Champsey Bava & Co. v. The Jivraj Balloo Spinning Co., Ltd.*, which deals with questions arising under contracts for the sale of cotton. In the course of carrying out the contracts disputes arose which were submitted to arbitration and an award was made against the Respondents, which though upheld by the first Court was set aside on appeal on the ground that there was an error of law patent on the face of the award in that it awarded damages to the defaulting party.

Messrs. Upjohn, K. C. and W. Wallach for the Appellants.

Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

The argument for the Appellant was not concluded when the Board adjourned.

7-2-23

G D M

Review.

THE PROBLEM OF PROOF. Specially exemplified in Disputed Document Trials. By *Albert S. Osborn, New York and Albany Mathew Bender and Company 1922.*

We had occasion in these columns to review the author's previous work on "Questioned Documents," which though more or less technical work, was presented with such firm grasp of essentials and lucidity which is the outcome of genuine insight that it was possible for any lawyer or judge to follow each step of the thesis without appreciable difficulty. The present work, as its title indicates, has more to do with the work of Courts and legal practitioners than with the business of the document expert proper, and it is no small part of the merits of the work that the author is able to bring to bear upon it the fresh outlook of one who is not a lawyer by profession. The value of the work is further enhanced by the genuine sympathy and insight with which what is mostly other people's business is handled, and though some aspects of the

lawyer's business come in for much "candid criticism" at the author's hand, it is offered with such patent *bonâ fides*, total absence of any assumption of superiority and real regard for public interest, that we are not surprised at the eulogium which the work as a whole and the chapter on "Advocacy" in particular have drawn from Professor John Henry Wigmore, himself a notable lawyer and jurist and a writer of eminence on the Law of Evidence. As we have already hinted, disputed documents have furnished the occasion to the author to make a survey, in this book, of the whole business of adducing and sifting evidence in Courts of Law, and by way of illustration we pick out here the titles of some of the chapters of general interest, e.g., "preparation of facts," "sifting the evidence," "the atmosphere of a trial," "cross-examination from the standpoint of the witness," "cross-examination from the standpoint of the lawyer," "memory and the proof of facts," "advocacy," "persuasion and practical psychology in Courts of Law." It is impossible in a review notice to give a more detailed idea of the contents of the work and the only thing we can do, in justice to the work, is to recommend it strongly to all lawyers and students of law for close and careful study, and wish that we had more of this class of work to help us to look at our own special business from the point of view of persons who are not of our profession but who have sufficient knowledge and experience of that business to be able to give us valuable advice and guidance.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before
SANDERSON, C. J. and B. B. GHOSE, J.
CRIMINAL REFERENCE No. 91 OF 1922.
EMPEROR v. AHIRANNESSA BIBI.
The 17th January 1923.

*Criminal Procedure Code (Act V of 1898),
sec 510—Doctor's evidence, in trials for murder
by poisoning, what should be—Nature of the
examination required in such cases—Order of
calling witnesses—Advantages of chronological
order.*

'Accused' Ahirannessa was the wife of one

Kanchan but had left her husband's house and was away for about a year. Her husband brought her back with the assistance of the police and two days after her arrival her husband died of poisoning with *dhutura* and some black powder which, it was alleged, had been given to her by her co-accused Ahaddi and which was mixed with the food given to the deceased. The Jury returned a verdict of not guilty as regards Ahaddi as well as Ahirannessa. The Sessions Judge of Faridpur disagreeing with the Jury referred the case of Ahirannessa to the High Court.

Held—That the Jury may not unreasonably have felt a doubt about the case and were consequently justified in finding the verdict which they did. One respect in which this doubt may have arisen, is in connection with the doctor's evidence. Neither the Assistant Surgeon, who examined the dead body, nor the Chemical Examiner, who examined the viscera and stains of vomit, etc., was called as a witness at the trial. The report of the Chemical Examiner did not contain any information as to the amount or percentage of the poison contained in the uneaten food and the stains of vomit, nor did it supply anything to enable the Court to judge whether the amount of poison found in any of the exhibits would be sufficient to cause death. Further, there was no evidence as to what quantity of the food containing the poison, alleged to have been detected, would have to be taken to cause death. Such a report cannot be considered a satisfactory or sufficient report, if neither the person who made the analysis nor the medical man who examined the dead body is called as a witness at the trial. Much might depend upon the result of the analysis of the uneaten food and the deposits of vomit, and although the report was admissible under sec. 510 of the Code it is not satisfactory that this question should be allowed to depend upon such a limited and incomplete report.

The witnesses for the prosecution ought, as far as possible, to be called in the order of the events, which they are called to prove and in chronological order. Absence of method and order in presenting the evidence is noticed in many cases and the desirability of calling witnesses in the proper order should be impressed upon those who conduct prosecutions. It is far easier for the learned Judge, who is trying the case, and for the Jury, to follow and appreciate the evidence, if the wit-

nesses are called in the proper order. It certainly would lighten the work of the Court of Appeal. Of course, it is not meant that it is the duty of the learned Judge, who is trying the case, to dictate to the prosecution the order of the witnesses, but it is in the discretion of the learned Judge, who has control over the trial, to suggest to those, who are responsible for the conduct of the prosecution, that the proper method and order of calling the witnesses should be observed. If the course be adopted it will be found to be a great convenience not only to the prosecution but also to the accused person or persons, and it will certainly be of material assistance to those who have to administer justice.

Mr. Orr for the Crown.

Babu Manindra Nath Banerjee for the accused

J. N. R.

Reference not accepted,
Accused acquitted

CRIMINAL REVISIONAL JURISDICTION. Before B. B. GHOSE and PANJON, JJ. CRIMINAL REFERENCE No. 17 of 1923 SALKA MAJHAN, first party, v RAUGTA MAJHI and another, second party. The 7th February 1923.

Criminal Procedure Code (Act V of 1898), sec 435 (3), orders under sec. 144, Cr. P. C., if "proceedings" within—Sec. 435 (1), jurisdiction of the District Magistrate to take action in such case.

In the above case the trying Magistrate passed an *ex parte* order against the second party under sec. 144, Cr. P. C., directing it not to go upon the disputed land. Subsequently the second party filed a petition for having the order rescinded. The Magistrate thereupon heard arguments of both sides and finally rejected the application for rescinding the order under sec. 144, Cr. P. C. Before passing the order for rejection, the Magistrate at the request of the second party had passed an order directing the Police to have the paddy cut and deposited with the nearest *panchayat*. After the above mentioned order of rejection the Magistrate passed another order directing the Police to make over the paddy to the first party. The second party thereupon made an application to the District Magistrate for revision of the last order of the Magistrate to have the paddy made over to the first party.

The District Magistrate therefore referred the case to the High Court.

Held—That orders under sec. 144, Criminal Procedure Code, are not proceedings within the meaning of sec. 435 of the Code. The District Magistrate had therefore no jurisdiction to take action under sec. 435 (1) of the Code.

J. N. R.

Reference not accepted.

CRIMINAL REVISIONAL JURISDICTION. Before NEWBOULD and SUHRWARDY, JJ. CRIMINAL REVISION No. 1158 of 1922. KISMATULLA MOLLA and ors., Petitioners v. EMPEROR, Opposite Party. The 21st February 1923

Criminal Procedure Code (Act V of 1898), sec 428, examination of Magistrate who holds enquiry on the order of the Appellate Court—Appellate order how far vitiated by omission to examine the Magistrate in the Appellate Court.

The Petitioners were convicted of rioting and appealed to the Sessions Judge, who directed the trying Magistrate to take steps for a local investigation to be held by a competent person who was to make a map of the locality. A Sub-Deputy Magistrate was thereupon appointed and he did this and the map and report were submitted to the Sessions Court. It was not clear from the judgment of the Sessions Judge whether the map and the report were considered by him when hearing the appeal. There was reference to the map but not to the report. During the hearing of the appeal the Government pleader had objected to the map and the report going in unless the Sub-Deputy Magistrate was examined. Against the order of the Sessions Judge the present rule was obtained.

Held—That the objection of the Government pleader was a perfectly sound one and the learned Sessions Judge should have directed the evidence of the Sub-Deputy Magistrate to be taken in accordance with the provisions of sec. 428, Cr. P. C., before deciding the appeal. The appeal should therefore be re-heard after the Sub-Deputy Magistrate has been examined to prove the map and report in accordance with the provisions of sec. 428, Cr. P. C.

Babus Monmatha Nath Mookerjee and Dinesh Chandra Roy for the Petitioners.

J. N. R.

Rule made absolute:
Appeal remanded.

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Sir Abdur Rahim on the Recommendations of the Bengal Retrenchment Committee.

We are continuing to receive large numbers of communications criticising the suggestions of the Bengal Retrenchment Committee with reference to judicial administration, the most notable amongst which are a pamphlet written by a Member of the Provincial Judicial Service and a representation to Government by the Bengal Civil Service (Judicial) Association over the signature of their President, Rai P. B. Bose Bahadur, both of which are well-reasoned and moderately worded statements of the case on behalf of the Members of the service. It is gratifying to find that Sir Abdur Rahim, the Member of the Government in charge of the department, himself has no doubts in his mind as to the value of the recommendations of the Committee so far as his department is concerned, and what he said in Council ought to hearten the Members of the Provincial Judicial Service. *Sir Abdur Rahim is reported to have said:—

"The Committee's recommendations had been receiving the earnest attention of the Government. The Committee had made sweeping recommendations as regards the Judicial Department. They had suggested a reduction in the number of Judges. He, however, recognised that a reduction in the number of Judges was not feasible. The cadre at present was below the one actually recommended by the Committee. He felt afraid that the members of the com-

mittee did not realise the difficulties of the work done especially in the Civil Courts. It was very difficult to adopt all the recommendations of the Committee which were mere pious wish. It would be a very despotic order to say that only six months' time would be given to clear up the arrears. They had set up a false standard of expedition at the expense of justice. Government had referred their recommendations to the High Court for its opinion as to how far they were feasible and how far, if any, they were sound from the point of view of justice. He, however, thought that very few of them could be given effect to. Those proposals of the Committee had created consternation in the subordinate judicial service. The members of that service had repudiated the suggestions underlying the recommendations. They bitterly resented any reduction of their salary and status as unjust. He would say that the Government fully appreciated the high quality of their work."

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

On 8th February 1923 the Board, composed of LORDS DUNEDIN, ATKINSON and WRENCH, heard arguments in the case of *Chambersy Rhava & Co. v. The Jivraj Balloo Spinning and Weaving Co.*, an appeal from Bombay. In this case the Appellants had sold cotton to the Respondents which on arbitration was found to be of inferior quality and was rejected by the buyers. The sellers thereupon, although in default themselves, claimed damages against the buyers for not taking delivery and in a further arbitration obtained an award for Rs. 25,000. The buyers contested the jurisdiction of the second arbitration and urged that there was an error of law apparent on the face of the award. The latter contention had succeeded before the High Court and the appeal was brought by the sellers. Judgment has been reserved.

MERRIS Urwin, K. C. and *W. Wallack* for the Appellants.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

On February 8th and 9th the same Board heard the arguments of Counsel in another Bombay appeal, *The Tata Iron and Steel Co., Ltd. v. The Chief Revenue Authority of Bombay*. The question at issue was whether an item of Rs. 28,00,000 paid by way of under-writing commission in connection with an issue of shares of the Appellant Company ought to be deducted from receipts as an expense of carrying on the business. A preliminary point was raised by the Government that under the Government of India Act, 1915, there was no power to refer the matter to the High Court, and that even if there had been a proper reference, no further appeal lay from the judgment of the High Court. The arguments of Counsel were confined to these preliminary questions of jurisdiction. Judgment has been reserved.

Sir W. Finlay, K. C., Messrs. A. M. Brenner and E. B. Raikes for the Appellants.

Messrs. A. M. Dunne, K. C. and Reginald Hills for the Respondents.

On February 12th in *Usham Singh v. Gundip Singh*, *Sir John Simon, K. C. and Mr. Parikh* applied for special leave to appeal to a Board composed of LORDS BUCKMASTER and ATKINSON, SIR JOHN EDGE and MR. AMEER ALI. Leave had been given to the parties in a similar case 3 years before and steps had been taken to prosecute the appeal. The Board accordingly directed the application to stand over until further information was received to account for the delay.

On the same day in *Gopal Lal Sett v. Purna Ch. Basak*, *Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes* applied to the Board for the amendment of the Order in Council on the ground that it did not accurately carry out the provisions of the Board's judgment (Reported in 27 C. W. N. 174). The suit had been instituted for the construction of a Will, and the applicants contended that the High Court had really held that the *shebaitship* established under the Will was heritable whereas the Board had decided conclusively

that it was not so. They, therefore, applied that there should be a slight alteration in the wording of the Order in Council to enable the High Court to appoint a *shebat* and to make it clear that the Board had decided that the Appellant had no preferential claim to the office. LORD BUCKMASTER in granting the application said that it was not contested that the judgment decided that the preferential claim was gone and that if the suggested alterations made the decision clearer the amendment ought to be made. The applicants would have to pay the costs as it was due to the negligence that any alteration became necessary.

Messrs. DeGruyther, K. C., Dunne, K. C. Ramsay and Kehworthy Brown represent other members of the family.

On the same day the appeal in *Rai Bayna Goenka v. Nanda Kumar Singh* (from Patna) was heard by LORDS FINLAY, DUNEDIN and ATKINSON, SIR J. EDGE and MR. AMEER ALI. The point at issue was the period for which mesne profits should be calculated, from the date of the decree of the Subordinate Judge or from the date of the Order in Council which confirmed that decree. The Board dismissed the appeal without calling on the Respondent holding that it was governed by their decision in I. R. 27 Ind. App. 209.

Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Appellant.

Mr S. Hyam (for Mr. B. Dubé) for the Respondent.

G. D. M

Correspondence.

To

The EDITOR, "CALCUTTA WEEKLY NOTES"
SIR,

It is evident from your editorial remarks published in the several issues of your much esteemed journal that the public and the press have resented the aspersions cast on the provincial judiciary by the Retrenchment Committee. There is one thing in connection with the Committee's recommendations regarding the appointment of Sessions Judges which has not attracted the amount of attention it deserves. The Committee say that

they prefer Deputy Magistrates to Sub-Judges, as the latter are "by training more disposed to decide on the balance of evidence rather than on probabilities." Let us assume for a moment that this is so. It is tantamount to saying that Sessions Judges must be selected from officers who decide criminal cases on probabilities. In other words, the Committee give preference to Deputy Magistrates, because they are disposed to decide on the probabilities. In their eagerness to give preference to one class of officers, the Committee members have betrayed a lamentable ignorance of the rules of evidence regarding proof in civil and criminal cases. The rule is exactly the opposite. A civil case may sometimes be decided on preponderance of probabilities, but in criminal cases a much higher degree of assurance is required. This higher degree of assurance is known as moral certainty. This is elementary law. The rule has thus been stated in *Best on Evidence*, secs. 95 and 96: "The rules of evidence are in general the same in civil and criminal proceedings. But there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis for decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required." The reason which the Committee give for giving preference to the Deputy Magistrates, viz., that they are disposed to decide criminal cases on probabilities, is exactly the reason which should make them unfit for holding posts of Sessions Judges, if the rules of evidence are not to be set at naught. Criminal cases should never be decided on probabilities, and it would be dangerous to appoint a man as a criminal judge who is disposed to decide cases on probabilities. The Committee members have lent countenance to a proposition which is subversive of all principles of justice and which is in direct conflict with a well established and sound rule of evidence. There was at least one lawyer in the Committee, whose practice, it is said, is confined exclusively to criminal cases and it is astonishing that he too subscribed to such a proposition.

Review.

THE LAW OF COSTS AND PRACTICE OF TAXATION IN THE BOMBAY HIGH COURT. By N. W. Kemp. Messrs. N. M. Tripathi & Co., Bombay, 1922 Price Rs. 12 nett.

Though they are always with us, costs are not a subject which receives systematic study by the general run of practitioners, whether advocates or attorneys. The author, who at one time was Assistant Taxing Master, Bombay High Court, has found matter to deal with the subject in eleven Chapters, headed respectively "Different kinds of Taxation" (Chap. I), "Party and Party Costs" (Chap. II), "Taxation on the as between Attorney and Client Scale" (Chap. III), "Taxation against Client" (Chap. IV), "Taxation of the Bill" (Chap. V), "Court's discretion as to Costs" (Chap. VI), "Separate appearances and apportionment" (Chap. VII), "Costs of certain parties and in certain actions" (Chap. VIII), "Security for Costs" (Chap. IX), "Appeal as to Costs" (Chap. X) and "Costs of appeal" (Chap. XI). There is besides an appendix containing *inter alia* the Taxing Rules of the Bombay and Calcutta High Courts and the Rules as to costs of the Bombay Presidency Small Cause Court and of the Judicial Committee. A systematic treatise like the present ought to go far towards making (what appears to be one of the main objects of the book) practitioners realise the very great practical importance of obtaining correct orders as to costs, and to make the practice in the matter of costs more ordered and uniform than it is at present. The subject is more neglected even in the Mofussil than on the Original Sides of the Chartered High Courts. Although the book has the practice on the Original Sides of these Courts and particularly of the Bombay High Court specially in view, there are Chapters (e.g., IX, X and XI) which have a wider application, and the book as a whole will no doubt be useful for reference on knotty points of costs to Mofussil practitioners as well. It is handy and well got-up.

• Yours faithfully,
S. C. SARKAR.

2-3-1923.

Notes of Cases.
CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before
WALMSLEY and B. B. GHOSE, JJ. S. A.
No. 1583 OF 1921. FAKIR CHANDRA
HAIDAR, Defendant-Appellant v. KHA-
GENDRA NATH KUNDU, Plaintiff-
Respondent The 1st March 1923.

Suit for recovery of rent of a jalkar—Sec. 67, Bengal Tenancy Act (VIII of 1885), if applies.

The Plaintiff brought a suit for rents and interests of a *jalkar* alleged to be held by the Defendant under him at an annual *jama* of Rs. 200. Claim was laid at Rs. 120, being the unpaid rent for 1926 B. S. with interest at Rs. 3-2 as. per cent. per month. The Defendant pleaded payment and satisfaction. The Munsif, 2nd Court, of Krishnagar, decreed the suit in part for Rs. 55 only. On appeal by the Plaintiff, the District Judge of Nadia decreed the suit for Rs. 95 with interest at Rs. 3-2-0 per cent. per mensem. The Defendant preferred this second appeal.

In second appeal, the question raised *inter alia* was whether the Plaintiff was entitled to interest on the arrears of rent at more than 12½ per cent. per annum in view of sec. 67 of the Bengal Tenancy Act:

Held—That sec. 67 of the Bengal Tenancy Act has no application to arrears of rent of a *jalkar*.

Dr. Dwarka Nath Mitter (with Babu Satindra Nath Mookerjee) for the Appellant.

Babu Mrityunjay Chattopadhyay for the Respondent.

S. C. C. Appeal dismissed with costs.

CIVIL APPELLATE JURISDICTION. Before
CHATTERJEE and CUMING, JJ. M. A.
No. 89 OF 1922. DINABANDHU BAN-
DYOPADHAY, Appellant v. CHANDI
CHARAN NASKAR and others, Respon-
dents. The 21st February 1923.

Order under sec. 47, C. P. C., directing delivery of possession in a certain way, if appealable.

One Dinabandhu obtained a decree for possession of portions of certain plots of land, and in execution obtained possession through Court. The judgment-debtors filed an objection in the executing Court contending that the possession delivered was not in accordance with the direction of the Court as it gave the decree-holder more than he was entitled to. A Commissioner appointed by the executing Court found that the possession was not in accordance with the decree; and the Munsif, 1st Court of Alipore, passed the following order:

"The possession delivered has therefore not been in accordance with the directions contained in the decree. Possession will again be delivered to the decree-holder of the southern half of both the plots *cha* and *ga*."

The decree-holder thereupon appealed to the District Judge of 24-Pergannas, who dismissed the appeal holding that the order was not appealable.

Babu Mrityunjay Chattopadhyay for the Appellant contended that the order was appealable, as it was passed under sec. 47, C. P. C. and conclusively determined the rights between the parties. Cited *Deokhandan v. Bansu Singh*, 14 C. L. J. 35 and *Srinibas v. Kesoprosad*, 14 C. L. J. 489. The case of *Sashibhushan v. Radhanath*, 20 C. L. J. 433, which might be cited for the other side is distinguishable.

Babu Harendra Nath Sarbadhikari for the Respondents argued that the appeal was premature: an appeal would lie after the Court had confirmed some proceedings of the Commissioner in delivering possession. An order directing delivery of possession is not appealable. Cited *Sashibhushan v. Radhanath*, 20 C. L. J. 433:

Held—That the test whether an order under sec. 47, C. P. C. is appealable is if it conclusively determined the rights between the parties: and the order in this case, viewed in that light, was appealable.

S. C. C.

Appeal allowed.

THE Calcutta Weekly Notes.

Vol. XXV.1.]

MONDAY, MARCH 19, 1923.

[No. 18.]

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Greaves Committee and the Government.

We are not a little surprised at the attitude taken up by the Government with reference to the resolution moved in the Bengal Council calling upon them to give effect to the recommendations of the Greaves Committee on the separation of Judicial and Executive Functions. It was pointed out in the course of the debate that although the Report of the Committee had been before the Government for over a year, they had made no pronouncement on the subject. A definite statement of their views was expected, but nothing was vouchsafed except that the Government were out for a practical and definite scheme to give effect to the recommendations of the Committee. The High Court, we are told, should be addressed in the matter, as the Committee had proposed to place the whole of the judiciary of the province under it. But no reason was given why, although a year had elapsed, the opinion of the High Court had not been sought for. All this is not likely to inspire the public with confidence as regards the intentions of the Executive with regard to the matter. The resolution was carried and the public must now wait and see—we hope, not for long.

Mediums.

An interesting point of law arose in *In re Hummeltenberg; Beatty v. The London Spiritualistic Alliance (Lim.)*, viz., whether a gift "for the purpose of establishing a

College for the training and developing of suitable persons, male and female, as mediums, preference being given to healing mediums and those for diagnosis of diseases" was a good charitable gift. Russel, J., who decided the case, said that the gift was bad as it created a perpetuity. It was contended by the legatees that the gift was good as it was a trust for the advancement of education, and failing this, an attempt was made to bring the case within the fourth branch of Lord Macnaghten's well-known classification of charitable gifts in *Pemsel's case*: "Trusts for other purposes beneficial to the community not falling under any of the preceding heads," i.e., relief of poverty, education, religion. Neither of these contentions was accepted by the learned Judge, who, in deciding against the legatees, observed as follows: "Even if it were assumed that some of those persons called mediums possessed powers of diagnosis or healing or both, in which event it could scarcely be denied that a gift whose object was to increase their number would be operative for the public benefit, yet the gift here was not limited to that purpose; it was a gift which, consistently with its terms, could be wholly applied to the training and development of mediums other than therapeutic mediums." No opinion was expressed, because it was not necessary for the decision, on the general question whether the training of mediums was against public policy.—(*Law Journal*).

DUTY ON SECURITY BONDS.

(By MR. SURENDRA NATH RAY, MUNSIF,
NARAIL.)

Security bonds are bonds given to stand security for anything to be done by a person for another. According to Art. 15 of the Stamp Act such bonds are to be engrossed on non-judicial stamps, except in cases of docu-

ments otherwise provided for by the Court Fees Act. The Court Fees Act by Art. 6, Sch. II, provides that civil bonds or other instruments of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure or the Code of Civil Procedure are to be engrossed on a plain paper bearing Court-fee of As. 8. Now the question arises which of these duties is to be levied in which class of bonds. In the case of *Kulcanth v. Mahabir Prasad* (1), the stamps of both the denominations were called for. This was a case where a bond was given under orders of a Court as security by one party for the costs of another, and it was held that it was subject to two duties. That was a decision based on Art. 13, Sch. I of the Indian Stamp Act of 1879. Subsequently by sec. 18, cl. (1) of Act VI of 1889, Art. 13 of Sch. I of the Act of 1879 has been amended and, the words "or by the Court Fees Act, 1870" have been added to it, and this amended article has been reproduced as Art. 15 of Sch. I of Art. 11 of 1899. Hence the decision in that case can no longer be considered as a guide in determining the duty to be paid on such bonds.

In the case of *Dwarka Nath Dey v. Saluja Kanto Mallik* (2), the matter was referred to the Calcutta High Court for decision under the amended law. In that case the execution was ordered to be stayed by the District Judge on the judgment-debtor furnishing sufficient security to the satisfaction of the Court from which the appeal was preferred, and the question arose as to which of these stamps was to be given on the security bond. Holmwood, J., held that such documents should bear stamp leviable under the provisions of the Stamp Act. The reason assigned is "these bonds, ensuring for the benefit of the Secretary of State or of the parties in the case must be stamped in accordance with the Stamp Act. They are not made by order of the Court within the meaning of Sch. II, Art. 6 of the Court Fees Act, and that Act does not appear to apply. They are bonds taken on an order for stay of execution and the parties can furnish them or not as they please. If they do furnish them, the stay of execution becomes a matter of indulgence, and the bond must be stamped according to law." In a later case of the same High Court [*Sarbo v.*

Safur Mandal (3)], Newbould and Panton, JJ., held that a security bond given by a claimant in a claim case should bear a Court-fee stamp of eight annas under Art. 6, Sch. II of the Court Fees Act. The decisions of these two cases seem apparently inconsistent.

In the case of *Sarbo v. Safur Mandal*, there was a claim case, and the attached property was ordered to be released to the claimant on his filing a security bond agreeing to be liable for Rs. 10 in case he failed to produce certain attached goats. The learned Judges, following *In re Reference under Stamp Act, 1899* (4), held that a bond of this kind may be said to be given in pursuance of an order made by a Court under a section of the Civil Procedure Code, and accordingly it was held that such bond should bear Court-fee stamp of eight annas. In the case of *Dwarka Nath v. Saluja Kanto*, the execution was ordered to be stayed by the District Judge, as an Appellate Court, apparently under Or. 41, r. 5 (1) of the Civil Procedure Code, and the security must have been ordered under sub-r. (3), cl. (c) of the same rule. Now the question arises whether such an order can be considered as an "order made by a Court under any section of the Civil Procedure Code" within the meaning of Art. 6, Sch. II, of the Court Fees Act. In the case of *Sarbo v. Safur Mandal*, the order of the Court to furnish security for releasing an attached property pending the decision of a claim case, was considered to be an order under a section of the Civil Procedure Code, though there is no particular section in the Civil Procedure Code for demanding security in such cases. Such orders are given upon the general principle that the Court is to act upon the principle that every procedure is to be understood as permissible till it is shown to be prohibited by law (5). The test to be applied, as held in the case of *Dwarka Nath Dey*, is whether such bond ensures for the benefit of the party or not, and the learned Judge explains that they are bonds taken on an order for stay of execution and the parties can furnish them or not as they please. If they do furnish them the stay of execution becomes a matter of indulgence. Applying that principle to the case of *Sarbo*, it may be said that the release of attachment pending the period of the claim

(1) I L R 11 AH 16 (F. B.)

(2) 21 C. W. N. 1150

(3) 48 Ind. C. 19 720

(4) I J. R. 27 Mad 17

(5) 11 C L J 289. I L R 5 AH 163.

case is a matter of indulgence, and the parties are at option to furnish such bond. If they furnish such bond the attached properties are released; if not, they are kept in the custody of the Court. It is unfortunate that the case of *Dwarka Nath v Sailaja Kanto* was not brought to the notice of the Judges who decided the case of *Sarbo v Safur Mandal*. They decided the matter upon the plain interpretation of the words of Art. 6, Sch II of the Court Fees Act, and it seems to be the proper way of interpreting the statutes. It may be conceived that securities given under the Succession Certificate Act or the Guardians and Wards Act are not securities given in pursuance of an order of the Court under any section of the Civil Procedure Code and they should not come within the purview of the Court Fees Act, but should be stamped according to the provisions of the Stamp Act.

This diversity of rulings has resulted in a diversity of practice in different Districts in Bengal, and it is high time that the High Court should intervene and by a General Order authoritatively interpret these articles of the Court Fees Act and the Stamp Act so as to make the practice uniform in all places in Bengal and Assam.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

LORDS FINLAY, DUNEDIN, ATKINSON, SIR JOHN EDGE and MR AMELR ALI have composed the Board of the Judicial Committee during the past week (February 15th to 21st). The only case that has been before their Lordships is *Satish Ch Chatterji v S. K. Roy*, an appeal from the High Court of Bengal (Mookerjee and Panton, JJ). The Appellant was purchaser at an auction sale for arrears of revenue of a property in the 24-Parganas. The Respondents, who were Plaintiffs in the action, and had been owners of 2/3rd of the property, instituted the suit to have the sale set aside on the ground that the remaining co-sharer had wilfully defaulted in payment of the Government revenue, and had brought about the sale in collaboration with the Appellant through fraud and collusion. Judgment was reserved.

Messrs. L. DeGruyther, K. C. and *J. M. Parikh* for the Appellant.

Messrs. A. M. Dunne, K. C. and *W. Wallach* for the Respondents.

It was with the deepest regret that the news was received at the Privy Council yesterday of the death of Sir William Garth, K. C. Owing to reasons of health Sir William had ceased to practise before the Board and had latterly devoted himself to the pursuit of art and literature of which he was always a great admirer. The news will no doubt be received with equal regret by the Bar in Calcutta where for so many years he upheld its highest traditions.

G. D. M.

21-2-23

Correspondence

T)

THE EDITOR, "CALCUTTA WEEKLY NOTES" SIR,

Concerning "Acquisition of Occupancy right by an Under-riyat" published in your issue of the 26th February 1923, your correspondent Mr Bhowmick's difficulty about it seems to me to have arisen because his attention was not directed to the history of the Bengal Tenancy Act of 1885 and to the order in which the provisions of the said statute have been enacted.

Sec 4 of the Bengal Tenancy Act is merely a section specifying the classes of tenants to which the Act applies. It does not confer upon any tenant a status or any right, that is done by Chaps III, IV, V, VI and VII (per Richardson, J., 26 C W N 15). So neither sec 113 nor sec 183 confers any right of occupancy upon the under-riyat. Secs. 20 and 21 of the Bengal Tenancy Act provide for acquisition of occupancy right by a riyat and not an under-riyat, and it does not follow therefrom that these sections took away any right of occupancy from the under-riyat who could acquire it in certain circumstances by custom. It is owing to misapprehension in regard to this fact that Mr Bhowmick cannot reconcile Pt (2) of sec 183 with secs 20 and 21. This illustration has no positive legislative value except that it is meant to show (in order to avoid any misconception) that any customary occupancy right of an under-riyat is not inconsistent with and is not expressly or by necessary implication modified or abolished by the provisions of the Bengal Tenancy Act.

The right of occupancy of an under-riyat is no creation of the Bengal Tenancy Act.

Indeed, permanence is not a universal and integral incident of an under-raiyat's holding; if claimed, it must be established. This may be done by proving a custom, a contract, or a title and possibly by other means (25 C. W. N. 185). The origin of the occupancy right of an under-raiyat is perhaps to be found in the ancient *khudkhast* system of tenancy and not in any provision of the Bengal Tenancy Act.

Yours truly,
LALIT MOHAN INDRA, B.L.

KRISHNAGAR,
6-3-23

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before NEWBOULD and SCHRAWARDY, JJ. CRIMINAL REVISION No 3 of 1923. BAIS-NAB (HARAN and others, Petitioners v. AMINALI, Opposite Party. The 7th March 1923.

Criminal Procedure Code—Judgment written by trying Magistrate at a place outside his jurisdiction and made over to a Magistrate of the place of trial for delivery—How far valid

The Petitioners were placed on their trial, on the complaint of the Opposite Party, for having committed an offence under sec. 426, I. P. C.

After the case was fully heard by Babu Sush Kumar Sen, Magistrate, 2nd class, Karimganj, the judgment was reserved. In the meantime the said Magistrate was transferred from Karimganj to Hailakandi Sub-division in the District of Cachar. In order to avoid a retrial of the case, the record of the case was taken by him and on 23rd November 1922 he sent a judgment written from that station to the Subdivisional Magistrate, Karimganj, for delivery and the same was delivered by Maulvi Muhammad Choudhuri, the Magistrate in charge, on 27th November 1922, whereby the Petitioners were convicted under sec. 426, I. P. C., and sentenced to pay a fine of Rs. 50 and it was further ordered that out of the fine realised a sum of Rs. 50 should be paid to the complainant.

The rule was issued on the ground that the judgment as pronounced was not legal and liable to be set aside.

Babul Priyanath Datta (for Babu Paresa Lal Shome) appeared on behalf of the complainant Opposite Party to show cause. He contended that there was no defect of procedure in delivering the judgment by another Magistrate when case was heard by the Magistrate who wrote out the judgment, signed and dated it. He referred to secs. 350, 366, 367 and 537, Cr. P. C., 18 M. L. J. 197 and 1916 M. W. N. 372 in support of his contention.

M. Syed Saadulla who obtained the rule argued that it was not a defect to be cured by sec. 537, Cr. P. C. (3 All 563 and 19 All 114, referred to):

Held—That there is no provision in Criminal Procedure Code for such delivery of judgment. Their Lordships relied on 3 All 563 and 19 All. 114 and set aside the conviction and sentence and directed the Petitioners to be retried.

S. C. C.

Rule made absolute.

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Legal Profession and Women.

We welcome the decision of the Legislative Assembly in passing the third reading of the Bill legalising the right of women to be enrolled and to practise as lawyers. This measure which, it may be confidently expected, will shortly be placed on the Statute-Book, will set at rest a controversy which was started by a Bengalee lady, Regina Guha, an M. A. of the University of Calcutta and a Bachelor of law, who moved the High Court of Calcutta, on the 29th of August 1916, for an order that she should be enrolled as a pleader. A Full Bench was constituted who decided that "it is impossible to hold, on the law as it stands, that women are entitled to be admitted to the ranks of the legal profession" (21 C. W. N. p. 71). The Judges, though sympathetic, had to bend before the law as they understood it and the then Advocate-General (now Lord Sinha), although he said that he would be glad if the privilege were extended to the applicant, argued against her. Miss Guha has passed away from the land of law Courts and lawyers, but we have no doubt that she will be gratefully remembered by all future women lawyers as the first champion of their cause.

Unregistered Lease.

"It is well settled," says Mookerjee, J., in *Shyam Kishore v Umesh Chandra* (24 C. W. N. p. 463), "as the result of a long series of decisions in this Court that when in pursuance of an agreement to transfer property the intended transferee has taken possession, though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed provided specific performance can be obtained between the parties to the agreement

in the same Court and at the same time as the subsequent legal question falls to be determined These decisions are based on the well-known doctrine of equity enunciated in *Walsh v Lonsdale* (21 Ch. D. p. 9), that under certain circumstances equity regards that as done which should have been done." It has since been held by Rankin, J., in *Sampb Chandra Sanyal v Santosh Kumar Lahiri* (26 C. W. N. p. 329), that an agreement to lease intended to operate as a present demise is a lease within the meaning of cl. (d) of sec. 17 of the Registration Act, 1908, and as such is inadmissible in evidence in a suit for specific performance of its terms, under sec. 49 of the Act, if it is not registered even though the tenant is in possession under the said agreement. If this decision stands, it means that if a tenant, who is in possession in pursuance of a written agreement intended to operate as a present demise, brings a suit for specific performance, the suit will be dismissed for no other reason than that he will not be allowed to adduce in evidence the written agreement. In the above case, no evidence was given of any independent oral agreement and the point was left open whether the tenant may give such evidence. But it seems that sec. 92 of the Evidence Act will be in his way. The terms of the agreement, it may be argued, having been reduced into writing, no oral evidence can be given. The tenant is thus between the two horns of a dilemma. If he seeks to tender the written agreement, he is met by sec. 47 of the Registration Act; if he seeks to prove the agreement by oral evidence, he is shut out by sec. 92 of the Evidence Act.

Some Whipping.

Writing on "The Influence of the Church on our Law," a correspondent in a recent issue of the *Law Times* relates the following incident (or anecdote):—In a trial before the Star Chamber in 1632 a young girl was accused, with others, of publishing a scandalous libel imputing immorality to the Dean of Exeter. The Court consisted of several

hundred Lords besides the Archbishop of York and the Bishop of London. The facts having been proved, the various members of the Court proceeded to deliver their judgments. Lord Heath said "She is to be whipped at Exeter, at Colhampton and in the open streets." With this Lord Cottingham and the majority of the Court agreed. But the Bishop of London, who began his judgment with a text from the Epistle to the Galatians and a discussion on the Arian Heresy, concluded it by sentencing the poor girl to be "whipt at Colhampton and at Exeter and as the distance between them was ten miles, to be whipt from the one to the other."

THE TENANCY BILL AND ITS THREE SPECIAL FEATURES

(By MR. RAMANIRANJAN BHOSWICK, M.A., B.L.)
I

As the radical changes that have been proposed by the Committee appointed to consider the amendment of the Bengal Tenancy Act affect all classes of landed interest, they have been the topic of very hot discussion among all classes of people for the last two months. So I take courage to put forward a few comments on this very momentous subject for the consideration of the public and the authorities.

The most important features of the Bill are, as every one will understand, the proposal for giving the status of tenants to all *bonâ fide* cultivators, the transferability of occupancy rights, and the conferment of occupancy right on under-ryayats.

It seems that the Committee are so far carried away by their pious desire to ameliorate the conditions of persons who actually cultivate the land that they overlook the inconvenience and the confusion that will occur in the near future if all their suggestions are accepted by the legislature. Land law is a very perplexing subject. The maxim that "experience and not logic is the life of law" is nowhere truer than in this branch of the law. Another essential quality of Tenancy laws is that they require very careful and accurate drafting; for, where interests are varied and conflicting, the slightest inaccuracy or ambiguity becomes the source of controversy and litigation.

But unfortunately, it seems, some evil genius is watching over the drafting of this portion of the law of the land. The codifica-

tion of the Tenancy laws of Bengal is 130 years old, and it has undergone several thorough revisions; yet the Act has never yet been over famous for artistic drafting. Inconsistency and confusion have so long been the characteristic features of the Act. Now that the Act is going to be thoroughly revised after a period of 40 years, will it not be a matter of deep regret if those inconsistencies and confusions, far from abating, increase in undue proportions?

In the following lines I propose to speak principally on the questions of transferability of occupancy right and the conferment of occupancy right on the under-ryayats.

The question of changing the status of the *barqadars* that has been suggested by the Draft Bill has been so exhaustively discussed by Rajah Bon Behari Kapur Bahadur, C.S.I., that scarcely anything remains to be added. In his note of dissent appended to the Draft Bill he has with minute accuracy exposed the fallacies of Mr. McAlpin's three propositions that he has adduced in favour of the proposed change. I shall only incidentally add that the word "occupant" in cl. 5 (a) of the Bill is fraught with great possibilities of mischief. This word, if it remains there, is sure to create a good deal of confusion in the interpretation of the section and will be a fruitful source of a large crop of litigation. The Bengal Tenancy Act is a law applicable to the land lord and the tenant, and it has nothing to do with occupants generally who may be trespassers, mortgagees or even transferees *pendente lite*. Suppose an usufructuary mortgagee or a transferee *pendente lite* lets the land, while in his occupation, to a *barqadar*. The *barqadar* becomes a tenant by the operation of the clause. The *barqadar* thus becoming tenant may be ryayat or an under-ryayat. Let us suppose he becomes an under-ryayat and then by operation of the proposed sec. 48 *ipso facto* becomes an occupancy under-ryayat too. The result is that the tenant (in this instance, the under-ryayat) gets a better right than his landlord, the usufructuary mortgagee or the transferee *pendente lite* possesses—a principle which is certainly an encroachment upon the ordinary rule of law that a grantor is not competent to confer upon the grantee a better title than he himself possesses. It is not simply a violation of an elementary principle of law, its result upon the mortgagee in the above illustration would be simply disastrous. Suppose the usufructuary mort-

gaugee creates a fictitious *burga* settlement in favour of one of his relatives. The result is that his relative acquires occupancy right and as a consequence the mortgagor, even after redeeming the mortgage, cannot dislodge the mortgagee who continues in possession using the occupancy under-*raiya* as a shield against the unfortunate mortgagor.

The next question is as to making the occupancy right transferable by law. This question was taken up by the Rent Law Commission and thoroughly discussed by them previous to the passing of the Bengal Tenancy Act of 1885. After a thorough discussion the question of transferability was left to custom which in effect has proved to mean almost non-transferability. It has been argued in favour of transferability that non-transferability is an anomaly in the law of property and ownership. But then, who has the proprietary right in land? Has it not been specifically vested in the Zamindar by the Permanent Settlement Regulation of 1793? The *raiya* holds only under an agricultural lease. Approaching the question in that light, it is not an anomaly to hold that the *raiya* should not be allowed to transfer without the consent of the landlord. Non-transferability is consistent with the history of the previous law. This is one aspect of the question, and a theoretical one.

But we are to face facts and approach the question from the point of view of practical utility. And then it is found that the question of transferability should no longer be left entirely to custom but that it is high time that legislature should actively interfere for the simplification of the law and for putting a stop, for once and for ever, to its gradually increasing complications and uncertainties.

Economic causes have done what law has prohibited. Men have learnt to conform to the law and yet transfer occupancy holdings, by keeping a small slice to themselves. In the case of complete transfers the transferee obtains recognition of the landlord if only he knows how to procure it. Thus though the law does not allow it transfer occurs freely and frequently, and neither the transferee nor the landlord is the worse for it.

The rigour of the law of non-transferability has also been much softened by a long line of High Court rulings, and as the law now stands, all transfers, voluntary or involuntary, are binding as between the transferor and the transferee. If that is the actual state of

things, there is no harm if the legislature, by so many words, makes a right transferable which in spite of law to the contrary, has become, to all intents and purposes, transferable in practice, provided the proprietor's chartered rights are sufficiently safe-guarded. By so doing the legislature will only make the law simpler and will effectively bar the door to further complications. But a very important point has been raised against transferability by Mr. Surendra Chandra Sen who is certainly a great authority on the subject. In his note of dissent he suggests possible evils of transferability in the shape of agricultural lands passing into the hands of capitalist firms and planter companies, and thus reducing the cultivators to the class of mere day labourers. But there is a High Court Ruling reported in 1 L. R. 1 Cal. 957 to the effect that a firm of capitalists cannot acquire occupancy right. No doubt Field and Beverley, JJ. held in 1 L. R. 11 Cal. 50, that the decision in 4 Cal. 957 was an *obiter*. However that may be, a question of such vital importance should not depend on such an uncertain thing as High Court Rulings. In any case, the apprehended evil may be avoided by adding a clause to the proposed sec. 26G to the effect that firms and agricultural companies shall not acquire occupancy rights in agricultural lands held by them.

(To be continued.)

LONDON NOTES

(FROM OUR CORRESPONDENT.)

The further hearing of the appeal from Bengal, *Satish Ch. Chatterji v. Kumar S. K. Roy*, was continued on 22nd, 23rd and 26th February and the Board has reserved judgment.

On February 23rd, judgment was delivered in *Banubai Framji Commissariat v. Nanilal Juguldas* (Bombay) by LORD WRENCHUR, the appeal being allowed.

On February 27th the judgment of the Board was delivered in *Keshavlal Bros. & Co. v. Dhanchand & Co.* (Bombay) by LORD ATKINSON. The appeal was allowed and the decree of the trial Judge was reinstated.

The appeal from the judgment of the Chief Court of the Punjab in *Seth Kanhu Lal v. National Bank of India, Ltd.* (Punjab) is still part-heard. The Board is composed of LORDS FINLAY, DUFFOIN ATKINSON, SIR JOHN EDGE and MR. AMER ALI. The suit had been

brought by the Appellant to recover money paid under alleged coercion. In June 1902 the Plaintiff who was the sole debenture-holder of certain cotton mills purchased them at a sale brought about by the trustees for the debenture-holders. In August 1902 the mills were attached by the Respondent Bank, and in order to remove this attachment the Appellant paid to the Bank the sum of money which is now reclaimed. The Bank contend that there was no valid sale to the Appellant in June because the Appellant was in reality both seller and buyer.

Messrs. L. DeGruyther, K. C. and J. V. Parikh for the Appellant

Messrs. Tomlin, K. C., Dunne, K. C. and E. B. Raikes for the Respondents

On March 1st in *Gopi Lal v. Lakhpat Rai* (Allahabad), the judgment of the Board was delivered by LORD CARSON and the appeal was allowed.

In *Musammat Jatti v. Banwari Lal* (Punjab), an application was made by Mr. N. A. Majid for postponement of the appeal. Mr. Dubé opposed the motion. The Board allowed the appeal to stand over until next term but ordered the applicant to pay the costs of the application.

1-3-23.

G. D. M.

Correspondence.

APPOINTMENT OF SESSIONS JUDGES FROM THE JUDICIAL SERVICE.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES"
SIR,

Many comments have been appearing in the press on the remark of the Retrenchment Committee regarding the comparative duties of the Deputy Magistrates and the Subordinate Judges, viz. that the latter are "by training more disposed to decide on the balance of evidence rather than on probabilities." It seems there is some room for the members of the Committee to complain that their real intention has not always been correctly represented. Let us be absolutely fair and impartial in construing their remark, even though their recommendations have been against us. The Committee probably meant to say that in Civil cases the Judge gets the advantage of having evidence adduced on both sides and of weighing their comparative value, while in Criminal cases the evidence is almost

always one-sided and its truth has to be judged from its probability alone without the help of any counter-evidence on the other side. This is the most favourable way in which the remark of the Committee may be put, but at the best it is only an incomplete statement. The Civil Judge has not only to weigh the evidence of the two sides, but has also to take into account the probability of the evidence of each side by itself. He decides not simply on the balance of evidence but on probability as well. On the other hand the Magistrate has not only the probability of the prosecution-story to fall upon, but has also the contradictions or corroborations elicited by cross-examination to guide him. Cases also come up in Civil Courts in which one party, setting up, say, a negative plea, has very little evidence to adduce except possibly his own deposition. In such cases, the evidence of the other side has to be sifted and its probabilities considered in exactly the same way as in a Criminal case. It is a gratuitous assumption of the Committee that because Sub-Judges have not always to deal with one-sided evidence, they would be unfit to do so if called upon to decide Criminal cases.

A MEMBER OF THE JUDICIAL SERVICE.

11-3-23.

PAY OF SUB-JUDGES.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES"
SIR,

The fact that the highest pay of Sub-Judges is Rs. 1,200, whereas that of the Deputy Magistrates is Rs. 1,000 has naturally led many persons to entertain the idea that Sub-Judges get more than senior Deputy Magistrates. But I see from the Civil list corrected up to July last that the average pay of the Civil Judicial Officers who drew from Rs. 750 to Rs. 1,200 per mensem is Rs. 836, whereas that of the Deputy Magistrates who drew from Rs. 750 to Rs. 1,000 is Rs. 851. It is thus seen that Judicial Officers who work as Sub-Judges get Rs. 15 per mensem less on average than Deputy Magistrates of the same rank. Add to this the fact that the former commences getting Rs. 750 four years (on average) later in life than the former and you will be able to see the real relative position of the two classes of officers as regards their pay.

FAIRPLAY.

THE Calcutta Weekly Notes.

Vol. XXVII.]

MONDAY, APRIL 9, 1923.

[No. 20.]

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REPORTS (See Index.)

Inter-caste' Marriage and Hindu Law.

A very interesting case which came up for decision before Macleod, C. J. and Shah, J., of the Bombay High Court in October 1922 is reported in *L. L. R.* 46 Bom. at p. 871 (*Bai Gulab v. Juandul Han Lal*). The Plaintiff, Bai Gulab, through her next friend, Bai Nandubai, apparently no relation of the Plaintiff's, sued for a declaration that her marriage with the Defendant was invalid, that the same was induced by fraud, Plaintiff having been given to understand that she was to live in Defendant's house as his mistress and not as his wedded wife. Plaintiff also claimed Rs. 10,000 as damages for having suffered in body, mind and reputation owing to the Defendant going through a fraudulent marriage ceremony with her and his subsequent conduct towards her. The allegations of fraud were not substantiated, and it was established that the minor's next friend, Bai Nandubai, in whose care the minor was living, at the time, was herself instrumental in bringing about the marriage. The question of the validity of the marriage thus came to turn upon circumstances other than the fraud alleged. These were that the Plaintiff was an illegitimate daughter of a Vaishya of the Modh Bania caste by a Sudra concubine of the Maratha caste, that the latter having died shortly after giving birth to the Plaintiff, she was brought up by her putative father in his own house along with his legitimate children, wore Bania dress and was recognised by the people of the caste as a Bania girl, that the marriage with Defendant, a Modh Bania, was performed according to the ceremonies of the caste and at the marriage feast Plaintiff, dressed as a Bania bride, dined with several Bania females.

The trial Judge, Mr. Justice Kopp, took the very simple and common sense view that the Plaintiff having been recognised as a Bania girl by the people of the caste at the time of the marriage, the marriage was valid according to Hindu law. A caste cannot expel one of its members without a justifiable cause established upon due investigation. To permit that would be to permit social tyranny of a most reprehensible kind. But considerable latitude should surely be permitted to the caste organisation in the matter, not of excluding but of admitting new members. The law which would compel the caste which has willingly admitted a new member to exclude him against its wishes will surely lay itself open to the charge of tyranny of the same magnitude.

Mr. Justice Shah who delivered the judgment in appeal however, felt pressed by authority to hold that the validity of a marriage could not be left to the decision of the caste, but was for the Court, which, in the absence of proof of a special caste custom or usage must decide it according to the general principles of Hindu law. In this case no immemorial custom of the caste permitting marriage of a Modh Bania with a girl not of that caste was alleged or proved. This marriage was presumably the very first of its kind sanctioned by the caste, but to be valid as a custom the practice must be shewn to have been invariable and ancient. The caste could not at will create a new custom, salutary or otherwise. The learned Judge had therefore seriously to address himself to the question whether the marriage was valid according to Hindu law, pure and undebilitated by custom, salutary or otherwise.

The first question which confronted him was, what was the caste of the girl? If she had been the legitimate issue of a Modh Bania who had married a Sudra woman, there was authority for holding that the caste of the girl, being the issue of an *anuloma* marriage,

would be higher than that of the mother but lower than that of the father. But here there was no marriage. In Madras, a Bench of Judges cut the knot by treating the illegitimate offspring of the connection between a man of a higher and a woman of a lower caste as *anulomaja*. But Shah, J., excusably found himself unable to endorse this *tour de force*. In the absence, however, of any text or decision to guide him, his Lordship could not arrive at any conclusion, left the question open and proceeded to deal with the case on the footing that the girl was a Sudra.

Now, if the girl was a Sudra, the marriage was an *anuloma* marriage. *Pratiloma* marriages have been held to be invalid in the Presidency. As to *anuloma* marriages, there is no question that, though disapproved, such marriages were not prohibited according to texts of the *Smritis*. Have they become obsolete since? To this, his Lordship's reply is "What is obsolete is not necessarily prohibited." "The prohibition," his Lordship said, "must be found in the law books or in usage having the force of law," and of course a usage to have the force of law must be proved to be invariable and immemorial. The result was that his Lordship found the marriage valid according to the texts of Manu and Yagnavalkya and other ancient sages and therefore one which he was bound to uphold. We entirely approve of the result, but the mode of reasoning by which perforce that result had to be reached does not commend itself to us and does not, in our opinion, reflect credit either on the law or on the system which has made itself responsible for the application of that law. The reasoning simply is that what some very peculiar people, with whom no community of people in India at the present day can claim to have much in common, did 2000 years or so ago, must be imposed as the law upon every community which calls itself Hindu, though these same practices may have been obsolete for the last 1999 years. A modern innovation, on the other hand, acquiesced in though it may be by the entire community, must nevertheless be thrown overboard as illegal, because no sanction can be found for it in some worm-eaten ancient Sanskrit texts, a hopeless situation for all who call themselves Hindus; and the pity of it is that most of those who profess to be the leaders of the

community shout in fury and rend the air with cries that the community is in danger at the moment such mild measures of reform as inter-caste marriages are so much as breathed without their hearing. Practices which are disregarded with impunity in every other matter must be strictly followed in matters of marriage only or out you go of the pale of Hindu Society!

THE TENANCY BILL AND ITS THREE SPECIAL FEATURES

(By MR. RAMANIRANJAN BHOWMIK, M.A., B.L.)

(Continued from p. lxxv.)

II

But the defect of the Bill lies not in advocating the transferability of occupancy rights but in making provisions of very doubtful efficacy for safe-guarding the vested interest of the landlord. If the under-ryat is given occupancy right and the 9 years' limit under sec. 85 is abolished, every one will avoid the landlord's fee of 25 per cent. by sub-letting the riyati holding after receiving a big *selam* and retaining a nominal rent so that the transaction may not be called a sale. It may be argued that no one will buy the risk and disabilities of an under-ryat by paying a big *selam*, while he may buy the holding itself by paying something more. As an instance of the risk of the under-ryat, it may be suggested that the under-ryat will live in daily fear of his under-ryati being annulled by the landlord of the riyat when the latter after pocketing the *selam* would collusively sell the riyati holding to a third person from whom the superior landlord would pre-empt. That there is no substance in this apprehension of the under-ryat will be apparent from the following:—Sec. 26H is the section under which the pre-empting landlord may annul the under-ryati. A shrewd under-raiva may easily avoid the annulment. All that sec. 26H entitles the pre-empting landlord to do, is that he can annul only the under-ryat held immediately under the purchaser and no one below him. So if the under-raiva immediately after taking settlement from the riyat creates another under-raivati in favour of an obliging relative, the second under-ryati will, in all cases, remain intact. If the riyat after giving an under-raivati lease collusively surrenders his holding, the position of the under-ryat is rendered stronger by

operation of the proposed sec 87A. Thus in all cases if a person instead of purchasing the raiyati holding takes an under-raiyati lease his position is none the less secure for that.

In another way the zamindar may be deprived of his pittance of 25 per cent, and that more effectively. Let us take an illustrative case. Suppose that A is the proprietor, B a raiyat under him his holding comprising 5 kams of land. If B sells the holding to C, it would fetch Rs 300 of which B would get Rs 225 and the landlord Rs 75 as his fees. But if B, instead of selling it gives an under-raiyati lease to C on a solatium of Rs 245 reserving a nominal rent say Re 1, the landlord gets nothing. Shortly after B sells the holding to C, the erstwhile under-raiyat, for a very small price say Rs 20 of which the raiyat gets Rs 15, the landlord Rs 5. Thus in case of sale the transferor raiyat gets Rs 225 whereas the buyer has to pay Rs 300. But in case of under-raiyati lease first and sale shortly after, the purchaser pays for the holding altogether Rs 265 (Rs 245 for lease and Rs 20 for the subsequent purchase) and the vendor gets Rs 260 (Rs 245 for the lease and Rs 15 for sale), a transaction very convenient to both transferor and transferee, but very unprofitable to the proprietor whose fees are reduced to Rs 5 from Rs 75. It may be said that the landlord A will meet the situation by exercising his right of pre-emption. But then, the transferee C also will rise to the occasion. Immediately after securing the under-raiyati lease C will create another two under-raiyati leases successively in the name of two of his relatives. And then what object would the superior landlord have to pre-empt? He shall have to pay Rs 22 in order to pre-empt, and with that sum he will buy only the right of receiving a very insignificant sum as rent from the under-raiyati last created. For by the proposed sec 26H, he cannot annul the last under-raiyati as that is not held immediately under the purchaser.

Thus though apparently the proprietary right of the Zamindar is recognised by allowing him a fee of 25 per cent at every transfer, that recognition turns out to be a very shadowy one and is more than neutralised by giving occupancy status to under-raiyats. From the above considerations the following suggestions appear to follow:—

(i) Occupancy rights should be made transferable by law.

(ii) At the same time the proprietor's interest should be rigorously safe-guarded.

(iii) No provision should be made which would defeat the provision for the realisation of the landlord's fee of 25 per cent. As a necessary corollary of the above, occupancy right should not be given to the under-raiyats.

(iv) Very strict provisions should be enacted against agricultural holdings passing into the hands of capitalist firms and planter companies.

(To be continued)

LONDON NOTES

(FROM OUR CORRESPONDENT.)

On March 1st, judgment was delivered in *Gopi Lal v. Lakshpat Rai and others* (Allahabad) the appeal being allowed.

On March 1st, 2nd and 5th, the hearing was continued of *Seth Kanhya Lal v. National Bank of India*. The judgment was reserved.

On March 5th judgment was delivered in *Sourindra v. Mittha v. Heramba v. Bandopadhyaya* and the appeal allowed.

The hearing was commenced of an appeal from Lower Burma, *Imperial Bank of India v. T. Rai Gyau Shu & Co., Ltd.* In this appeal important points of law are raised as to priority among mortgagees. Documents of title were deposited with the Bank to secure an overdraft. Later the depositor obtained large sums of money from the Respondent Company on the same properties which he represented as being unencumbered. The Company obtained a registered mortgage to secure their loan but did not require production of the title deeds. They now claim to have priority over the unregistered equitable mortgage of the Imperial Bank.

Messrs N. Mucklam, K. C., DeGruyther, K. C. and Warwick Drafer for the Appellants.

Messrs Dunne, K. C., Webster and Pennell for the Respondents.

The arguments of Counsel are not yet concluded (March 8th).

On March 6th, judgment was delivered in *Champsay Bhara Co. v. Jirrai Balloo Spinning and Weaving Co., Ltd.* (Bombay). The appeal was allowed.

In *Mirza Abid Husain Khan v. Ahmad Hussain* (Lucknow), the contest centred round an annuity of Rs 250 per annum, and the objection was taken by the Respondent

that the value of the subject-matter in dispute on appeal was Rs. 10,000. This objection was upheld by the Board composed of LORD ATKINSON, SIR J. EDGE and MR. AMERL AIR and the appeal was dismissed.

Messrs. DeGruyther, K. C. and *Raikes* for the Appellant.

Mr. H. Hallach for the Respondent.

The question for determination in *Sudhamani Das v. Sarat Lal Das* (Bengal) was whether a Hindu widow who had been given property under her husband's Will as *mahli* took an absolute or a limited estate. The same Board upheld the decision of the High Court that the estate taken was unlimited.

Mr. Park for the Appellants.

Messrs. DeGruyther and *Dube* for the Respondents.

G. D. M.

Reviews.

THE PRINCIPLES OF THE LAW OF EVIDENCE. By the late W. M. Best, 1 M., LL.B., Twelfth Edition by Sidney L. Phipson, M.A., Barrister-at-Law, London, Sweet and Maxwell, Limited, 3 Chancery Lane, W. C., 2 1922.

Best in Evidence is a legal classic which has held its own as a text-book against younger competitors for nearly three quarters of a century through sheer merit. A better apologist for all that is best in the English law of evidence or a sounder critic of its defects does not exist, and we doubt very much whether any serious student of the English law of evidence can get reader insight into the foundations and the details of that law from other sources without unnecessary waste of time. The book has been fortunate too in its editors, who have made all necessary changes and improvements without interfering with those features which make it specially valuable to students, viz., its elucidation of fundamental principles. A feature of the present edition which will be specially appreciated by Indian students is the English translations, given in the foot-notes, of Latin citations, nor will they regret the omission of Canadian cases from the references. The book will be specially welcome on this side of India where it has for long been the standard text-book prescribed for the B. A. Examination.

THE LAW OF POSSESSION IN INDIA. By A. Chaudhuri, Barrister-at-Law. The Book Company, College Square, Calcutta, 1923.

This is a handy and attractively got up book of 200 pages, in which the student and the practitioner will get all the salient topics bearing on the subject of Possession discussed with reference to opinions of well-known writers of text-books and judicial decisions of the Indian High Courts. The chapter headings give an idea of the variety of matters which have been considered. They are: I. Possession in general, II. Burden of Proof and Evidence of Possession, III. Presumptions, IV. The Possession of a Trespasser, V. Constructive Possession, VI. Possessory title, VII. Dispossession and Discontinuance of Possession, VIII. Adverse Possession, IX. Possession under Specific Relief Act, X. Possession under sec. 145 of the Criminal Procedure Code and XI. Possession under the Indian Penal Code and property in animals *feræ naturæ*. The four appendices deal with miscellaneous allied topics including the law of limitation and possession in its bearings on *benami* transactions and the application of the doctrine of *Walsh v. Lonsdale* to suits for recovery of possession of land. A full table of contents and a detailed subject index facilitate ready reference. The book ought to prove useful.

THE CODE OF CIVIL PROCEDURE. By S. Harnam Singh, M.A., Member of the Punjab Provincial Civil Service, Amritsar. Printed at the Commercial Press, Triplicane, Madras, S. E., 1923. Price Rs. 7-8.

The book is written by a judicial officer of experience and standing and purports to be a commentary "embodying the conclusions of the latest case-law" and making up, at the same time, the deficiency in the Punjab references. The commentaries are brief and the references are far too scanty for the purposes of the general practitioner, and far too summary and condensed for students. They seem to presuppose a working acquaintance with the Code and the general drift of judicial decisions bearing on its provisions; but as the notes, though condensed, are, so far as they go, informing, they should prove helpful as a guide to judicial officers, specially in the Punjab, most of the references being to Punjab decisions. The printing and general get-up are commendable.

THE Calcutta Weekly Notes.

Vol. XXVII.]

MONDAY, APRIL 16, 1923.

[No. 21.]

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REPORTS (See Index.)

Civil Marriage.

We welcome the decision of the Legislative Assembly in passing the "Bill further to amend the Special Marriage Act, 1872." Its object, as our readers are aware, is to enable Hindus, Buddhists, Sikhs and Jains to dispense with the customary marriage ceremonies and contract what is called a civil marriage. A similar bill was introduced a few years ago by the Hon'ble Mr. B. N. Basu, but was not proceeded with. Under the present Act III of 1872 Indians may contract a civil marriage, but it can be availed of by a limited section of the public, because of the fact that the parties to the marriage have to make a declaration that "neither of them professes the Christian or the Jewish or the Hindu or the Mahomedan or the Parsi or the Buddhist or the Sikh or the Jaina religion." The result has been that the Act is confined to those who profess the Brahmo faith. But even among the Brahmos, there are some who have great scruples in making the declaration as they think that, although they are Brahmos, they have not ceased to be Hindus. The present measure will enable Hindus, etc., to contract a civil marriage on making a declaration that they profess the Hindu or the Buddhist or the Sikh or the Jaina religion as the case may be. It is, however, a wholly permissive measure and does not take away the right of a Hindu to marry according to the ancient forms and ceremonies. There are people who think that the bill, if it becomes law, means

the beginning of the disruption of the Hindu social system. We entertain no such apprehension. On the contrary, we believe that it will stem the tide of disintegration which has already begun by meeting a long-felt want of those adherents of the community who would like to remain within its folds but who hesitate to subscribe to all its ancient forms.

Removal of disabilities of a Hindu Heir.

Under the Hindu law, blindness, deafness, dumbness, want of any limb or organ (provided the defects are congenital), lunacy, complete idiocy, leprosy, and other incurable diseases have been held to operate as excluding an heir from inheritance. The heir, so excluded, is entitled to maintenance, but nothing more. These disabilities are now sought to be removed by a bill which has been recently passed by the Assembly, the material portions of which are as follows:

I. (1) The Act shall not apply to any person governed by the Dayabhaga School of Hindu law.

II. . . . No person governed by the Hindu law, other than a person who is and has been from birth a lunatic or idiot shall be excluded from inheritance or from any right or share in joint family property. . . .

III. Nothing contained in this Act shall be deemed to confer upon any person any right in respect of any religious office or service or of the management of any religious or charitable trust.

After this bill is passed, born lunatics and idiots will be the only disqualified heirs. It should be noticed, however, that Dayabhaga Hindus, i.e., Bengalees, are not touched by the proposed change. There is some reason for making this distinction having regard to the fact that a Dayabhaga owner of property can dispose of it as he likes, whereas in the case of those who are governed by the Mitakshara, there is no such power of disposition.

THE TENANCY BILL AND ITS THREE SPECIAL FEATURES.

(By MR. RAMANIRANJAN BHOWMIK, M.A., B.L.)
(Continued from p. LXXIX)

III

Then as to the next important change proposed by the Committee, *viz*, the conferment of occupancy status to under-riayats. Among all the proposed amendments, this change seems to be the most startling, and promises to create the greatest hardship to landlords, and a very entangling complication in the status of the tenants.

The shorter the chain of rent-receivers and rent-payers, the simpler is the law which governs them. The law, as it stands at present, is already in a sad state of confusion. The rapid growth of subinfeudation has been mainly responsible for this. As a result of the conferment of occupancy status to under-riayats subinfeudations will still more increase, and the law will need to be revised year after year to adapt it to each series of new complications.

Cl. 28 of the Bill proposes to give occupancy right to all under-riayats excepting a very small number of those who hold under certain disabled persons. The raiyat, in order to be an occupancy one, has to qualify himself under sec 20 and sec 21. But the under-riyat according to the novel principle of "touch" enunciated by the Bill, *ipso facto* becomes an occupancy under-riyat. The result is ruinous to the raiyat landlord. The under-riyat was inducted into the land on the understanding that he would go out of it on the expiration of the lease, and where the agreement was oral he is a mere tenant-at-will. As in all cases his interest has been a very temporary one, the consideration which the raiyat landlord has so long received from him has been necessarily very small. Now the Committee proposes, in spite of all contracts to the contrary, to give him a permanent right in the holding [*vide* Bill, cl. 109 (a)]. Though we are told on high authority that at the present day everywhere in the world the movement is from status to contract, in the land laws of Bengal at least it would seem, the movement is in the reverse direction. If in their eagerness to improve the condition of the cultivators the legislature must needs violate elementary principles of law, they should in fairness give sufficient warning to those who will be the greatest

sufferers by their novel and unexpected innovations. Suppose a raiyat gives an under-riyat lease of his holding of 3 kams of land on a *jama* of Rs. 15 per year. Let us further suppose that the raiyat himself pays Rs. 10 as rent to his landlord. The value of the raiyat would be, under the present law, to make a very modest estimate, Rs. 300; for in assessing the value of the holding it may be considered to be in *khas* possession of the raiyat as the under-riyat has only a temporary interest, whereas the under-riyat, as it is not transferable at all, would fetch a very small price for any sub-lease which the under-riyat may create in favour of another. But imagine for a moment the glaring change that happens in the price when the under-riyat is given the occupancy right with unfettered right of transfer. The right of rent-receiving which merely is left to the raiyat would be valued at most at $(15-10) \times 15 = \text{Rs. } 75$ whereas the under-riyat would be valued at Rs. 300. At one stroke of the pen one is made a beggar, the other a prince.

Then again it cannot be said with any degree of certainty that this inequitable change will accomplish the desired purpose. In the main report of the Committee, an explanation of the proposed change is given. It is said that so long occupancy right has been enjoyed by the wrong person, and that as occupancy right should in all cases be the due of the actual cultivator the only way by which that result may be obtained is by giving occupancy status to all persons holding land under a raiyat.

The Committee proceeds upon the wrong assumption that raiyats as a class do not cultivate the lands themselves, they always let out their lands. The agriculturists, according to their status, may be divided into two main classes—raiayats and persons holding under the *burga* or other cognate systems. The number of actually cultivating under-riayats is comparatively very small. The raiyats have already occupancy right. No doubt if the Committee's proposal for making *burgadars* tenants is accepted the number of actually cultivating under-riayats will vastly increase. But then, the Committee invites difficulties and then propounds desperate remedies to meet them. It has been already shown that *burgadars* need not be made tenants. Their present status is neither inconvenient to themselves nor to those under whom they hold. Minus them the number of actually cultivat-

under-riyats is so small that it would not be prudent to run the risk of complications that would ensue if occupancy right is given them. I have elsewhere remarked that "life is not logic but experience," and experience shows that the law that renders the greatest benefit is the best, and it can never be so perfect as to be enforceable without inconvenience to some at least.

(To be continued)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

On the 9th March, the application of *Zagul Pasha* mentioned in my notes two weeks ago again came on for hearing and after further argument the Board decided that there were not sufficient grounds to justify granting special leave to appeal from Gibraltar.

On the 12th March, judgment was delivered in the case of *Tata Iron and Steel Co v. Chief Revenue Authority, Bombay*, dismissing the appeal on the ground that no appeal lay to the Privy Council under the provisions of the Indian Income Tax Act.

On the 13th March, *Mr. Wallach* applied to the Board composed of LORDS PINLAY, DUNEDIN, ATKINSON, SIR JOHN EDGE and MR. AMERALL for special leave to appeal from a decision of the High Court at Lahore in the case of *Jar Bhagwan v. Hakim Singh*. The question on which the decision of the Board was required was whether or not the innocent sons of a person convicted of murder should be allowed to succeed to the murdered man's property. The High Court answered the question in the negative and did not consider that an appeal to the Privy Council was permissible. The Board refused leave.

On the same day, in *Pathbai v. Sorabji* (Bombay), an application was made to the same Board by *Mr. E. B. Raikes* for special leave to cross-appeal. The suit had been brought in the Bombay High Court for the construction of a Will. The applicants were two of the Respondents who asked for leave in order that they might place before the Court a construction which had been negatived by the High Court and which it was

against the interests of the Appellant to uphold. The application was opposed by *Mr. J. G. Wood* and *Mr. G. Douglas McNair* as being out of time. The Board gave leave to the applicants to be joined as co-Appellants on paying the costs of the application.

On March 9th to 15th, the further hearing was resumed on March 9th and concluded on the 15th of the part-heard appeal from *Lower Burma, Imperial Bank of India v. V. Rai Gyan Thu & Co.*, in which the question of priority of mortgagees was argued. The debtor deposited title deeds of certain properties with the Bank to secure present and future advances. He then executed a registered mortgage in favour of the Respondent Co., who were money-lenders. Some of the Bank's advances were made prior to, and others later than, the registered mortgage.

15.3.23

G. D. M.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

ORDINARY ORIGINAL CIVIL JURISDICTION. Before GLEAVES, J. (in Chambers). Suit No. 667 of 1920. *HOWESONS BROS. LTD. v. W. S. J. HARVEY and anr.* The 2nd January 1923.

Execution against surety. Sec. 145 of C. P. C. - Whether surety for a Receiver can discharge himself by giving notice. Sec. 130 of the Indian Contract Act.

In this case, the Defendant Harvey was appointed Receiver of certain properties and one M. A. Mamoojee stood surety for him. Harvey having made default, one M. was appointed Receiver in his place to whom Harvey was ordered to pay a certain sum of money. Harvey having again failed to pay, an application was made to enforce payment of the sum against the surety. The same was refused as the bond executed by the surety in favour of the Registrar had not been assigned. The Registrar having then assigned the bond to M. the Plaintiffs applied to enforce payment against the surety on the bond under sec. 145 of the C. P. C. The following objections were taken:—(1) That the Plaintiffs

were not competent to apply, (2) that the matter was *res judicata*, and (3) that the surety had discharged himself by notice under sec. 130 of the Indian Contract Act.

Held—(1) That the Plaintiffs were the proper parties to apply. A Receiver does not ordinarily sue or commence proceedings and it is only when the parties interested refuse to apply that strictly speaking he is entitled to apply.

(2) no decision having been given on the merits on the former application, the matter was not *res judicata*, and,

(3) sec. 130 of the Indian Contract Act has no application to a continuing guarantee on behalf of the Receiver.

P. K. C.

Application granted.

CIVIL REVISIONAL JURISDICTION. Before PANTON, J. CIVIL REVISION CASE No. 30 of 1923. BANWARI LAL BOSE, Plaintiff-Petitioner v. LABANYABATI DASIA, Defendant Opposite Party. The 13th March 1923.

Setting aside ex parte decree. Or. 9, r. 13, Civil Procedure Code. Revision—Illegal exercise of jurisdiction.

The facts will appear from the following judgment of Mr. Atul Chandra Ganguli, Munsif, 3rd Court, Jessore—

This is an application for setting aside an '*ex parte*' decree passed in an ejectment suit.

The suit was filed on 15th May 1920. Defendant No. 8 appeared and contested the suit and dropped off later on allowing the suit to be decreed '*ex parte*' on 22nd February 1921. Then Defendant No. 2 filed an application on 22nd July 1921 (Miscellaneous Case No. 335 of 1921) for getting the '*ex parte*' decree set aside and this application was allowed on 9th January 1922. Then Defendant No. 2 filed W. S. and began to contest the case and then allowed the suit to be decreed '*ex parte*' on 27th June 1922. Again on 7th July 1922, the present application was filed by Defendant No. 2. Defendant No. 8 did not turn up after revival of the case. The record shows that on 17th May 1922, Plaintiff was ready with 8 witnesses and Defendant No. 2 was ordered to pay Rs. 2 as adjournment costs to Plaintiff and an order was passed to the effect that no further time would be allowed. On 6th June 1922 Plaintiff was again ready with 9 witnesses and Defendant No. 2 applied for time. As a matter of favour

the Court allowed her time on payment of adjournment costs of Rs. 3. But it appears that Defendant No. 2 did not care to pay adjournment costs ordered on those two dates. The case then came up for hearing on 27th June 1922 and Plaintiff was ready with 8 witnesses. On that day the suit was decreed '*ex parte*' as Defendant No. 2 did nothing up to 31st June on that date. It is now said that Defendant No. 2 was ill and so he could not take any steps on 27th June 1921. Defendant No. 1 is father of Defendant No. 2. Defendant No. 2 does not depose in this case. Defendant No. 1 and his son who is Defendant No. 5 gave then evidence in this case. No independent witness or medical man has been examined to corroborate the testimonies of those two highly interested persons. On the other hand decree-holder has examined his brother Chundal Bose and besides three men who live close by to Defendant No. 2's house have been examined to prove that Defendant No. 2 was quite hale and hearty at or about the time the case was disposed of. So I am unable to accept the Petitioner's story of illness and it is evident that the aim of the Petitioner and her father is simply to prolong this litigation. This is a typical case which shows how a designing litigant can avoid coming to a trial and keep his opponent at arm's length for an length of time. It is, however, said that Petitioner lives on the land in suit and that she is a '*pardanashin*' lady. No doubt, some allowance has to be made for all these circumstances but at the same time it must be seen that a '*bona fide*' litigant who comes to Court for relief and was ready for trial of the suit does not suffer. In consideration of all these circumstances, it is ordered that the application be allowed.

The Plaintiff thereupon moved the Hon'ble High Court and obtained this rule:

Held—The Munsif made an illegal exercise of jurisdiction. His order setting aside the '*ex parte*' decree was cancelled.

Babu Kshitish Chandra Chakrabarti for the Petitioner.

No one appeared for the Opposite Party.
S. C. C. Rule made absolute.

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The new Criminal Procedure Code.

Neither of the two Criminal Procedure Code Amendment Acts recently passed has yet been officially published. Still another Bill, the one, namely, which contemplates the abolition of transportation which has been referred to the Select Committee, will, when passed, materially affect certain provisions of the Code untouched by these Acts. It will certainly be convenient to Courts and legal practitioners if all the amendments could be brought into force at the same time so as to enable the issue of editions of the Code with all the amendments duly carried out, and it is presumably this, which is delaying the publication of the amending Acts already passed by the legislature.

Lawyers and Politics.

The decision of the Privy Council in *Shan-lar Ganesh Dabir v The Secretary of State for India in Council* (27 C. W. N., p. 313) has raised a question of considerable importance to the legal profession. The facts of the case are shortly as follows:—The Petitioner, a pleader practising in Beera, took part in an agitation against the Mahar Bahuta revenue system prevailing in Beera in course of which he told the cultivators not to pay the tax, but to allow their property to be attached by Government and sold for it. By an order under sec 107 of the Criminal Procedure Code, he was bound down to keep the peace for a year. Proceedings were then started against him under the Legal Practitioners Act and his *sanad* was cancelled "until such time as he satisfies us by his future conduct that he is fit for re-admission." The pleader applied to the Privy Council for special leave to appeal against this decision which was refused on the ground that "the circumstances

of the case were sufficient to found jurisdiction under sec 13, sub-sec (f) of the Legal Practitioners Act."

Sec 13 of the Legal Practitioners Act authorises the High Court to suspend or dismiss a pleader or muktau for certain acts done in his professional capacity as also 'for any other reasonable cause'. These words have been the subject of judicial construction in our Courts on several occasions. In *In the matter of Purna Chandra Paul* (4 C. W. N., p. 389), Hii and Rampur, JJ. held that cl. (f) was intended to cover misconduct other than professional misconduct. This view was not followed in *In the matter of Jogendra Narayan Bose* (5 C. W. N. p. 48), where Maclean, C. J. and Banerjee, J., after laying down the broad principle that the Act in question is aimed at the misconduct of legal practitioners in relation to their professional duties and not in relation to other matters, decided that "the expression 'other' means other *quodam generis*, that is, of the class or description of misconduct which is referred to in preceding sub-sections, that is to say, professional misconduct." The matter again came up for consideration in *In the matter of Syed Wajid Hossain* (6 C. W. N., p. 556), where the Full Bench by a majority overruled the previous decision and held that the words in question are to be taken in the wider sense as embracing disqualifying causes of a kind different from the strictly professional.

Mr. Dubé appearing for the pleader contended before the Privy Council that a pleader could be suspended only on grounds of professional misconduct or for an act or an offence involving moral delinquency. Then Lordships held that sub-sec (f) was not confined to acts done in a professional capacity and as regards the question of moral delinquency, they declined to go into the merits of the case, as, in their opinion the facts were sufficient to enable jurisdiction to arise. There was some discussion at the bar as to whether a pleader who incited people not to obey the law was a fit

and proper person to continue as such, and Lord Sumner went so far as to observe: "This man is a pleader and an officer of Court. He assists in the administration of law. That being so, he incites a very large number of people . . . to defy it. Is that proper conduct for a man who is one of the officers of the Court?" Lord Buckmaster, however, made it quite clear that the Board expressed no opinion as to whether they would have exercised the discretion vested in the Court below in the way in which it was exercised. *The only question they had to consider being whether there was material which enabled the discretion to arise.*

From the point of view of the profession the refusal of the Privy Council to give a decision on the merits is most unfortunate. Legal practitioners are supposed to be officers of the Court and are expected to assist in the administration of justice. Having regard to the fact that, all over the world, a considerable number of them take part in political controversies and agitations directed against the Government, a judicial illumination of the pitfalls of the profession, would, we need hardly say, have been a welcome guidance.

THE TENANCY BILL AND ITS THREE SPECIAL FEATURES

(By MR. RAMANIRANJAN BHOWMIK, M.A., B.L.)
(Continued from p. LXXXIII.)

IV

Then as regards the wording of the proposed sec. 48 it is apprehended that the wide language of the proposed section will create great difficulties in construing it. The exception which has been proposed in favour of certain disabled persons is so vague that, it is feared, it will not be any effective protection to those whom the Committee intend to protect. It will only breed unnecessary litigation. The causes of the disability are five—age, sex, disease, accident and temporary absence. But neither of them by itself is to be sufficient to form an exception. In order to come under the proposed exception one is not only to be of certain age, sex, etc., but one shall have to prove that besides all or any of those disadvantages, he has the further disadvantage of not being able to have his land cultivated by the members of his family or by hired labourer or even with the aid of partners. Let us take the case of a woman—her sex merely would not be enough

to bring her within the exception; she has to prove that she cannot have the land cultivated by the members of her family, that she has no business capacity to manage the cultivation by hired labour and lastly that she cannot even secure a partner to cultivate the land for her. What is the result? Many will, with a considerable show of reasonableness, invoke the aid of the exception, if on no other ground, at least on the ground of accident (a conveniently vague term) or temporary absence, while it will be as easy for the under-ryat to show that the woman or other apparently disabled ryat had opportunities to have the land cultivated by the members of his or her family or by hired labour and in all cases, with the aid of partners. As a result of this uncertainty there will be an immense crop of litigation which the very situation of the disabled person will deny him the opportunity of combating successfully.

Then the words "with the aid of partners" require consideration. The difficulty and hardship which those words will cause I shall try to show by illustration. Take for example the case of a person who is compelled to be temporarily absent from home. Let us further suppose that all the other ways of cultivating the land excepting cultivation with the aid of partners are barred to him. What can he do? He may let his land to an under-ryat, who at once acquires occupancy right in it. The only other way open to him is to cultivate it with the aid of partners. Let us see how far this method will prevent the acquisition of occupancy right by any body in his holding. Here it is necessary to consider the provision of cl. 5 (a) of the Bill in this connection. The clause runs as follows:—

"Where a proprietor, tenant or occupant of land permits a person to cultivate such land on condition that the produce is shared between that person and the proprietor, tenant or occupant and where that person himself provides the ploughs, cattle and implements of agriculture, that person shall, notwithstanding any contract made after the first day of November 1922, be deemed a tenant, unless in any contract made before the first day of November 1922 the contrary appears." Now if the land is given to a partner for cultivation, as sure as anything, the partner will turn round and make himself a tenant with the aid of cl. 5 (a) as set forth above. In this instance he will also acquire the occupan-

cy right with the aid of the proposed sec 48. The unfortunate absentee raiyat is in a sad plight; if he lets the land to the under-raiyat the latter acquires occupancy right in his holding, if in order to avoid that danger that he gives his land to a partner, as the law directs him, the partner also, in an indirect way, acquires the same right. The raiyat is either to let his land lie fallow and starve, or as a penalty of his temporary absence forfeit his holding.

From what has been said above the following conclusions would necessarily follow —

(1) Under-raiyats should not be given occupancy right for the following reasons—

(a) Sale of raiyat holdings will be few and far between and the provision for the landlord's fee will be avoided.

(b) Subinfeudation will increase to an abnormal extent.

(c) The raiyat will be practically deprived of his holding.

(2) If the under-raiyat is given occupancy right some provision similar to secs 20 and 21 should be prescribed.

(3) The exception in favour of the disabled persons should be more clearly worded.

(4) The words 'with the aid of partners' in Bill cl 28 in amending sec 48, should be left out.

(Concluded)

ZAGHLUL PASHA'S CASE.

It is an important characteristic of our time that the executive power of the State should have extended, within recent years, to boundaries far beyond what were deemed legitimate by the classic doctrines of the last age. In the realm of delegated legislation, there is much to be said for the development, though the famous *Arldge* case (a) shows the danger that this power may be used to oust the jurisdiction of the Courts. That danger is even more apparent in the exercise of the prerogative by the Government. Here no Parliamentary enactment can be quoted, and the protection of the subject is dependent upon the firm resolve of the Courts to scrutinize each action taken against him. Unless that scrutiny is relentless and searching a fundamental safeguard of popular liberty is in constant danger of destruction.

The recent refusal of the Judicial Committee to entertain Zaghlul Pasha's petition against

his imprisonment by the Governor of Gibraltar is exactly the kind of case where rigorous scrutiny of this kind has been evaded. With the wisdom or unwisdom of Zaghlul's acts in Egypt the Court is, of course, unconcerned. What does concern it, is the fact that whatever offences he has committed have been committed upon the soil of what is now, by our own act, an independent State. He is guilty that is, of no offence against the British Crown, and his petition was for a writ of Habeas Corpus to show for what cause he was interned in Gibraltar by the order of the Governor. The argument of the Attorney-General which induced the Judicial Committee to throw out the petition, is of a nature so dubious and so vague that it is greatly to be hoped it will secure a more detailed examination. Gibraltar he said, was obtained by conquest, and in the absence of any special legislation applying the common law to its government, it is ruled simply by the prerogative of the Crown. Magna Charta and Habeas Corpus have therefore no relevancy to any territory acquired by conquest, unless Parliament has willed otherwise; for if the king in Council should apply that system of rights by Ordinance, it appears that another Ordinance may equally take it away. It follows therefore, that neither a British subject nor an alien has the liberties historically associated with our political system except by Royal grace, and what Royal grace has given Royal grace may take away.

That is surely a position that will come as a surprise to most constitutional lawyers, and it is amazing that the Judicial Committee should have accepted it without full argument. The report, indeed, indicates that the Court was not unanimous, but, since the Judicial Committee is bound by the opinion of its majority, we have unfortunately, no dissent to form the reservoir of future judgment. But it is surely clear that if the seventeenth century meant anything in the history of this country it meant that the Crown and its executive can act only within the ambit of common law and statute. It is quite true that English law does not apply to ceded or conquered territory in the absence of express direction to that effect. But by Order in Council of February 2nd, 1881, English law, which includes *habeas corpus*, was made applicable to Gibraltar as of December 31, 1885. The Attorney-General offered no evidence that the Order had been repealed, or that had it

(a) [1915] A. C. 120.

been repealed, repeal would have been valid, for the surrender of the prerogative is a final surrender. And in the classic case of *Attorney-General v. Stuart* (b), the notion was dismissed that the application of English law is at all limited, it is general as of the date when it comes into force. And this involves, quite clearly, the right of Zaghlul to be informed of the legal grounds of his detention. If held *ultra vires*, it involved also the right, ever since the great case of *Musgrave v. Poldo* (c) to sue the Governor of Gibraltar for unlawful imprisonment. The Privy Council, moreover, might have remembered that in the case of *Spragg v. Stuart* (d), which is not unlike that of Zaghlul, it was held that the internment of a native chief whose presence was thought dangerous to the public safety was illegal, even though the common law had not been applied to the territory. The refusal to entertain Zaghlul's petition becomes, in the face of these facts a wanton deprivation of justice.

That deprivation is the more urgent when our own experiences of the last decade are borne in mind. Under Dona and despite the protest of Lord Shaw, the House of Lords in *R. v. Halliday* (e) allowed the internment of a British subject without the production of any evidence whatever. The arrest of 150 Irishmen under an Act which was intended to operate for and in Ireland held under subjection by the Black-and-Tans is another instance of the same growth of executive power. Few will doubt that the Free State Government had good cause to demand these arrests. But, if offences have been committed, the ordinary Courts lie open in this country, and it is not yet alleged that they do not function. We are confronted, in fact, by the very grave danger that the substance of martial law is being introduced into normal administrative procedure either by the strained and illegitimate use of the prerogative on the one hand or by the strained and illegitimate use of delegated legislation on the other. If the Courts permit then jurisdiction to be ousted in such vital cases as that of Zaghlul there is an end of that rule of law which Professor Dicey thought the chief glory of the British constitution. If we are to have, as we are now developing, a 'doux administra-

ti' it is better that we should have it through straightforward legislative enactment than through the insidious methods by which it is now being evolved—*The Nation and Athenaeum*.

Review.

A DICTIONARY OF ENGLISH LAW. By H. J. Byrne. Messrs. Sweet & Maxwell, Ltd. 1923. Price 23-3s. net.

This is a very neatly bound, elegantly printed and a handy law lexicon of 912 pages. The work is said to be based on Sweet's Dictionary of English Law, but it is difficult to trace its paternity to the earlier work, altered as it has been beyond recognition. It confines itself to words, phrases and maxims in common use in English law which one often comes across in the course of his practice in the law Courts or legal studies. Technical terms of English common law or law of real or personal property are concisely and precisely explained. The Latin legal maxims which are to be found in English law books or in the pages of the English or Indian law reports are also given and briefly explained in this work. Obsolete words of dog-Latin, Norman-French, Anglo-Saxon and old English legal jargon which occupied much space in the earlier law lexicons have been judiciously weeded out of this work. The work begins with a table of regnal dates of the English reigning sovereigns. This will facilitate references to the English statutes which ordinarily bear such dates. Formerly the civil, ecclesiastical and legal year in England used to commence on the 25th of March until the reformation of the calendar in 1753, when the historical and legal year became uniform and 1st of January was adopted as the commencement of the year. The table would be useful in making ready reference to the historical year in respect of older legal documents. In the body of the book we find under such important headings as "marriage" a short historical account of the changes in the law given and also reference to the statutes relating to it. Then again under other important headings we find the law also briefly explained. For instance, under the heading "character" the admissibility of evidence of character is explained. For ready reference to a legal principle or legal maxim, this work will prove very valuable to practitioners and students alike.

(b) [1817] 2 Mer. 148.

(c) [1879] 5 A. C. 102.

(d) [1807] A. C. 238.

(e) 21 C. W. N. clxx.

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Journal of Comparative Legislation and International Law.

The last number of the *Journal of Comparative Legislation and International Law* is taken up entirely in a review of legislation for 1920 of the following countries: I British Isles, II British North America, III Australia and IV South Africa. Of special interest is the summary of the Government of Ireland Act of 1920, which we reproduce in another column.

Pleaders' responsibilities as "officers of Court."

The profession should note the decision of Shah, C. J. and Crump, J. of the Bombay High Court in *Government Pleader v. Vinayak Balwant* reported at p. 117 of the current volume of the Bombay Series of the Indian Law Reports (1 L. R. 47 Bom.). A public meeting had been convened at Ahmednagar at which a pleader practising in the District Court of Ahmedabad presided. At this meeting another pleader of that Court moved and a Vakil of the High Court seconded a resolution which ran as follows: "That this meeting congratulates Maulana Mahomed Ali and Shaikat Ali and other leaders who are on their trial at Karachi as well as the leaders and other persons convicted in Dharwar case and also Mr. Gangadharao, Pleader of Belgaum, who is on his trial at Dharwar." Against all three pleaders, proceedings were started under the disciplinary jurisdiction of the High Court. The learned Judges were of opinion that it was not necessary to enquire whether the conduct of the pleaders amounted to contempt of Court in law and

fact. But, in the language of the Chief Justice, the pleaders were officers of this Court who hold *sanads* of this Court, and are expected to extend their co-operation and assistance in the task of the administration of justice and the least that could be expected of them is that by their act they will cause no hindrance to the even and impartial administration of justice."

Any criticism of any proceedings pending in a Court of Justice, in his Lordship's opinion, is calculated to hinder the even and impartial administration of justice, and therefore the pleaders in question having failed in their duty as pleaders, though as individuals they might not be liable for contempt, made themselves amenable to the disciplinary jurisdiction of the High Court. Crump, J., observed that pleaders have privileges, but they have responsibilities also, and a pleader who acts so as to hinder and embarrass the administration of justice is guilty of improper conduct within the meaning of those words as used in sec. 26 of the Bombay Pleaders Act, XVII of 1920, and such conduct furnishes "reasonable cause" for the exercise of the High Court's disciplinary jurisdiction within the meaning of those words as used in sec. 25 of the same Act.

We have been following carefully the various judicial pronouncements recently delivered in the High Courts here and in the Privy Council in the very large crop of pleaders' cases which have come up for consideration before the Courts since the prevalence of the non-co-operation and allied movements. The proposition that "pleaders are officers of the Court" seems to be at times unduly strained to formulate a very wide range of conduct more or less politically undesirable to keep them from taking part in them. For this reference is made to the privileges which are supposed to belong to

pleaders "as officers of the Court." What are the privileges to which Mr. Justice Crump alludes in his judgment? They are not exactly licensees who may practise or not according to the will and favour of the Courts. The "privileges" elude one's grasp the moment one attempts to draw up a table of them on paper. It is doubtful whether this matter of pleaders' privileges will ever receive attention until there is a duly constituted Indian Bar capable of looking as well after the privileges of the profession as after its responsibilities.

Do they as legal practitioners forego the rights of free citizenship and are they, for that reason, debarred from expressing their opinion on political questions? Of course, when a lawyer comments on a pending case, except in a law Court and in his professional capacity, he is no more privileged than an ordinary layman and may like any one else be called into account. But we are of opinion that no Court of law should take notice of his views as a citizen or a public man unless such views offend against the laws of the land. We do not know of any case where any lawyer has gone the length to which Lord Carson did during the Home Rule agitation in Ireland and the English Judges before whom he practised never took any notice of his conduct. In our view the conduct of a lawyer outside his professional business should not be questioned by the Judges unless it offends against law and order or public morality. The Judges are above politics and it would be an evil day for the State if they should take any notice of political views prevailing outside.

GOVERNMENT OF IRELAND.

The Home Rule Act of 1914, suspended by successive Orders in Council, was repealed by the new Government of Ireland Act of 1920 (c. 67). The significant new feature is a dualism conspicuous against a background of prospective unity. Ireland is partitioned into Northern Ireland (the six north-eastern counties) and Southern Ireland (the remainder). Each of the two parts is to have a Parliament consisting of a Senate and a House of Commons. If either Parliament is not properly constituted, provision is made for a form of Crown Colony Government. To impose this dualism upon the fabric of the 1914 Act was not difficult; to enact the hope of

unity was harder. The following enactments explain the plan:—

2.—(1) With a view to the eventual establishment of a Parliament for the whole of Ireland, and to bringing about harmonious action between the Parliaments and Governments of Southern Ireland and Northern Ireland, and to the promotion of mutual intercourse and uniformity in relation to matters affecting the whole of Ireland, and to providing for the administration of services which the two Parliaments mutually agree should be administered uniformly throughout the whole of Ireland, or which by virtue of this Act are to be so administered, there shall be constituted, as soon as may be after the appointed day, a Council to be called the Council of Ireland.

3.—(1) The Parliaments of Southern Ireland and Northern Ireland may, by identical Acts agreed to by an absolute majority of members of the House of Commons of each Parliament at the third reading (hereinafter referred to as constituent Acts), establish, in lieu of the Council of Ireland, a Parliament for the whole of Ireland consisting of His Majesty and two Houses (which shall be called and known as the Parliament of Ireland) and the date at which the Parliament of Ireland is established is hereinafter referred to as the date of Irish union.

On the date of Irish union the Parliament and Government of Ireland takes over all powers of the Council of Ireland and assumes control over all matters which under the Act cease to be "reserved matters" at that date.

The 1914 safeguards for the universities, religious equality, and freemasons are repeated. The Air Force, submarine cables, and wireless telegraphy are added to the list of subjects excluded in 1914 from the legislative powers of an Irish Parliament. Certain other subjects, including the constabulary, postal services, savings banks, designs for stamps, registration of deeds, and the Irish Record Office are "reserved" till the date of union. Customs, income-tax, super-tax, excess profits duty, corporation profits tax, and any other tax on profits are also "reserved," but otherwise the two Parliaments can make laws for imposing and collecting taxes within their respective jurisdictions, except for imposing a tax "of the nature of a general tax upon capital."

Law-making about railways, fisheries, and diseases of animals is left to the Council of Ireland with a view to uniform administration. Orders of the Council of Ireland, made in the exercise of legislative powers, are to be presented (like Bills passed by the Southern and Northern Parliaments) to the Lord-Lieutenant for His Majesty's assent. The

Council may also consider questions affecting the welfare of Southern and Northern Ireland, and may make "suggestions" and "recommendations" in relation thereto. Neither Parliament can repeal Acts (or rules and orders) of the United Kingdom made after the appointed day." Hence later Acts have sometimes declared themselves to be deemed to have been passed before the appointed day, so as to make them alterable by the Irish Parliaments.

The work of the Joint Exchequer Board and the Irish contribution to imperial liabilities required careful statement. The dualism involved adding provision against double death duties and stamp duties and provision for the inter-availability of excise licences.

A dual judiciary is set up. The old Supreme Court of Ireland disappears, and is replaced by separate Supreme Courts, each consisting of a High Court and a Court of Appeal. Appeal lies from these to a High Court of Appeal for Ireland, and thence in specified cases to the House of Lords. Constitutional questions requiring speedy determination may, if His Majesty so directs, be referred to the Judicial Committee of the Privy Council, which may also review decisions of the Joint Exchequer Board on points of law.

The power to make adaptations of Acts and to issue Irish Transfer Orders was operated during 1921 as to Northern Ireland. The whole Act (especially as to transfer of services in Southern Ireland) has now to be read in the light of the Irish Free State Act of 1922 and the orders in Council made thereunder—*Journal of Comparative Legislation and International Law*.

THE BENGAL TENANCY ACT DRAFT AMENDMENT BILL

(By MR. RASBEHARI MOOKERJEE OF THE BENGAL PROVINCIAL JUDICIAL SERVICE.)

In offering my views on the Draft Bill for amendment of the Bengal Tenancy Act, I have to confine myself to a few main heads, fully recognising that a detailed examination of the Bill clause by clause would be out of place in such a communication as this.

Right of pre-emption to landlord—The Committees' estimate of the actual facts bearing on the alienation of occupancy holding is just. The decay of village industries and

the growing pressure of population on the soil, coupled with the increase of wealth in certain other directions, have greatly raised the market value of agricultural lands, and caused them to be freely bought and sold. The Bengal Tenancy Act does not interfere with such transfers if permitted by custom or usage. Understanding by custom and usage not only what is definitely established as such, but a practice that is of comparatively recent origin, or actually growing, and taking due account of the actualities of the situation, it was conceivably possible for the law Courts to have evolved the proposition that occupancy holdings were transferable subject only to the condition of the customary fee or *nazar* being paid to the landlord as the price of his recognition. Such a solution would have been quite within the terms of the existing law, and in accord with the actual facts and economic necessities of the situation. But that was not to be. By the application of a highly technical distinction between quiescence and acquiescence, notorious facts were blinked, or glossed over by legal fiction, and the case-law on the subject became a veritable maze by contradictory attempts, now in the direction of further logical extensions of an artificial principle, and again in the direction of tentative approximations to the actual facts of the situation and a return to a saner and more practical view of things. In these circumstances, the Committee have done just the right and proper thing in putting an end to the existing legal tangle by openly recognising the transferability of occupancy holdings, and thus giving legislative sanction to what had become irresistible as a fact of daily transaction in the country-sides of Bengal. The fixing of the customary landlord's fee at 25 per cent of the purchase money, though undoubtedly high, may be also defended on the principle of securing general uniformity in a matter where certainty of knowledge would be cheap almost at any price. The provision for recovery of the landlord's fee in the same way as a claim of rent, and all else that is made to hang round it, may be also accepted, subject to a few modifications of detail, as a necessary corollary. But the line must be drawn here, and the further concession of a right of pre-emption to the landlord cannot be defended on any principle of justice or expediency.

One feels tempted to inquire if in making

this concession to the landlord the Committee were harking back to Gladstone's Irish Land Act of the early eighties of the last century, to the complete disregard of the fact that the *land khas*, or his statutory successor, the occupancy raiyat of Bengal enjoys an inherently far superior status to the old Irish tenant, and that all the later land legislation of Ireland has aimed, with the support of liberal grants from the treasury, at the creation of peasant proprietorships truly so called, by giving a virtual right of pre-emption to the tenant against the landlord.

A tenure-holder is defined in the Bengal Tenancy Act as a person holding land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and much more so must be the proprietor or zamindar. By giving a right of pre-emption to the landlord this radical distinction of the hierarchy of land-holding interests is practically subverted. It is said that an undesirable person should not be forced on a landlord as his tenant. But where is the guarantee that the landlord, after pre-empting the land, will establish a desirable tenant on it; and if there were any such condition, how was it going to be enforced? What is there to prevent a moribund landlord, or the *mahajan* who holds the landlord in power, from buying up the whole or most of the area of arable land in a mahal into his *khas* possession, and thus bring about that very state of servitude the apprehension of which this proposal is ostensibly intended to forfend. Besides how do you judge a tenant to be desirable or undesirable? What is the test? Not certainly the landlord's whim or humour? It must mean undesirable for the purposes of the tenancy. But for that there is the safeguard already provided that when an occupancy raiyat renders the land unfit for the purposes of the tenancy, he is liable to be ejected. A man buying land at its present high level of market value, and paying a handsome *salami* to the landlord into the bargain, must be presumed to be a desirable tenant till the contrary is proved. And if a definition were demanded of the supposed undesirability of a prospective purchaser, the impracticability of framing an adequate statutory formula or expression for such a concept will furnish the best practical refutation of the privilege that is sought to be conferred on the landlord as a deduction or corollary from it. One could

understand a right of pre-emption being reserved in favour of a co-sharer in the tenancy, but the grant of such a right to the landlord is altogether unintelligible except as a piece of bucksteering compromise between two opposite schools of opinion, without any real unity or coherence of principle or outlook behind it.

The right of pre-emption is confined by modern jurisprudence to some select preserves of personal law, and to certain matters where the close and delicate intimacy and interaction of interests makes such a provision just and expedient, as for instance by special reservation in articles of partnership, or in certain exceptional situations arising in course of partitions of properties. To set such a reactive principle working at full blast through the broad areas of rural Bengal would work havoc with the settled agricultural interests and well-being of the whole province. It would necessarily entail the levy of illegal exactions far beyond the statutory premium, depreciate the just value of the holdings sold, foment village faction, give the *naib* and *gomasta* an unconscionable hold on the domestic affairs of the tenants, and lead to a veritable gambol in the spoils of land, and to strife and litigation to an extent that the Committee could not possibly have fully reckoned with. And all the disintegrating effects actually fall short of the extent to which they are theoretically apprehended, that would be only because the self-protecting instincts of the community will have asserted themselves in spite of the legislature, for which, indeed, little thanks would be due to the latter. So the grant of the right of pre-emption to the landlord has to be unqualifiedly reprobated.

(To be continued.)

ADDENDUM TO A SHORT NOTE.

It has been represented to us that our short report of the case of *Banwari Lal v. Labanqubali* at p. lxxxiv of the current volume does not do justice to the Munsif's judgment which was set aside by the High Court in revision. In the ordering portion of his judgment restoring the case, he imposed on the Petitioner certain terms and conditions as to payment of costs, default in fulfilling which was to result in the dismissal of the application. The omission does not appear to have been material so far as the purpose of the report went. But since we have been requested to notice it, we do so at the request of our correspondent

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REPORIS (An Index.)

Lawyers "as Officers of Court."

In our last two issues, we commented on the growing tendency of Courts of law to strain their powers under what is known as their disciplinary jurisdiction. That some control should be exercised by Courts over those who practise before them has to be admitted. But in view of recent decisions, we feel that the nature and extent of this control should be clearly defined. Until recently, legal practitioners were liable to be dealt with either for the commission of a criminal offence or an act involving moral turpitude or for professional misconduct. For although the words, in sec. 13, sub-sec. (f) in the Legal Practitioners Act, "for any other reasonable cause" have been extended to causes other than professional misconduct, reports of cases decided until recently show that the jurisdiction was seldom, if ever, invoked except in the circumstances mentioned above. This is in conformity with the law as understood by English Judges and we are glad to find that Judges of the High Court of Calcutta have not yet materially departed from it.

The Legal Practitioners Act as well as the Charters have invested the judiciary with very wide powers to deal with members of the legal profession. It was to be expected that they should exercise their powers in the interest of the work with which they are directly concerned and for which they are directly responsible, viz., administration of justice. It is, however, to say the least, extremely unfor-

tunate that in the numerous cases which have come up for judicial decision since the Non-co-operation movement, this limitation has not been observed. Some of the judges appear to be obsessed with a new theory as regards their duties, viz., that they are not only to interpret and administer the law, but that they are actively to assist the executive in the maintenance of law and order. Acting consciously or unconsciously on this theory, they have seized on the formula that legal practitioners are officers of Court and have dealt with them in a manner which is hardly consistent with the spirit of the law from which they derive their powers and which, we venture to say, will not be tolerated in England or any of the Self-governing Colonies.

As the report of the case before the Privy Council shows, once the jurisdiction has been exercised, His Majesty's Judges are absolutely powerless to interfere with the order of the Court here, although they may feel that in the circumstances of the case, the order should not have been made. Lord Buckmaster said that it was a question of degree, forgetting that in this quantitative world, a difference of degrees goes a long way in preventing a man from following an honourable profession. As matters stand at present, a position of extreme peril has been created for the legal profession in all its branches and fresh legislation has become absolutely necessary.

THE BENGAL TENANCY ACT DRAFT AMENDMENT BILL.

(By MR. RASBEHARI MOOKERJEE OF THE
BENGAL PROVINCIAL JUDICIAL
SERVICE.)

(Continued from p. xcii.)

II

Under-raiyats.—The grant of occupancy right to under-raiyats is to be deprecated on a proper consideration of all the pros and cons of the case. The Committee have been so-

tuated by natural sympathy for the landless labourer. But certain other important factors of the case ought not to be overlooked. The Bengal Tenancy Act does not interfere with the acquisition of occupancy right by custom or usage. And in certain areas where settlement and record-of-rights under Chap. X of the Bengal Tenancy Act have been made the acquisition of occupancy right by under-ryats, where sanctioned by custom, is to a large extent a settled fact. But in those areas where custom and usage do not permit it, such a right ought not to be created by legislative enactment. The Committee have perhaps allowed their judgment to be swayed by a natural, though not, it is to be feared, a fully reasoned aversion to the *mahajan*. But after all, all *mahajans* are not of the sinister type, nor are the *mahajans* as a body necessarily a class apart, altogether divorced from the soil. Some of them belong to the well-to-do farmer class, investing their surplus money in loans to their needier brethren. Besides the *mahajan* is a necessary factor in the present economic system, or even a necessary evil, if you prefer to have it so, and the problem of agricultural indebtedness, of which the causes lie too far and deep, is not brought appreciably nearer to solution by the forced liquidation, so to say, of the right of occupancy as hitherto existing by law and custom. That problem can be really solved by the Government making, if possible, liberal *tuccavi* grants at low rates of interest and on easy terms of repayment, by providing cheap industries on co-operative lines, by organising village industries as feeders to agriculture, and in various other ways upon which it is needless here to digress. Pending the carrying out of these longer measures of economic amelioration, and *pari passu* with them, the Courts should be vested with liberal discretion in matters of interest and repayment not only in suits for recovery of loans, but for liquidation of debts as well, in respect of which a general right of action in redemption should be granted to all classes of debtors. And the Village Boards also, as they gain in strength, tone and sense of responsibility, ought to be invested with a similar discretion corresponding to the progressive devolution of judicial powers on them. The *mahajan* is not always after land. If he gets a reasonable return on his investments, he is content, and sometimes he is driven to the purchase of land only because he has no

other way of recouping his money. The under-ryat is not always the serf of the *mahajan*. Labour is now asserting itself even in rural areas, and better able to stand on its own legs and make terms for itself. Very often under-letting is resorted to as between riyats themselves simply as a form of labour co-operation or co-partnership. A certain proportion of the under-ryats again represents the margin of free labour available for hire in a village and the custom of under-letting, whether on *bhag* or money rent, must be presumed to be preferred by a certain type of labour, and in certain circumstances, to casual employment from day to day, or for short terms, and thereby to subserve, to some extent, a felt economic need. Then again some people who are prevented by caste disabilities or social restrictions from taking an actual hand in cultivation have sometimes to under-let their lands. I am not supposed to say any thing here on the ethics or economy of these limitations, or from the standpoint of social reform. I only deal with facts as they are, and from the standpoint of vested rights in law. In any case it is only a superficial view of things which would permit these people to be left entirely out of account as mere drones or parasites. The village life of Bengal is built up on a system of graded interests in the soil. These *bhadrolokes* who are agriculturists in this sense, that their savings are invested in agricultural lands, and they depend in a large measure on the produce of these lands, set the cultural standards and communal tone of the typical Bengali village. The Committee's proposals will squeeze out these people and perhaps ruin them in their means and subsistence, and lead to the expropriation of the *bhadrolokes*, and thus make the problem of resuscitation of Bengali villages the decay of which is the subject of such general lament, more difficult of realisation than ever. It is not inconceivable that rather than jeopardising their most valuable security, and what has been hitherto, perhaps, the safest and most stable form of investment for people of moderate means, those of the *bhadrolokes* who can afford to do so, will prefer to let some of their lands lie fallow, and that a certain proportion of the arable land in a village may in this way permanently remain out of cultivation from one year to another, which must unfavourably react on labour also. It is not desirable

therefore, that the Legislature should create a subordinate grade of occupancy right as an economic experiment, however, benevolent, at the expense, and to the manifest prejudice of settled rights and expectations. It would needlessly complicate the land tenure, already sufficiently complex, and undermine the historic and statutory position of the occupancy raiyat, as representing the last grade of a real heritable and transferable right of property in the soil, by multiplying weak and inferior duplicates of a singularly fluent and variable character. At the same time it is recognised that *bona fide* cultivators, resident in the village, require a certain measure of statutory protection, in regard to which the following suggestions are offered, without any pretension to formal completeness, or proper statutory precision—

That the lease of land as between a raiyat and under-raiyat be left to be regulated by contract, without any restriction as to term or durations subject to the following conditions and safeguards—

(a) Sec 48 be so re-modelled as to apply to the proportionate rent determined to be payable by the landlord upon fair and equitable principles of assessment, when a portion of his holding only has been sub-let

(b) The produce rent of an under-raiyat, though not open to commutation, be regulated by the Courts so that the under-raiyat may not be denied his proper economic wage subject to the reservation that the landlord's share do not fall below one-third of the out-turn.

(c) That where the ejectment of a under-raiyat in execution of a decree under sec. 49 of the Bengal Tenancy Act is likely to cause hardship, the Court may defer the operation of the decree for any term not exceeding two years, subject to payment of rent on the existing terms.

(d) One person holding and cultivating land as an under-raiyat in the village, including his heirs shall have a limited right of occupancy, heritable but not transferable, in the homestead land on which he actually resides, on payment of the agreed rent, or such rent as the Court may deem fair and equitable, and that the provisions of sec. 49 shall not apply to such land; provided that homestead land not in actual occupation for purposes of residence, or on which the under-raiyat has ceased to reside, will not enjoy any such protection.

(e) That the provisions relating to the surrender (sec 36) shall apply *mutatis mutandis* to under-raiyats.

(f) That the provisions relating to abandonment (sec 87) shall apply to under-raiyats to the same extent as to non-occupancy raiyats, with this qualification that notice as provided by sub-sec (2) shall be dispensed with, except in the case of a homestead protected under cl. (d) above

It is apprehended that as a working compromise between several conflicting interests, this may serve for the present, till experience shows in what respects or directions further changes, if any, are needed

General observations—Certain things remain to be said by way of general observations. For one thing the Bill suffers in places from formalism and over elaboration. Cl. 90 of the Bill may be cited as an instance in point. It were best to have stopped short with the proposition that all co-tenants were jointly and severally liable for the rent, and left the decree and sale in execution to take their usual effect, unless modified by the operation of the doctrine of representation. To take three-fourths or any fraction of the tenancy as the statutory equivalent of the whole is necessarily arbitrary, and is likely to be unsatisfactory in practice, and may possibly lead to abuse. In any case the excluded co-tenants must, in obvious fairness, be allowed the same rights with the recorded Defendant or judgment-debtor in the case, not only under sec 171, but under sec 174 as well

Another very obvious remark to make is that the Bill makes personal preferences and disabilities affect important questions of right and status to an almost perilous extent. A landlord can certainly choose his own tenant, as for that matter a tenant can choose his own landlord, when a lease is to be given or taken. But once a stable right of property has come into existence, for instance an occupancy right, it must not be made to depend on the precarious element of personal taste. Similarly important reservations and safe-guards are attempted to be provided in the adjustment of the relative rights of raiyats and under-raiyats with reference to such elements as means of family subsistence, age, sex, disease, accident, temporary absence from home, supply of cattle and implements of husbandry, and so on. The motive is intelligible, but little account has apparently been taken of what ends

less subjects of dispute these pliant and variable factors will furnish in the Civil Courts, how unworkable they will really prove in practice, how easily liable to perversion and provocative of evasion, and it requires no great foresight, or experience to say that they will depress agricultural interests instead of toning, elevating and strengthening them, by the enormous amount of litigation they will unfailingly engender, thereby defeating their own object. As a safe rule it may be said that in matters of this kind it is much better to legislate on certain broad lines and leave the details to adjust themselves by the play of the normal forces of intelligent self-interest, economic necessity and social accommodation. The provision for the appointment of a common agent by the Collector may be cited as another unhappy instance of interference with personal liberty of action, which is certainly not redeemed by any reasonable balance of advantage that appears to be promised by it. If the time ever comes when the Village Boards, in conjunction with some comprehensive form of co-operative agency, can be fitly trusted to undertake the control and regulation of the agricultural industry of the village, these and other matters may have conceivably to be re-arranged on a different basis. But the attempt to regulate the domestic concerns and agricultural economy of the village by the machinery of the existing Civil or Revenue Courts is bound to be abortive, and will inevitably produce corrosive and disruptive effects which cannot be too earnestly deprecated.

(Concluded.)

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY and B. B. GHOSE, JJ. S. A. No. 1594 of 1921. DURGA CHURAN MAJHI, Deftt.-Appl. v. PABESH BEWA, Plff.-Respdt. The 2nd March 1923.

Usufructuary mortgage bond containing stipulation for repayment after 50 years—Stipulation, if clog on redemption.

The Plaintiff brought a suit for the establishment of her title to and for recovery of possession to half share in certain lands as one of the two daughters (reversioners) after the death of her mother Tirtha Bewa or the alternative for redemption thereof upon payment of the proper amount, construing the document as a mortgage bond under which the Defendant No. 1 contended that Tirtha Bewa had sold the lands to her father for the legal necessity of paying off her husband's debts. The Defendant No. 1 substituted his name in the office of the landlord. The learned Munsif held that the document which was dated 1299 contained a period of 50 years for repayment and there was no condition therein for reconveyance upon payment within that time and that accordingly it was not a mortgage bond but a sale deed for 50 years with a condition as to reconveyance after the expiry of the terms after 1348 B. S. The lower Appellate Court held that it was usufructuary mortgage for 50 years and that considering the period was too long it was clog on redemption. The Defendant No. 1 appealed to the High Court:

Held—(1) That the document should be interpreted as a deed of usufructuary mortgage and not a deed of sale, (2) that although the right of redemption would accrue on the expiry of 50 years after the execution of the deed that ordinarily did not constitute a clog on redemption and (3) that the subsequent conduct of the mortgagee in setting up absolute title in himself and in getting himself recognized by the superior landlord constituted such inequitable conduct on his part as to give the mortgagor a right to redeem the mortgage on the expiry of only 26 years.

Babu Rajendra Chandra Guha for the Appellant.

Babu Sarat Chandra Ray Chaudhury for the Respondent.

S. C. C.

Appeal dismissed.

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REPORTS (See Index.)

The irregularities and illegalities in the certification of the Indian Finance Act.

It appears from a semi-official communique, issued from Simla, that differences have arisen between the law officers of the Government of India and those of the Crown in England as regards the interpretation of sec. 67B, under which the Viceroy has certified the salt tax. The Government of India maintain that a bill like the Finance Bill enhancing duty on salt on being certified by the Governor-General immediately becomes law and that the Act need not be laid on the table of the Houses of Parliament when they are sitting and await His Majesty's assent. They maintain that the only control that the Parliament possesses in respect of such an Act is that the members of Parliament may move a resolution recommending that His Majesty may disallow the Act. Or, in other words, barring His Majesty's power of vetoing, the power of the Governor-General is absolute in this respect. We do not wonder that, autocratic as the Governor-General's powers are, he would claim that he has powers not only to impose taxation or pass laws without the assent of both Houses of the Indian Legislature but that measures so passed should not await Royal assent after consideration by both Houses of the British Parliament. But it is hard to believe that the Government of India Act, the avowed object of which was to introduce a constitutional and representative form of Government in India, ever contemplated making the Governor-General an absolute and irresponsible ruler of his kind. We are of opinion that the claim of such powers by the Governor-General is unsupported, extravagant and altogether unsupported by the terms of 67B of the Government of India Act. The view that seems to

have been taken by the law officers of the Crown in England is that whether the certified Act be a Finance Act or any other measure of legislation, it must be laid before both Houses of Parliament when the Houses are sitting for at least eight days and then it shall be presented to His Majesty in Council for assent and on such assent being signified and the same being notified by the Governor-General, the Act becomes operative as an Act of the Indian Legislature.

This is not the only matter in respect of which the Governor-General has gone wrong with regard to the exercise of his extra-ordinary powers under sec. 67B. A serious doubt is entertained as to the legality of the procedure adopted by His Excellency the Governor-General in certifying the last Finance Bill, but since there is no proper machinery for directly calling it into question we feel it to be our duty to draw public attention to it at some length.

We shall first set out the full text of sec. 67B

67B. (1) Where either Chamber of the Indian Legislature refuses leave to introduce, or fails to pass in a form recommended by the Governor General any Bill, the Governor General may certify that the passage of the Bill is essential for the safety, tranquillity or interests of British India or any part thereof, and thereupon—

(a) If the Bill has already been passed by the other Chamber, the Bill shall, on signature by the Governor General, notwithstanding that it has not been consented to by both Chambers, forthwith become an Act of the Indian Legislature in the form of the Bill as originally introduced or proposed to be introduced in the Indian Legislature, or (as the case may be) in the form recommended by the Governor General; and

(b) If the Bill has not already been so passed, the Bill shall be laid before the other Chamber, and, if consented to by that Chamber in the form recommended by the Governor General, shall become an Act as aforesaid on the signification of the Governor General's assent, or, if not so con-

sented to, shall, on signature by the Governor General, become an Act as aforesaid.

(2) Every such Act shall be expressed to be made by the Governor General, and shall, as soon as practicable after being made, be laid before both Houses of Parliament, and shall not have effect until it has received His Majesty's assent, and shall not be presented for His Majesty's assent until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat; and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor General, the Act shall have the same force and effect as an Act passed by the Indian legislature and duly assented to:

Provided that where, in the opinion of the Governor General a state of emergency exists which justifies such action, the Governor General may direct that any such Act shall come into operation forthwith and thereupon the Act shall have such force and effect as aforesaid subject, however, to disallowance by His Majesty in Council

A mere inspection of sec. 67B, sub-sec. 2 will shew that a Bill certified by a Governor-General under his power under sub-sec. 1 (a) or (b) becomes an Act, but the certified Act does not become operative unless, first, the Act is laid before both Houses of Parliament for, at least, eight days, when the Houses are sitting; next, the assent of His Majesty in Council signified thereafter; and finally such assent is notified by the Governor-General. As His Majesty's assent has not been signified or notified, it may well be said that the enhancement of the salt duty has no legal force yet. But the Government of India have evidently been urging on the Home Government that the certified Finance Act at once became operative under the proviso at the end of sec. 67B. They maintain that under the proviso Governor-General is given "emergency" powers for directing that a certified Act shall come into operation at once and that the only way that it may be put out of operation is by its "disallowance by His Majesty in Council" and that on a resolution moved and carried in Parliament.

The plea of "emergency" cannot with any propriety be urged with regard to the doubling of the salt duty especially in view of retrenchments recommended. It was never alleged that the "safety or tranquillity" of India would be at stake unless the salt tax was doubled. The salt tax was said

to have been enhanced in the "interests of India" under sec. 67B. "Emergency," surely refers to "safety or tranquillity" and not necessarily to "interests." Even assuming that it was a case for the exercise of the Governor-General's emergency powers, the proviso cannot be so construed as to dispense with the observance of the procedure laid down in sub-sec. (2) for obtaining the assent of His Majesty in Council, whenever the Governor-General has thought fit to exercise those powers.

The next question with which we are more intimately concerned is the procedure followed by the Governor-General in certifying the salt tax after it was rejected by the Legislative Assembly. We shall now consider the scope of sec. 67B in this connection and examine how far the Governor-General has complied with its provisions in certifying the Finance Bill. Before we examine the provisions of the law it is necessary to state some facts in this connection. The Finance Bill was introduced in the Legislative Assembly on the 1st of March last. On the 20th of March the Finance Member moved that the Bill be taken into consideration which was agreed to by the Assembly. The clause which proposed to double the duty on salt was rejected by the Assembly but the other clauses of the Bill were passed. Under Rule 25 of the Indian Legislative Rules, the Bill as amended was laid on the table of the Council of State on the very next day. On that day a Bill including the salt clause was placed by the Governor-General before the Council of State with a certificate of recommendation printed on the back of the Bill. The message of recommendation was also read to the Council by the Government member in charge of the Bill.

The recommendation to the Council of State in view of certification by the Governor-General not merely recommended amendments for the restoration of the salt clause but also that the other provisions of the Finance Bill be passed by the Council of State as passed by the Assembly. We reproduce the portion of the recommendation which has no bearing on the salt duty.

In pursuance of the provisions of sub-sec. (2) of sec. 67B of the Government of India Act, I, Rufus Daniel, Earl of Basing, do recommend to the Council of State that it do pass the Bill

* * * to vary the duty leviable on certain articles under the Indian Tariff Act, to fix maximum rates of postage under the Indian Post Office Act, 1899, to amend the Indian Paper Currency Act, 1923, and to fix rates of income-tax, in the form in which it was passed by the Legislative Assembly.

We invite particular attention to the portion of the recommendation which recommends that the provisions amending the Currency Act, the Tariff Act and those specifying the postal rates, and the rates of Income tax in the Finance Bill, be passed by the Council of State, "in the form in which it was passed by the Legislative Assembly." We are unable to find any provision in either the Government of India Act or the Indian Legislative Rules, which authorises the Governor-General to direct or recommend to the Council of State, that it should pass the provisions of a Bill as passed by the Legislative Assembly. Sec. 67B, sub-sec. 1 says when either Chamber "fails to pass" the Council of State possesses statutory authority for the revision of Bills as passed by the Legislative Assembly. The recommendations of the Governor-General to the Council of State direct that "it do pass," the provisions above referred to, "in the form in which it was passed by the Legislative Assembly," and are therefore, unconstitutional, legal and *ultra vires*. As the recommendation of the Governor-General is a preliminary to the exercise of an extra-ordinary power, it must be read as a whole and strictly construed. No portion of the recommendation cannot be separated from the other under the accepted canons of construction, the whole of it must be read and construed together. As the above recommendation runs counter to the express provision of sec. 67B, the whole of it is *ultra vires* and the certification of the salt duty must fall with it.

The proper course for the Government member in charge of the Finance Bill (the Financial Secretary) in the Council of State could have been to move formally that the clause rejected by the Assembly be reserved in the Finance Bill and leave the Council free to deal with the other clauses of the Bill according to the ordinary Rules of legislative procedure. We are also of opinion that the Governor-General should not have recommended the adoption of the salt

clause at this stage, as the Government member in charge might have moved for its inclusion under the ordinary Legislative Rules.

Rules 32 and 33 of the Indian Legislative Rules, which are as binding as any provision of the Government of India Act, were thus not complied with, by reason of the intervention of the Governor-General under sec. 67B, which being an extra-ordinary power to supersede ordinary course of legislation, should have been reserved for being exercised at a later stage. The Bill so recommended by the Governor-General was, however, passed by the Council of State and was treated as a Bill amending the Bill as passed by the Assembly. Next, this Bill was assumed to have been properly passed by the Council of State and was sent back to the Assembly by the Council of State to be placed before the Assembly at a meeting of the Assembly held on the 25th of March last. It should be mentioned here that on the 23rd of March, the Governor-General placed the identical Bill, which he had recommended to the Council of State and was so passed by the Council, on the table of the Assembly as a Bill recommended by him to the Assembly.*

We are unable to find from the terms of sec. 67B any legal justification for such a course. The Finance member, in charge of the Bill, however, made no motion in respect of this recommended Bill in the Assembly. This deprived the Assembly of an opportunity of questioning the legality of the procedure adopted by the Governor-General. Hardly any of the members was aware that such a Bill had been laid on the table. On the 25th the Finance member moved before the Assembly that the Bill as passed by the Council of State

* In pursuance of the provisions of sub-sec. (1) of sec. 67B of the Government of India Act, I, Rufus Daniel, Earl of Reading, do recommend to the Legislative Assembly that it do pass the Bill to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the duty leviable on certain articles under the Indian Tariff Act, 1894, to fix maximum rates of postage under the Indian Post Office Act, 1899, to amend the Indian Paper Currency Act, 1923, and to fix rates of income-tax, in the form in which it was passed by the Council of State.

READING,

Viceroy and Governor-General.

March 23rd, 1925.

be taken into consideration. If the Viceroy's recommendation was, as we have pointed out, initially bad, the Bill could not be said to have been properly passed by the Council of State, and the proceedings with regard to such a Bill in the Assembly would also be a nullity.

It by way of justification, reliance is placed by the Government of India on the words in sub-sec. 1 of sec. 67B, "Where either Chamber of the Indian Legislature . . . fails to pass in a form recommended by the Governor-General, any Bill, the Governor-General may certify," the omission of the Finance Member to move that the Bill as recommended by the Governor-General to the Assembly be taken into consideration, has the effect that there was no recommended Bill for the consideration of the Assembly and the necessary preliminary having been omitted, the certification on the above ground is also bad.

The procedure under sub-sec. 1 of sec. 67B presents other pitfalls which the Government of India have taken no trouble to avoid. The first para. of sub-sec. 1 states the conditions under which the Governor-General may certify a Bill. (1) When leave to introduce a Bill is refused by either Chamber (as was done by the Assembly with the Princes' Bill). (2) Where either Chamber of the Indian Legislature fails to pass in a form recommended by the Governor-General any Bill. (3) That such a Bill is essential for the safety, tranquillity or interests of British India.

The question whether the doubling of the salt tax, condemned universally by public opinion and rejected by the Assembly, is essential to the "interests" of India and whether the Governor-General should be sole judge of it, we shall leave alone for the present.

We shall examine now whether the Governor-General has complied with the procedure which has to be followed by him under cls. (a) and (b) of sub-sec. 1. We have already stated that the clauses of the Finance Bill that were passed by the Assembly cannot surely come within the scope of condition No. 2 above-stated. Only the salt clause might be said to have come within its scope and the Governor-General could have certified it. But with regard to the other clauses of the Finance Bill that the

Assembly did not "fail to pass," the Governor-General could not surely certify under sec. 67B, sub-sec. 1.

That this is the obvious view will appear from the following consideration. During the last Delhi Session of the Legislative Assembly, the Assembly refused to pass sec. 162 of the Code of Criminal Procedure in the form contained in the Government Bill and they made some amendments in respect of it. The amendments were further amended at the instance of the Government by the Council of State. Assume that the Assembly refused to accept the amendments made by the Council of State and did not effect any compromise with the Government. The Governor-General could not have certified sec. 162 of the Code as not the whole of the Bill amending the Code of Criminal Procedure. The other clauses which had been passed by the Assembly could not surely be certified under sec. 67B sub-sec. 1 (a) or (b) of the Government of India Act at the time the Bill as passed by the Assembly was submitted to the Council of State. To maintain otherwise would be contrary to common sense, to the spirit and terms of sec. 67B and the Legislative Rules which are a part of the Government of India Act.

The Rules and the Act obviously contemplate that with regard to every legislative measure, opportunity should be given to both Chambers of the Legislature to deal with the measure in the ordinary course. When the Assembly had rejected the salt clause of the Finance Bill, in accordance with its obvious powers and when no "emergency" could be pleaded at the time, the Governor-General should have allowed the Bill to go before the Council of State in the usual course and there any Government member could have moved for the re-insertion of the salt clause. If the Council of State passed the clause, as it did, and the Bill came back to the Assembly in the usual course the procedure under Rules 33, 34 and 35 would have been complied with. If the two Chambers disagreed the disagreement might have been reported to the Governor-General under Rule 36 (5) (i). Then the Governor-General could have placed a recommended Bill embodying the

salt clause before either or both houses of legislature and if one of the Chambers passed it, he could pass it by certification under sec. 67B (1) (a) or (b) and even if neither of the Houses passed it, still he could certify under sec. 67B (1) (b). The words "either Chamber" in the general portion of sec. 67B and the "other Chamber" in sub-sec. 1 (a) surely do not justify the procedure of recommending the Bill to both Chambers in the manner it was done.

The Governor-General not having complied with the procedure laid down by the Rules of the Legislative Procedure and having availed himself of the extra-ordinary powers under sec. 67B, which are meant to be availed of as a last resort, he has adopted an unconstitutional and illegal course. The procedure so adopted in recommending not only the salt clause which was rejected by the Assembly but also other clauses of the Finance Bill, passed by the Assembly, was further open to the serious objection that such a course was liable to influence the opinion of the members of the Council of State and fetter a free discussion of the Bill in that Chamber. The head of the executive in no constitutional country ought to do it. The Governor-General, who was the Lord Chief Justice of England, ought to have been the last person to adopt such a course.

Sec. 67B confers a discretionary power on the Governor-General and extra-ordinary powers in certain circumstances as specified in the section. Whatever construction may be placed on the term "emergency" in the proviso, upon no view of the matter can "emergency" be pleaded for not allowing the Finance Bill to pass through the usual legislative course. Such a constitutional course would have surely aided His Excellency's discretion than otherwise. But in adopting the course that the Governor-General did, His Excellency has not only acted against the spirit of the constitution but against the letters of the law as well. When autocratic powers are conferred by law on the head of the executive and he is influenced by a bureaucratic cabinet and is further required to follow the mandate of the Secretary of State, one's brilliant judicial and legal records are of little avail

in counteracting such influences. We are not at all surprised that under a combination of such circumstances His Excellency has come to be a supporter of his own autocratic powers to such an extent, that he has not hesitated to put forward a claim that the Finance Act need not be laid on the table of both Houses of Parliament and need not await even Royal assent as is required by the Government of India Act, that he has a quasi-sovereign prerogative of passing a law by certification and that it need not await the sanction of the real sovereign power in the Empire, viz., the King in Parliament, and that it can only be set at naught by Royal Veto. The law officers of the Crown, we presume, are not prepared to entertain such a claim on his part. His Excellency the Governor-General and his colleagues of the Government of India have gone the length of suggesting that sec. 67B of the Government of India Act should be amended in accordance with their views. If this is done, the Government of India will practically be irresponsible not only to the Legislature in India, but to Parliament as well. It is therefore the urgent duty of the Indian public to raise a protest against it and to urge that the section should be so amended as to make the Governor-General more responsible to the Legislature in India and the British Parliament as well.

THE PROPOSED BENGAL TENANCY ACT AMENDMENT BILL

(By MR. SAYIDUR RAHMAN, M.A.S.B.)

I

The poverty of the cultivating class is well-known. The large majority of them can hardly afford to supply themselves with means of subsistence for carrying on agricultural work of the year. Many of them have to find means of subsistence by borrowing at exorbitant interest from those who let out in *bhag* and they have to repay from the produce of the land. The exorbitant interest of not less than 25 per cent. charged on paddy advanced in the agricultural season of *Sraban* and *Bhadra* and realised in *Poush* and *Magh* of the same year, barely leaves them sufficient for their subsistence for even a couple of months. In the months of *Chaitra* and *Baisakh* they have to earn their half meal a day by working as *hulies* and often they have to go outside

their village to find work; with the setting in of the rains they go to the field and work there with constant struggle for food and fall a victim to the *manajan* who imposes his own terms. The *bhagchasi* can rarely supply manures and seed-grains. He may fall ill, his cattle may die or become otherwise incapable or exhausted for the work. He having no economic legs to stand upon, it is to his interest to cultivate land as a *bhagchasi* on condition that all the requirements of cultivation including his subsistence are supplied by one whose land he cultivates. Tenancy legislation may create rights in their favour in lands they cultivate but want of any protection against the money-lender and practically unlimited rate of interest will make it impossible for him on account of his poverty to retain the rights conferred on him and the rights will ere long vanish by sale or transfer.

The interest of agriculture demands imperatively in my opinion that the cultivator should be given protection against the money-lender by regulating interest and limiting its accumulation within reasonable bounds. Mere tenancy legislation will not suffice to give an impetus to agriculture or improve the lot of the agriculturist. The tenancy legislation sacrifices the landlord for the sake of the tenant but the latter is left to be sacrificed by the money-lender. I therefore propose that legislation should regulate the interest which the agricultural community have to pay, when the loan is for the purpose of agriculture. The main features of the present Bill are free transfer of land by all those who till the soil and enlargement of their rights on the land they till, by conferring occupancy rights to all under-riyats, by allowing rights of commutation of produce rent and by conferring on those who cultivate for a share of the produce the status of tenant. Whatever the cultivator gains by all these, he is not in a position to retain by reason of his poverty and illiteracy. The expensive and dilatory system of the law Courts with all the intricacies of the most advanced and refined system of procedure embodied in the Procedure Code and Evidence Act hardly suits him and he seldom succeeds in holding his own against the shrewd intelligence of the land and even his success is at the cost of his little all. The welfare of the agricultural community demands that he should spend his time and money as little as possible in law Courts and the adjective laws

of Procedure and Evidence should be so modified as to secure him substantial justice with the least delay and expense.

There are various formalities in the Procedure laws which hamper justice amongst the unlettered people. Multiplicity of suits and proceeding has to be controlled, so that he has not to run once to the Criminal Court and then to the Civil Court with its variety of proceedings for settling his differences on any matter. The illiterate and poor riyat should be given protection against the harassments of the law Courts which are only suited to the educated and the well-to-do, by simplification of the Procedure law.

Right of transfer of occupancy right which the Bill proposes to confer to all classes of tenants from riyat to the last in the chain of under-riyats who has the occupation of the land and this it does not seem to be a boon for those for whom it is intended and will perhaps not secure the welfare of the agricultural community. The market-value of occupancy right will deteriorate on the scheme as it is presented and will depend upon various factors. The holding of a riyat with occupancy right in a *jama* of 5 bighas at Rs. 10 as annual rent will fetch value only according to the profit it will yield to the purchaser. If it is in the *khas* possession of the riyat, its price will be the average yield allowing for variations of season less the rent payable and the cost of cultivation varying from $\frac{1}{3}$ to $\frac{1}{2}$. The purchaser may either cultivate it as a riyat or let out to others at money rent. Its price will depend upon the average profit it will fetch either by *khas* cultivation or by letting out, and annual profit or rent of the sub-lease must be at least 5 to 6 per cent. of the price paid. The legislature does not attempt and perhaps cannot attempt the restriction of free contract of rent initially by the purchaser though it regulates subsequent enhancement. The rent of the sub-lease granted by the purchaser of the occupancy holding will not be less than the lowest rate of interest in the money market, say 6 per cent. on the price paid; very few, if at all, will invest on land if it fetches less than that paid by Government on its loans. If the legislature attempts to regulate the initial rate of rent, it will rest on the market-value of the holding by reducing its price. The market-value of the holding will thus depend upon the average profit it will leave to its owner either

by his *khas* cultivation or by letting out. But this value on the average profit of the land less than rent payable will go only to the occupant of the land, whoever he may be, the *raiyat* or the last of the under-*raiyats*. The intermediate persons from the *raiyats* to the last of the under-*raiyats* will be nothing but middle men and cannot command more than the capitalized value of the difference between the rent they have to pay and the rent they have to realise. Of course the value of the holding in the hand of the last in the chain will suffer in price according as his rent increases with the intervention of the middle men. The "right of occupancy" is *de facto* only in one who cultivates the land in *khas*. Why use the expression for those who will only collect rent and have no connection with the land itself. The definition of "tenure-holder" and "raiyat" in sec. 5 based as it is on the test of the "purpose" with which the right to hold land has been acquired seems to lead to much complication and excessive litigation and instead of "the purpose" which being the original purpose must involve inquiry into the old history of the *jama*, often obscure and difficult to investigate, the matter may, I venture to think, be simplified by classifying the tenants according to the present user they make of the land. This will reduce complications and litigation. The right of transfer conferred on *raiyat* and under-*raiyats* who do not possess the land will be indistinguishable in the market from the right to collect rent and will be not attractive to those who want to have land for *khas* cultivation. Such intermediaries only collecting rent without possessing the land have no stake in the improvement of agriculture as under no circumstances can they increase the rent except under the strictly and remotely realisable conditions of enhancements laid down by the Tenancy Act. The elaborate provision of transfer fees and right of pre-emption with all their complexities in favour of the intermediaries will be of little benefit to them in practice and whatever these intermediaries will realise, will go to reduce the price of the land in the hand of its occupant. I therefore see the necessity of changing the definition of "tenure-holder" and "raiyat" in sec. 5 of the Bengal Tenancy Act and make it depend upon the use the land is put to, e.g., whether for collecting rent or for cultivation.

The tenant at produce rent who pays a cer-

tain undetermined share of the produce, i.e., the *bhagchasi* is not so miserable as he is supposed to be and is in some respects better off than his fellows who would, with the operation of the proposed new law, hold at money rent. The seasons and the rains make differences in the yield. He has to pay no more than the land produces. He cultivates under the supervision of his *malik* and with his help when he stands in need of it and gathers crops at his place and divides it after threshing it out under the control of the *malik*. There is no risk of arrears and his land passing away in rent execution. With his poverty and improvidence, he frequently falls into arrears in respect of his holding at money rent or rent in kind. He incurs debts. The result of free transfer practised during a quarter of a century has helped to accumulate land in the hand of the non-agriculturist class of money-lenders, pleaders, officers and zamindars, and every one of the latter now has land in their *khas* cultivation by hired servants or by letting out in *bhag* or rent in kind. To convert the *bhagchasi* into tenant and to allow the latter to reduce the income of the purchasers of the occupancy holdings to rent at prevailing rate by commutation is to deprive them of their rights which they justly earned under the existing law and is based on no principle of justice and equity. If the present *bhagchasi* is made tenant and is allowed commutation liberally, it will not confer on him any lasting benefit but will only kill the middle classes of the present generation by depriving them of what they fairly acquired under the law.

In future none will let out in *bhag* but will let out at the highest money rent by imposing his own terms or, will cultivate the land by servants. The cultivating class will not thereby be benefitted if they are not actually injured by being obliged to accept land on rack rent or to work as mere labourers on the land for wages. The proposed addition to sec. 3, cl. 3, intended to convert *bhagchasi* into tenants, coupled with the law of commutation will on the other hand kill the middle classes of the present generation for no fault of theirs. The existing situation of the country does not demand it and the proposal should be dropped. It will shock public confidence in law as unholder of right and justice if the legislature destroys the existing legal rights of the middle classes. The report of the Committee condemns produce rents as "they

encourage indifferent cultivation" and the rents are not moderate. No power is taken and can be taken in the Bill for keeping down the money rent at which the new purchasers will let out the land. Money rent will take the natural course according to the economic situation and the value of the produce of lands. It is difficult to see how by discouraging produce rent by means of commutation, rent can be kept moderate as the exorbitant money rent at which the new purchasers will let out will be even more exorbitant, e.g. A holds under B at produce rent on the average value of Rs. 10 per bigha. By means of commutation he may reduce his rent to Rs. 3 per bigha. A has to sell his holding for his poverty and improvidence. C purchases and lets it out and there can be no limitation to the rental he will impose and it would often exceed the money equivalent of the heretofore produce rent. The money rent of fresh lands leased by purchasers of holdings cannot be checked by any means without prejudicing transferability itself. Sec. 48 of the Bengal Tenancy Act, limiting rent of under-raiyats to 50 and 25 per cent is omitted in the present Bill. The right of transfer of occupancy right is bound to force up rent to the fullest productive capacity of the land, if the purchaser lets out the land. It will reduce the cultivator to the mere labourer, if he chooses to cultivate in *khas*. The result will not be in the interest of agriculture and for the welfare of the agricultural community. If the rent is limited by restoring sec. 48 or some analogous principle, it will reduce the value of the holding in proportion as imposition of rent is limited.

From the very nature of the case right of transfer in order to be marketable must carry with it the right of the purchaser of occupancy right from one who cultivates the land, to settle at any rent it suits him.

As I have shown above the cultivator with his dire want of food and necessities of cultivation will not be able to retain a land let out to him at the highest rent by a purchaser of *khas* land with occupancy right, against the rent sale, against the money-lender and against harassment in the law Courts.

In these circumstances it will be not against the interest of agriculture or against the improvident agricultural community to allow ~~disadvantage~~ to remain without the right of a tenant.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Easter Sittings of the Judicial Committee commenced on the 12th April, appeal from Crown Colonies being the first to be heard.

On the 17th April a Second Board was constituted for the hearing of Indian appeals which was composed as follows. LORD BUCKMASTER President, and LORDS DUNEDIN, CARSON, SALVESEN and SIR JOHN EDGE.

The first appeal to be heard was *Baliran Sing and anr. v. Rai Bahadur Seth Narsingda and anr.*, from the Court of the District Court of Wardha, Central Provinces. The Appellant were judgment-debtors whose property had been sold in execution of a decree. They sought to have the sale set aside on the ground that the conditions of Or. 21, r. 66 of the C. P. C. had not been complied with. The auction-purchaser while admitting an irregularity in the sale proclamation contended that the Appellant had not discharged the onus of establishing that he had suffered any damage from the irregularity.

Messrs DeGruyther, K. C. and I. A. C. Skinner for the Appellant.

Sir G. Lowndes, K. C. and Mr. A. Majid for the Respondent.

LORD BUCKMASTER delivered judgment dismissing the appeal.

Mussamat Jatti v. Banwari Lal (Punjab) is now part-heard before the same Board.

Messrs DeGruyther, K. C. and Dubé appear for the Appellant.

Mr. A. Majid for the Respondent.

It is anticipated that Crown Colony appeals will be concluded on the 19th April and the other Board composed of LORDS HALDANE, SHAW and PARMOOR will also hear Indian appeals of which there are 16 in the list.

19-4-23.

G. D. M.

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Certification of legislation by Governors and Governor-General, and their responsibility to Parliament.

The Government communique from Simla, referred to by us in our last issue, says that "sec. 72E" of the Government of India Act, "which makes a similar provision, (to that of sec. 67B) for the case of failure of the Provincial Council to pass legislation is couched in unequivocal language." The Government of India suggest that both these sections make the Governor-General the final authority in putting into operation a certified Act and maintain that he may, by declaring that "a state of emergency exists," oust the operation of sub-secs. (2) and (3) of sec. 72E, which are substantially identical to sub-sec. (2) of sec. 67B. We, on the contrary, propose to show that the above sub-sections specifically require that a certified Act, be it of a Provincial or the Indian Legislature, must be submitted for the assent of His Majesty in Council and that it shall not be so submitted unless the Act has been laid on the table of both Houses of Parliament, for at least eight days, when the Houses are sitting. We have shown in our last issue by quoting the full text of sec. 67B, that such a claim is contrary to the express terms of that section. We shall now reproduce the full text of sec. 72E of the Government of India Act and show that there is nothing in this section either to support any such claim.

Sec. 72E is in the following terms:—

72E (1) Where a governor's legislative council has refused leave to introduce, or has failed to pass in a form recommended by the governor, any Bill relating to a reserved subject, the governor may

certify that the passage of the Bill is essential for the discharge of his responsibility for the subject, and thereupon the Bill shall, notwithstanding that the council have not consented thereto, be deemed to have passed, and shall on signature by the governor become an Act of the local legislature in the form of the Bill as originally introduced or proposed to be introduced in the council or (as the case may be) in the form recommended to the council by the governor.

(2) Every such Act shall be expressed to be made by the governor, and the governor shall forthwith send an authentic copy thereof to the Governor-General, who shall reserve the Act for the signification of His Majesty's pleasure, and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the local legislature and duly assented to.

Provided that where in the opinion of the Governor-General a state of emergency exists which justifies such action, he may, instead of reserving such Act, signify his assent thereto, and thereupon the Act shall have such force and effect as aforesaid, subject however to disallowance by His Majesty in Council.

(3) An Act made under this section shall as soon as practicable after being made be laid before each House of Parliament, and an Act which is required to be presented for His Majesty's assent shall not be so presented until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat.

The only point of difference between secs. 67B and 72E is that the Governor's power is more limited and he can only certify Bills relating only to reserved subjects. But the check on his power of certification is almost identical with that provided in sec. 67B. The other differences relate to a mere matter of form. Under sec. 67B, an Act certified by the Governor-General has to be forwarded by him for being laid on the table of both Houses of Parliament before submitting it for Royal assent, as stated above. In the case of a Provincial Act certified by the Governor, sec. 72E (2) provides that the Governor is

to forward it forthwith to the Governor-General "who shall reserve" it for Royal assent. Sub-sec. (3) of sec. 72E lays down the identical procedure for obtaining such assent as is laid down in sec. 67B, sub-sec. (2).

The next question is, does the proviso to the sections override the requirements as to Parliamentary scrutiny and Royal assent or merely confers an emergency power on the Governor-General to bring the certified Act into operation subject to disallowance by Royal veto? A comparison of secs. 67B and 72E will show that they are in identical terms, except that the proviso to sec. 72E, in case of emergency, provides that instead of reserving such Act for Royal assent, the Governor-General may signify his assent and the Act thereupon will become operative. But the proviso to both the sections state at the end that such operation is subject to disallowance by His Majesty in Council. We do not dispute the proposition that the Governor-General has under the proviso to sec. 67B or 72E the provisional power of directing a certified Act of either the Indian or a Provincial Legislature to be put into operation on the ground of "emergency." But there can be no question that this is a mere emergency power subject to the grant of final sanction or withholding thereof in accordance with the provisions of sec. 67B (2) or sec. 72E (3). The proviso confers a provisional power which cannot be regarded as overriding the express provisions of the sub-sections above referred to.

Sub-secs (2) and (3) of sec. 72E and sub-sec (2) of sec. 67B defines the responsibility of the Governor or the Governor-General to Parliament in respect of such certification. Sub-sec (3) of sec. 72E, which comes after the proviso to sub-sec (2), must be regarded as independent of it. It makes it clear that even after the Governor-General has assented to such certification, the Act must be laid on the table of both Houses at least for eight days when the Houses are sitting and submitted for Royal assent thereafter. Royal assent can only be given on the advice of Parliament through a responsible minister and the veto as contemplated in the proviso may also be similarly exercised.

Those who are acquainted with the history

of the present Reforms and the Government of India Act as finally amended in Parliament are aware that sec. 67B and sec. 72E were enacted at the instance of the Joint Parliamentary Committee and were intended to make the Governor or Governor-General responsible to Parliament in respect of the exercise of this extraordinary power of certification, as the following extract from the Committee's Report will convincingly show:—

"The Committee think it much better that there should be no attempt to conceal the fact that the responsibility is with the Governor in Council, and they recommend a process by which a Governor should be empowered to pass an Act in respect of any reserved subject, if he considers that the Act is necessary for the proper fulfilment of his responsibility to Parliament. He should not do so until he has given every opportunity for the matter to be thoroughly discussed in the Legislative Council, and as a sensible man he should, of course, endeavour to carry the Legislative Council with him in the matter by the strength of his case. But, if he finds that cannot be so, then he should have the power to proceed on his own responsibility. Acts passed on his sole responsibility should be reserved by the Governor-General for His Majesty's pleasure, and be laid before Parliament. His Majesty will necessarily be advised by the Secretary of State for India, and the responsibility for the advice to be given to His Majesty can only rest with the Secretary of State. But the Committee suggest that the *Standing Committee of Parliament* whose appointment they have advised, should be specially consulted about Acts of this character. Provision, however, is made in the Bill for the avoidance of delay in case of grave emergency by giving the Governor-General power to assent to the Act without reserving it, though this of course would not prevent subsequent disallowance by His Majesty in Council."

The italics are ours. The above extract makes it clear that the Secretary of State must consult the Parliamentary Committee about the assent or veto. In view of the above recommendations, the interpretation now attempted to be put on secs. 67B and 72E is quite untenable. Sir Valentine Chirol in a letter to the *Times* says that the doubling of the salt tax by certification cannot be defended on the ground of emergency. The Joint Committee contemplated that the Governor-General should never exercise such powers except in case of *grave* emergency. So the plea of the Governor-General for certification on the ground of emergency also fails. At present the sections above referred to make the Governors and Governor-General responsible to Parliament in respect of these extraordinary

powers. While public opinion in India demands that the Provincial and Indian Executive Governments should be responsible to the Legislatures in India, we cannot but deprecate this attempt on the part of the Government of India not only to put back the hands of the clock of constitutional progress, but also to avoid their responsibility to Parliament in respect of their arbitrary and autocratic powers

THE PROPOSED BENGAL TENANCY ACT AMENDMENT BILL.

(By MR SAYIDUR RAHMAN, MUNSIF)

(Continued from p. civ)

II.

The effect of conferring free rights of transfer on all from the raiyat to the last of the under-raiyats cultivating the lands is likely to lead to disastrous results and the cultivating class will be ruined and go out of existence, the lands are likely to accumulate in the hands of non-agricultural capitalists who will either adopt farming as a business employing the cultivators on the lands as mere labourers or they will let it out at exorbitant rents which will make it impossible for the poverty-stricken cultivators to survive and to retain their holding for any length of time on payment of the highest rents. It will then be beyond the power of any legislature after this law of transfer has worked for a certain number of years to bring back to existence this very useful class of productive people. The question arises for anxious consideration by all those who have a stake in the country, whether it will be good to prohibit or limit transferability of holding, as has been done in the case of backward classes. See Chap VIIA of the Bengal Tenancy Act.

Stress is laid on the report of the Committee on the wide-spread practice of transfer adopted by the tenants in favour of legalising transfer by express law. But this is no answer to the question whether transfer should be prohibited by legislation if expressly legalising transfer will accelerate and complete the ruin of the tenantry already begun by their own acts to which they were forced by economic distress. I propose that the Government should issue a commission to enquire into this fundamental and important question of transferability and its consequences, as the Committee does not appear to have devoted

adequate attention to the consequences that this legislation will lead to

The provision of common agent for receiving notice and fee of transfer will be a great hardship to the majority of petty landlords. If the tenants can find out their co-sharee landlords for paying rent for all time, they can surely find them out for paying transfer fee. This payment should be left to the parties concerned. The landlords may be given rights to realise fees in case of default just as arrears of rent.

When the landlord is dependent upon the produce rent for the subsistence of himself and his household, it is not only "inequitable" as the report conceded, but it will be nothing short of sheer injustice to allow such a rent to be converted into money rent. The matter should be set at rest by a clause that "commutation shall be refused when the rent in kind is mainly required for the subsistence of the landlord and his household and not for trade."

The persons disabled by age, sex, disease, accident or temporary absence, will not be in a position to sue for ejectment or get a fresh *kabuliyat* within one year of the expiry of the lease for a term not exceeding nine years, if their disability continues. The proposed secs 18 of cl 28 of the Bill should be amended by allowing temporary leases till the cessation of their disability and not for nine years only and they should be permitted to resume their lands within one year after their disability ceases by suits for ejectment.

Secs 19 to 21 of the Bengal Tenancy Act regarding the settled raiyats and acquisition of occupancy right by settled raiyats should govern under-raiyats as I see no sufficient reason for preference of under-raiyats to raiyats in the matter, but as suggested before, the whole thing may be simplified by reserving occupancy right to the actual cultivators of the land and classifying as rent-receivers every one else except those who have occupancy right by real occupation of land with all its attendant privileges.

It is in the interest of both landlord and tenant that realisation and payment of rent should be as smooth as possible and the simplest and cheapest means should be devised to facilitate easy collection and payment of rent so that neither the landlord nor the tenant can create any difficulty in the way of each other. Much of the litigation between

them is due to want of a machinery which will preclude either of them from harassing the other by dilatory and expensive proceedings in Courts. The machinery should be simplified for the welfare of both the classes.

The new rule of tender of rent by postal money-order and the legal presumption in favour of the postal receipt are welcome and will relieve the tenant of the difficulty of proving the tender by citing postal peons. It is valuable also as the entries in the money-order form will represent the case of the tenant on the point of rate of rent and appropriation of payment as laid down in sec. 55 (1), Bengal Tenancy Act and other particulars.

The new proviso to the proposed sec. 51 makes the entries in the postal money-order inadmissible in evidence as admission on the part of the landlord by reason of his acceptance only of rent sent by the postal money tender. There is greater reason on the ground of general illiteracy of the tenant for making the entries made by the landlord in the receipts granted to the tenants inadmissible in evidence as admission on the part of the tenant by reason merely of his acceptance of the receipt. Experience in Court shows that often higher rates of rent are entered in the *dakhilas* than are realised, appropriation is made to barred periods and the *dakhilas* filed by the tenants are made use of to disprove his case, on the ground that he accepts them and relies on them by their production.

The well-known Full Bench case having laid down that the tender otherwise validly made "must be kept good" by making a fresh offer after a suit is instituted for rent defeats the effect of the postal money-order, if the tenant fails to deposit the claim after the suit has been instituted. The unprovident poor tenant has not the money ready for deposit after suit as a rule and the plea of tender fails on a technical rule of law in spite of the wrongful refusal of the landlord to accept the postal remittance. Words should be added at the end of the proposed sec. 54 (2) or in sec. 64A to guard against the plea of tender failing by reason of this Full Bench ruling. His want of food and clothing and dire poverty make it impossible for him to keep the amount of the refused money-order ready for the land-

lord whenever he chooses to institute suit for rent.

Rent is ordinarily payable in four equal instalments a year. The deposit in Court four times a year by means of applications and *rakalatnamas* in Court meant all the loss of time, money and energy which is not at all suitable for the illiterate and poor tenants. The cost of depositing a rent of Rs. 5 in four *kists* will work out to a sum of Rs. 20 apart from his trouble of attending the Court at a distance. Similarly drawing out deposited rent from Court by the landlord means loss of money, time and energy which is no less a grievance to the landlord. The landlord finds relief from the proposed sec. 63 (1) as the Court will send the deposit to the landlord by postal money-order.

It is all the more necessary, nay, I think imperative, that the poor tenant should be relieved of all his trouble and expense by being permitted to make the deposit in Court by means of postal money-order in all the cases (a), (b), (c) and (d) under sec. 61, Bengal Tenancy Act.

It should be remembered here that sec. 61 has been authoritatively interpreted by the decision reported in 15 Cal. 166 as not requiring the Court to enter into any judicial enquiry in connection with the matter of the deposit and the landlord is not allowed in such a proceeding to raise objection as to the amount or validity of the deposit. The duty of the Court in this respect is merely ministerial. Another decision reported in 25 Cal. 289 dispenses with the personal presence of the tenant.

In this state of the law provision ought to be added in the Bill to enable the tenant to make the deposit under all the four grounds laid down in cls. (a) to (d) in sec. 61 (i) by postal money-order. The application for permission to deposit as required by sec. 61 may be allowed to be submitted to Court by post before the money-order form be revised and altered for the purpose.

The proposed sec. 87A seems to be inequitable as it awards the holding in its entirety to the occupancy under-raiyat in respect of a mere fraction or parcel of it. The under-raiyat seems to deserve no more than the fraction or parcel he holds.

(To be continued.)

Calcutta Weekly Notes.

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BY MR. S. K. DAS, JUDGE.	

The new Prime Minister and the lessons of his appointment.

The appointment of Mr. Stanley Baldwin as Prime Minister in the place of Mr. Bonar Law, indeed, is full of constitutional significance. Under the British constitution, be it in Great Britain or in the Dominions, the Prime Minister or the other Ministers are not elected by the House of Commons or the House of Representatives. They are appointed by the King and in the Colonies by the Governor representing the Crown. Although it is the Crown which appoints them under its discretionary powers, still the Crown takes every care that the discretion is exercised in a responsible manner. The system of party government helps the Crown in the proper exercise of that discretion. When the members of the party command a majority in the House, their acknowledged leader is sent for by the King and asked to form the ministry or the cabinet. He then selects his colleagues. The Prime Minister or the cabinet has no constitutional or statutory existence. It is under Parliamentary convention that the Chief Minister is called the Prime Minister and he with his ministerial colleagues are called the cabinet. The ministry or the cabinet owe joint responsibility to the House of Commons. They exercise their executive functions in the name of the King for which they are jointly and severally responsible to the House but the King is in no way responsible. When the individual minister forfeits the confidence of his colleagues, he may have to resign his office as Mr. Montagu did. That does not affect the ministry. If the ministry forfeits confidence,

and the House passes an adverse vote against the ministry or against any individual minister for any act, measure or proposal relating to finance, legislation, administration or policy, the ministry has to resign and the King summons the leader of the opposition to form a ministry. If he fails to form a new ministry or the ministry fails to command the confidence of the House, the King orders a dissolution, a general election follows and thereafter a new ministry is formed in the same way as stated before.

These fundamental considerations make intelligible the procedure that has been followed by His Majesty the King in selecting the new Prime Minister. On Mr. Bonar Law tendering his resignation, the King ascertained the views of the leading members of the party that the Ex-Premier led. Lord Curzon, the Foreign Minister, held the most responsible position in the party next to the Prime Minister and in fact he was acting for the Prime Minister. But as the other influential members of his party did not want a peer, who is a member of the House of Lords and not of the Commons, to be the Prime Minister, His Majesty summoned Mr. Stanley Baldwin, the Chancellor of the Exchequer, according to the wishes of his colleagues, to be the Chief Minister. Lord Beaconsfield, Lord Salisbury and Lord Rosebery were Prime Ministers though they were peers and members of the House of Lords. So the selection of Mr. Baldwin in preference to Lord Curzon in the present instance would seem to give rise to a new convention that the Prime Minister should from now be in every case a member of the House of Commons.

Since the responsibility of the ministry is joint, the King asks the Prime Minister to choose his colleagues in the cabinet. It may be that some of the existing members of the cabinet may not be willing to serve under the leadership of the new Chief or may differ from

him on some crucial question of policy with regard to France, Germany, Turkey, Russia, or colonial or domestic politics. In such cases, the new Premier will be unable to discharge his joint responsibility with such colleagues to Parliament. Therefore on the selection of a new Prime Minister by the King, the other ministers also tender their resignation and the King asks the Prime Minister to form his own cabinet. The other ministers are appointed by the King on nomination by the Prime Minister. The King's power in law to accept or reject the nominations of the Prime Minister is absolute. But in practice, it is hardly possible for the King to overrule the Prime Minister's choice, if they should seriously differ. For instance, Queen Victoria objected to appoint the late Mr. Labouchere, as a minister of Mr. Gladstone's Government, but Mr. Gladstone insisted that he could not form a cabinet without him and the Queen had to give in. It is by such indirect methods that the executive in England have been made responsible to Parliament and particularly to the House of Commons. If the members of the Local and Imperial Legislatures here could, by promoting unity amongst themselves, form parties and bring about deadlocks and dissolutions, whenever the executive sought to take advantage of their discretionary or autocratic powers, they would before long be able to make them responsible to the legislatures.

Resignation of Ministers.

The resignation of Mr. Chintamani, Minister of Education and Industries, U. P., has raised a question of considerable importance. The facts leading up to the resignation are as follows.—The Vice-Chancellor of the University of Allahabad, Sir Claude de la Fosse, instituted criminal proceedings against certain gentlemen without having obtained the necessary sanction from the Government. To this Mr. Chintamani took exception and submitted to the Governor that an explanation should be called for from the Vice-Chancellor for not observing the rules for the conduct of public servants. The Governor thought that there was no necessity for calling for an explanation from the Vice-Chancellor and thereupon Mr. Chintamani resigned. It is not for us to enter into the merits of this unfortunate controversy, as to whether, for example, the Vice-Chancellor was justifying instituting criminal proceedings or

whether the Governor was right in his view that the rule did not strictly apply and so on, the only question, for our consideration, being whether the Governor was right in acting against the advice of his Minister in this case. If, under the Reforms, Education is a transferred subject, and if Sir Claude de la Fosse, whose services had been lent to the University by the Government, is a public servant, then no amount of sophistry can explain the action of the Governor as anything but improper and unconstitutional. No doubt, the Governor, under his Instrument of Instructions, may override the advice of his Minister and act on his own responsibility, but no one will seriously contend that the facts of the present case called for the exercise of any such power. In the circumstances, Mr. Chintamani had no other alternative left to him but to resign, and we congratulate him on the independence he has shown in so doing.

Barristers' Fees.

Apropos the increase in the scale of fees charged by members of the Bar, the following extract from the *Law Journal* will be of interest to our readers.—

More than one speaker at the public meeting of the Barristers' Benevolent Association, in commenting upon the small amounts which some of the big "leaders" contribute to its funds, alluded to the unprecedentedly large incomes now made by some of the busiest members of the Bar. Mr. Justice Horridge declared, indeed, that "the great leaders of the Bar are receiving fees that not long ago would have been regarded as fabulous." Yet it would not be accurate to assume that fees large enough to be regarded as "fabulous" were quite unknown in other days. Serjeant Ballantine received a fee of 10,000 guineas for going to India in 1875 to defend the Gaekwar of Baroda on a charge of attempting to poison the British Resident of his District. Lord Brampton having refused to accept the brief with a fee twice as large. Why he refused this offer of a large fortune for a single case Lord Brampton explains in his "Reminiscences"—

The Tichborne case was a great professional loss while it lasted; for the greater part of two years I could do little else; but no sooner was it finished than I was once more in the full run of work. One brief was delivered with a fee marked twenty thousand guineas, which I declined. It would not in any way have answered

my purpose to accept it. I was asked, however, to name my own fee, with the assurance that, whatever I named, it would be forthcoming. I said I would consider a fee of fifty thousand guineas, and I did so, but resolved not to accept the brief on any terms, as it involved my going to India, and I felt it would not be wise to do

so

Lord Brampton's refusal of a brief marked 50,000 guineas is not the only evidence of the high fees that were sometimes obtained in his flourishing days at the Bar. "Lloyd," he writes in his "Reminiscences" of his chief adversary in compensation cases, "must have made 20,000/ a year with the greatest ease." Though he ostentatiously abstains from giving any exact figures, he does not conceal the pleasing fact that his own professional income was even larger. "No expectation of mine," he adds, "ever came up to its amount, and even now, when I look back, it seems absolutely fabulous." More than eighty years ago, in a very different field of litigation, a fee of several thousand guineas was not unknown. Lord Truro received a fee of 4,000 guineas for arguing the famous case of *Small v. Atwood* in the House of Lords in 1838, when, of course, the purchasing power of the guinea was much greater than it is to-day. Originally, the fee marked was 3,000 gns., but the Serjeant's clerk—Lord Truro was Serjeant Truro in those halcyon days—insisted, with characteristic zeal, upon another thousand. But the average fee of the busy leader has, beyond all doubt, become much larger in recent years; and wealthy litigants—whose own incomes have, perhaps, grown in the same proportion—show no indisposition to pay the "fabulous" sums which "fashionable" leaders can now command for their services.

THE PROPOSED BENGAL TENANCY ACT AMENDMENT BILL.

(By MR. SAYIDUR RAHMAN, MUNSIF.) . .

(Continued from p. cxviii.)

III

The Civil Courts should be empowered to deal with cases in which the landlords do not grant *dakhilas* for payment of rent and impose penalty summarily. Institution of suits permitted for double the value of rent paid by the tenant on account of landlord's omission to grant him *dakhila* or account for any year has failed to give any relief to the tenant. To recover as penalty double the

amount of the rent paid, for which no receipt or account was given, cannot possibly suit the average tenant as he would have to spend much more than he could recover. This is a needless provision multiplying suits between landlords and tenants, thereby defeating the very object of the provision which is to relieve the tenant. The tenants are too poor to afford this luxury of litigation and have wisely avoided resort to the sections intended for their benefit. Sec 58 (1) and (2) of the Bengal Tenancy Act should be expunged.

Dakhilas being valuable documents to the tenants, it should be made obligatory on the landlord to use counterfoil books of *dakhilas* on durable paper. Experience in Court shows that a tenant's case suffers for the *dakhilas* having been granted on thin paper which scarcely stands handling. They wear away and get torn from rough handling by the ignorant tenants and the latter suffer for the miserable condition of these valuable documents of theirs. Sec 59 (2) should be changed and the Local Government authorised to sell the public forms of receipts with counterfoils on strong papers, and their use of these forms should be made compulsory.

The chapter on distraint has been omitted altogether by the Bill. It is rarely availed of and practically stands useless. But it is a matter for serious consideration whether it could not be so regulated as to yield more satisfactory results to both landlords and tenants. Arrears of rent are the prolific cause for which the tenants have often to lose their holdings. Rents remain unpaid for various reasons,—bad season, poor yield and improvident habits of the raiyats and his poverty,—for which reason they spend their whole yield without paying off the "first charge" on the land, viz., the rent. In this the tenant deserves to be pitied, for his dire penury and his want of education makes him thriftless and he has no foresight to put him on his guard against eventual sale of his holding for arrears.

The landlord has also so many difficulties and delays to encounter to realise rent by means of rent suits and execution proceedings that he might take it as a great boon if some short and summary means of realisation of rent were devised in his favour. For a rent suit the landlord has to find out and summon all his co-sharers and all the co-sharer tenants whose number in many cases is excessive with the consequent increase in expense and trouble.

For the tenant a rent decree and execution proceeding relating thereto are often the means by which he frequently loses his holding. The co-sharer tenants in possession default and the burden proves unbearable for one of them. Not unoften and naturally some of them have to adopt unfair means, e.g., by colluding with the *gomastha* to get rid of the other co-sharers by means of a fraudulent rent sale, for to pay the whole claim oneself and to realise from the other co-sharers by contribution suits is by no means an easy process. The proposed sec 146A and the new sec 148A do not seem to afford a satisfactory solution of the difficulties in the cases of the co-sharer landlord and co-sharer tenants.

I would propose that realisation of up to two years' arrears of rent by distraint of crops standing on the land be made obligatory on the landlord before he can have liberty to proceed to suit and sell the holding for arrears of four years. If the distraint proceeding proves infructuous, and the lands of the holding fail to satisfy the arrears, either wholly or in part, the landlord may then sue in the ordinary way. This I think will prove a blessing to the tenant whose improvidence makes him lose his tenancy by accumulation of arrears for four years to a heavy sum.

In the Bill the occupancy right conferred on under-*raiya*t is more shadow than substance.

The right of transfer of occupancy right leads to the following consequences:—The occupancy holding of a *raiya*t is sold by A to B. B may either hold it in *khas* cultivation or let out to a tenant C. B may cultivate it by himself or members of his family or by hired servants. If he cultivates by himself or by members of his family the interest of the agriculture is well-served, but in how many cases will the driver of the plough have money to buy the land? In most cases the purchase will be by one of the middle classes, the money-lender, the landlord and others who are not agriculturists but try to appropriate most of the fruits of agricultural labour. If the middle class man cultivates by hired servants, he will have to invest money in agriculture and his interest must be keen in it as a matter of business. The cause of agriculture may improve in his hands although large accumulation of lands in the hands of the middle classes who adopt cultivation as business will reduce large numbers of drivers of the plough to the

position of hired servants. To that extent the real tillers of the soil will have no interest in the land. In case the middle class man does not adopt agriculture and does not find it profitable to cultivate by hired servants as a business investment he will sub-let to another at the highest possible money-rent. No one will let out in *bhag* or rent-in-kind as that will be attended with the risk of the rent-in-kind being reduced by commutation to an amount of rent which may be less than the highest money rent at which he will be able to let it out. He will prefer the certainty of imposing his own term of money rent without undergoing the risk and worry of commutation by means of the complicated law administered by Revenue Officers. The sub-lessee has transferable occupancy right and may either sell or sub-let to another under the present Bill and this process may continue and there may be various intermediate persons above the one who actually cultivates.

The lease of an occupancy holding whether by *raiya*t or under-*raiya*t is a recognised mode of transfer but the Bill expressly creates no right in the landlord to recover mutation fees when the holding is let out. The practice may grow of sub-letting at a high premium with immunity in respect of payment of landlord's fee. The occupancy right of an under-*raiya*t is not a protected interest under cl (d) of sec 160 and his holding is made an encumbrance which is liable to be annulled under sec 159. The meaning of "encumbrance" in sec 161 (a) is left intact. He will only have the right to prevent the sale by paying money into Court before the sale, as a person having in the holding immediately above him any interest "voidable on the sale." But he will have no right to pay money into Court after sale as sec 174 is limited to the judgment-debtor only.

It seems thus clear that when a *raiya*t holding is sold in execution of a rent decree, the under-*raiya*t, immediately under the *raiya*t, can by paying money before the sale save himself, but the under-*raiya*ts below the first under-*raiya*t will have no means of saving their interest, although they acquired it at the cost of paying good price, landlord's fee and by a registered instrument. The result will be that when this Bill becomes law, on the *raiya*t or under-*raiya*t defaulting in the payment of rent, the rent sale will destroy all under-*raiya*ts' holdings below the immediate under-*raiya*t who may collusively refrain from exercising his

rights to prevent the sale by paying money into Court or may be unable to do so not having money to pay.

The occupancy right of all under-*rayats* acquired at so much cost of money and energy should be well-secured against the devastating effect of rent sales by necessary amendments in the definition of encumbrance and giving all under-*rayats* the right to prevent the sale and to set aside the sale by depositing money in Court under sec. 170 (3) and sec. 174 (1) and allowing them right to recoup themselves under sec. 171. The proposal seems to me quite workable in practice and should be given effect to by necessary amendments of secs. 161 (a), 170 (3), 171 and 174.

All objections on the part of the landlord can be met by the answer that the rent sale is only a means to realisation of rent and should not be open to abuse by making it a means of destroying legally acquired rights of under-*rayats*. The landlord ought to be satisfied when his decretal amount comes to him.ivolous petitions for setting aside sales of holding should be checked by requiring the applicant to deposit the amount then due under his decree with compensation to the auction-purchaser as a condition precedent before the application can be admitted, on the analogy of sec. 153A. This will very much facilitate speedy realisation of rent without incurring any one. The compensation of 25 per cent will be a gain to the auction-purchaser and deterrent to the tenant and thus discourageivolous applications to set aside the sale by the tenant and unprofitable opposition to *bonâ fide* applications by the purchaser and others.

No change has been effected in sec. 182 and the law giving tenancy right to those who cultivate for a share of the produce can be easily evaded through this section. *Pattas* and *kabulyats* will be created by which 10 *highas* of land will be given to a cultivator for his services for cultivating land for the whole year. The cultivator will acquire no right in the 10 *highas* given as he would hold in lieu of his service for cultivating other lands.

Sec. 149 should be changed so that the question of the right to the rent may be completely and finally adjudicated as between the rival claimants to the rent. The case-law on the point shows that the decision under this section only determines the claim to the amount

in deposit and is of no avail beyond it. The tenant has to repeat the process of pleading and depositing in rent suits any number of times and the rival claimants each time will fight over the deposit without any finality.

Rent is a recurring claim arising four times every year. The desirability, nay, the necessity of finally closing all questions arising in rent suits, even by adding necessary parties by the Court of its own motion according to the circumstances, should engage the anxious consideration of the Legislature as the solution of such questions once arising in the presence of all concerned will give rest and peace to all and is bound to prevent and reduce litigation in future for recurring periods. The conflict of case-laws on the question of *res judicata* in rent suits should be simplified and codified in the present Bill.

The superficial way of dealing with a rent suit by answering only the stereotyped question of the relationship of landlord and tenant between the parties leads to useless multiplicity of proceedings, e.g., A sues B for rent, B pleads that he holds under C. If the decision is in favour of A, C does not go to a title-suit against A, as Plaintiff's position in a Civil Court is most onerous but sues B for rent of the same holding and relies on B's admission in the written statement of the suit by A and all the materials, *dakhilas* and evidence which he then produced in support of his pleading in favour of C. C may succeed and often succeeds with the scandalous result of one holding being subjected to two rent decrees of A and C. The tenant stands outwitted and ruined by so much harassment and expense.

The solution appears to me easy, viz., by adding C in the 1st suit by A and answering the question of the right to rent as between A and C once for all in the interest of all concerned, leaving it open to the losing party to have the matter reconsidered in a title suit at his option.

The dismissal of a rent suit for wilful default of Plaintiff does not bar a fresh suit for rent of a subsequent period although the poor tenant is dragged into Court for several months and incurs all the expenses of getting together his evidence and citing witnesses to prove his case. This should be remedied in the present Bill.

The permission to institute a fresh suit is also freely granted by the Courts under the

rather uncertain and elastic law of the Civil Procedure Code and this Bill should enjoin upon the Court the necessity of recording expressly its finding that the suit will really fail in its entirety by reason only of some defect in form. The provisions are often abused by the landlords. Legal costs granted to the winning party fall very short of recouping him the loss he actually suffers and in the unequal fight between landlord and tenant, the costs should represent the actual loss as far as possible to prevent the law Courts from being made a means of oppression.

Questions as to the land and the area of a *jama* in a rent suit are often neglected as unnecessary for the determination of the liability for rent in spite of the tenant's express pleadings. But the land and area as described in the plaint with all their defects are advertised for sale, in execution of rent decrees to the injury of the tenant and involving the auction-purchaser in a litigation, criminal and civil, with the out-going tenant and the landlord. The decision of the question of land and area should be compulsory when raised by the tenant and the question should be left open only in cases when the decree will not be executed by selling the holding and this should be secured by an express order in the judgment that the decree shall not be executed as rent decree by selling the holding.

The provision by which a 1/3th share of the tenants' interest will represent the entire tenancy for the purpose of the rent decree seems most objectionable. The injustice to the omitted co-sharers may be avoided by altering the proviso to the proposed sec. 146A in favour of the omitted co-sharers and by making the latter pay proportionate shares of the decree with compensations to the auction-purchaser and thereby redeem their shares.

The co-sharer tenants should be given liberty under the proposed sec. 146B (2) not only to prevent the sale by a deposit but also to set aside a sale like a judgment-debtor under sec. 174 of the present Act. Necessary amendments should therefore be made in sec. 146B (2).

These proposals of mine are in accordance with the principle that rent sales should not be permitted to work greater havoc upon the holding than is reasonably necessary for the satisfaction of landlord's dues.

(Concluded.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Two Boards have continued to sit and hear Indian appeals during the past week. The one presided over by VISCOUNT HALDANE has been engaged (April 19th to 24th) in hearing arguments in *Putlibai v. Gamadia*, an appeal from Bombay. The appeal concerned the construction of the Will of the late Nowruji Jehangir Gamadia, a well-known and wealthy Parsi citizen of Bombay. In disposing of his property the testator endeavoured to limit the enjoyment of it by unborn persons and the Bombay Courts have declared the majority of the limitations invalid. The executors Appellants contend that the construction of these limitations does not at present arise, and that if it does, they are valid. The Board are considering their judgment. The Appellants were represented by *Messrs. Upjohn, K. C.* and *E. B. Rakes*.

Sir John Simon, K. C. and *Mr. J. G. Wood* and *Messrs. DeGruyther, K. C.* and *Douglas McNair* represented various Respondents.

The other Board presided over by LORD BUCKMASTER have heard the following appeals —

In *Mussammatt Jotti v. Banwari Lal* (Punjab), the suit was instituted by the Appellant against her late husband's brother and nephews for a share in the business carried on by her husband and his two brothers after the former had separated from the latter. She alleged that on her husband's death she had been admitted into the business as a partner and she now prayed for dissolution of the partnership. The trial Court found the facts in the Appellant's favour but dismissed the suit on the ground of limitation. The High Court affirmed the decree of the trial Court but on different grounds. Judgment was reserved.

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Appellant.

Mr. I. Wajid for the Respondents.

Raja Bahadur Raja Brij Narain Rai v. Manqla Prasad, an appeal from Allahabad was heard on April 19th and 20th. The appeal was argued *ex parte* by *Messrs. DeGruyther, K. C.* and *B. Dubé* and raised the question as to the validity of a mortgage of joint family property, and the meaning of the term "antecedent debt." The Appellants en-

deavour to distinguish the decisions of the Privy Council in *Chet Ram v. Ram Singh* (27 C W N 150) and *Sahu Ram v. Bhup Singh* (21 C W. N. 698)

After hearing a very full argument their Lordships decided that the point raised was of sufficient importance to merit re-argument before a full Board at an early date.

Balgobind v. Bahai Prasad (Oudh) was heard on the 20th April. The question at issue was, whether or not there existed a family custom of excluding daughters and their children from inheritance. Judgment was reserved.

Messrs DeGruyther, K. C. and *B. Dubé* for the Appellant.

Messrs Kenworthy Brown and Hyam for the Respondents.

Raja Md Muntaz Ali Khan v. Mohan Singh (Lucknow) was heard on April 23rd. These were consolidated appeals from decrees in suits instituted by the Respondents for a declaration that they held under proprietary rights in the lands in suit and were not simple tenants as alleged by the Appellant. Judgment was reserved.

Messrs DeGruyther, K. C. and *Parikh* *et parte*

Sir Raja Bammaderaya Naganna Naidu v. Ravi Venkatappaya (Madras) was heard on April 24th. This appeal was heard *ex parte*, *Messrs Dunne, K. C.* and *Narasimham* appearing for the Appellants. The disputes related to rent between zamindars and tenants. There are also questions of jurisdiction and *res judicata*. Judgment was reserved.

Judgment has been delivered (24th April) in *Surapati Roy v. Ram Narayan Mukherji* (Bengal) and *Seth Kanhiya Lal v. National Bank of India* (Punjab).

In each case the appeal was allowed.

26-4-1923

G. D. M.

Reviews.

THE LAW OF GAMING AND WAGERING, CIVIL AND CRIMINAL. By S. G. Velunker, B.A., LL.B. Barrister-at-Law, 3rd Edition, Bombay. Printed at the Advocate of India Press, 1922.

This is a handy and attractively got up volume in which the author has attempted to present the whole of the law of gambling and wagering applicable in British India and Burma. What is called the criminal law of gambling is mostly embodied in statutes of local application. Starting with the Bombay Prevention of Gambling Act, all statutory enactments bearing on gambling are taken up one after another and annotated. The material for the commentary is found in judicial decisions, Indian and English. It is concisely worded and informing and ought to prove helpful to practitioners and judges. The civil law of wagering contracts is dealt with in two chapters, the first of which takes up for discussion the common and statute law of England and Indian enactments seriatim, whilst the second chapter classifies and arranges the English and Indian case-law. The table of cases and the subject index are both carefully prepared.

THE HINDU CODE. By H. S. Gour, M.A., D. Litt., D. C. L., LL.D. Second Edition. (Revised and enlarged). Nagpur. Central Book Depot. 1923.

Dr. Gour is nothing if he is not encyclopedic and the present treatise is even more so than previous products of his unexampled industry and painstaking research. Like his other books, the Hindu Code will be chiefly valued as a book of reference, for different views are entertained as to the intrinsic value of his "codification." His point of view is essentially unorthodox, and it is the bulk rather than the contents of his commentaries which, we suspect, has been responsible for the immunity from adverse criticism at the hands of the orthodox school, he has so far enjoyed. It would, to our mind have been regrettable, if the first serious attempt at codifying Hindu law and justifying such attempt by reasons had come from this school. Dr. Gour has indeed had our fullest sympathy in the task he has undertaken.

though we do not agree that Hindu law was in a chaotic condition until Dr. Gour came and brought order into it. Mayne, Trovelyan and Golap Chandra Sircar's services in systematising Hindu law have by no means been superseded and their treatises continue to occupy exactly the place which they did before Dr. Gour's book made its appearance. The very volume of Dr. Gour's commentaries makes them difficult of handling for ordinary purposes. There is no doubt, however, that the profession have already come to regard "the Hindu Code" as indispensable as a work of reference. What effect it will have or whether it will have any calculable influence in giving Hindu law in any of its departments a new turn has yet to be seen.

THE INDIAN HIGH COURT REPORTS. Being a reprint of all the cases of the Privy Council on appeals from India and all the High Courts in India from the year 1900 Calcutta, Vol I (1901-1902); I. L. R. 28 and 29 Calcutta. Published by R. Cambray & Co. Law Publishers and Book-sellers 9, Hastings Street, Calcutta, 1923.

Messrs. Cambray & Co. have been permitted by the Government of India to bring out cheaper reprints of the Law Reports from the point at which they were left by two enterprising Madras firms of printers who had obtained similar permission with regard to the earlier volumes. This is the first volume and is priced Rs. 8. The get up of the volume is excellent and the purchaser of these reprints will certainly get good value for their money. Besides a combined table of cases and subject index for both the volumes of the Law Reports reprinted in this volume, there is appended an index of cases in which the decisions reprinted have been judicially considered—a feature which we hope will be maintained in subsequent issues.

THE YEARLY DIGEST OF INDIAN AND SELECT ENGLISH CASES, reported during the year 1922. By R. Narayanaswami Iyer, B.A., B.L., Vakil, High Court, Madras. Printed at the Madras Law Journal Press, Mylapore, Madras.

The profession is familiar with Mr. R. Narayanaswami Iyer's annuals. The cases in this issue are arranged under suitable headings. There are the usual tables of cases digested and of cases judicially noticed.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before Mr. JUSTICE PANTON. CIVIL RULE No 127 of 1923. *PALA KRISHNA PAL v. PYARI SANTOSH PAL.* Heard 20th March 1923 Judgment 27th March 1923

Power of nazir to accept bid at execution sale, whether subject to confirmation by the Court—Power of Court to adjourn sale after bid is accepted by nazir.

The Petitioner in this case was the decree-holder, who was permitted by the executing Court, to bid at the execution sale. His bid being highest, it was accepted by the nazir who conducted the sale, and the property was knocked down to him. Subsequently to that the judgment-debtor made an application for adjournment of the sale on the ground that, he had no knowledge of the date of sale. This application was granted and the Subordinate Judge passed orders that the bid accepted by the nazir should be refused, and the sale would stand adjourned for one month. Against this order, the decree-holder obtained this rule.

Held—That the officer conducting the sale has inherent authority to accept the bid and knock down the property, and that the order of the Court refusing to recognise the bid and postponing the sale was without jurisdiction.

I. L. R. 16 Cal 33, referred to.

Babu Bijon Kumar Mukerji for the Petitioner.

None appeared for the Opposite Party.

S. C. C.

Calcutta Weekly Notes.

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[No. 28.]

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REPORTS (&c. Index.)

The Chief Presidency Magistrateship of Calcutta.

Mr. Dawes Swinhoe, the Chief Presidency Magistrate of Calcutta, retired from the Bench on the 31st of May last. A member of the Indian Civil Service from Assam has been appointed in his place. He may be a very capable officer and he may very worthily fill the office, but if we cannot accord approval to the appointment, it must be understood that we have nothing to say against him personally. The office of the Chief Presidency Magistrate has for long been filled by members of the Bar and we see no reason why the Government of Bengal should not have got a member of the Calcutta Bar to fill the office. It is only casually that the office has been filled from the ranks of the Indian Civil Service. Mr. Kingsford was the last civilian incumbent in that office. It is well-known that he was not a success. During the anti-partition and *Suddeshi* movement in Bengal he sentenced some young men of respectable parentage to be whipped for some boyish political pranks. Public whipping in this country is regarded by respectable people as a worse indignity than imprisonment. This indiscretion or, perhaps, want of familiarity with the sentiments and sensibilities of the people of this country, on the part of the magistrate, practically gave birth to the anarchical movement amongst the young men in Bengal. It took quite a decade for the ferment and the unrest that followed in its train to subside.

It is not merely in the interest of the legal profession that we say that the Presidency Magistrate, be he the Chief or not, should always be recruited from amongst the members of the legal profession practising in Calcutta or its neighbourhood. We do not see any reason why Mr. Keays, who is regarded as an eminently fair Magistrate, should not have been promoted to take the place of Mr. Swinhoe. A member of the Civil Service is always on the look out for better prospects in his career and can never remain satisfied with a Presidency Magistrateship. He serves the purpose of a stop gap or is only a temporary incumbent in this office. The position, however, is one of great responsibility and it should never be filled by any birds of passage.

In London the Metropolitan Magistrates are all eminent men. They occupy a high position in society and command great respect. They are not only guardians of peace but are eminently judicial in their temperament and are in fact the best friends of the poor and erring people. In this first city in India and the second city in the Empire we should surely emulate the example of London and should take every care to select not mere lawyers but men of character and promise to the position of Presidency Magistrates. To the citizens of Calcutta the name of Marsden and Pearson are even to this day household words.

In Madras and Bombay the position is filled by eminent Indians. It would be an insult to our city to say that such men are not available in Calcutta. Why, the very member of the Executive Council in Bengal in charge of the Judicial Department, Sir Abdu Rahim, was himself a Presidency Magistrate of Calcutta. The Rt. Hon'ble Mr. Ameer Ali, P.C. was also a Presidency Magistrate. The cultured classes of this city are

above communal prejudices and if any Mahomedan member of the Bar, of character and promise, could have been found to occupy Mr Swinhoe's place, we would have heartily welcomed him. After all this talk of Indianisation in the services, it is sad to find that Sir Abdur Rahim who joined the late Mr Gokhale in his minute of dissent is now himself following a retrograde policy and filling judicial appointments by the importation of members of Indian Civil Service from another province, in disregard of the claims of members of the legal profession.

O'Brien case and Indemnity Bill.

The decision of the Court of Appeal in England condemning the deportation of the Irish leader, O'Brien, as illegal has been followed by the introduction in the House of Commons of an Indemnity Bill barring all legal claims for compensation by deportees. The French law confers an immunity on Government officers in respect of acts done in their official capacity. The executive in England, as our readers are aware, enjoy no such immunity. Whenever they do an act unauthorised by law, they do so at their own risk. It is obvious that high reasons of state should at times require the Government to take, as we say, the law into their own hands, but it is one of the principles of the British Constitution that that does not oust the jurisdiction of the Courts to test their legality nor does it take away the right of private individuals to proceed against persons actually employed in carrying out the Government order. In these circumstances, an Indemnity Act becomes absolutely necessary to save Government servants from proceedings in law Courts. But admitting that the State owes a duty to its servants to protect them from the consequences of law suits and prosecutions, what about those who have suffered from their illegal acts? And here one regrets to say that those who are in power are not so anxious to compensate the latter as they are to protect the former. That was one of the objections made by Mr Lloyd George to the Indemnity Bill at its second reading who told the Government frankly that the latter should pay up like gentlemen and that otherwise he would vote against the bill. It is not enough for the Government to say that they are prepared to satisfy claims for compensation, but an Indemnity Act, while barring legal claims against individual Gov-

ernment servants, should impose on the Government and the public purse the statutory liability of meeting all claims for compensation by those who have suffered from their illegal proceedings. In Malabar, the indemnity clauses in the Ordinances passed by the Governor-General indemnifying Government servants against legal proceeding in respect of acts done by them in the course of suppressing the Moplah movement have expired with the Ordinances and we believe an Indemnity Bill is likely to be introduced. The Government in framing such a bill, while barring legal proceedings against their officers, should make suitable provision for the payment of compensation to those who have suffered, not by way of favour, but as a matter of right.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

April 17th. Judgment was delivered by the Judicial Committee in —*Satish Chandra Chatterji v Kumar Satish Kanta Roy* (Bengal). The appeal was dismissed.

The Board presided over by LORD HALDANE was occupied in the hearing of *Heng Moh d Co. v Lim Saw Yean* (Lower Burma).

The suit was brought by the Appellant to enforce a mortgage by deposit of title deeds. The trial Judge passed the decree prayed for but this was reversed by the Chief Court who were unable to accept the Plaintiff's evidence of the alleged equitable mortgage. At the close of the argument their Lordships dismissed the appeal.

Messrs A. M. Dunne, K. C. and G. S. Sanders for the Appellant.

Messrs L. DeGruyther, K. C. and Kenworthy Brown for the Respondent.

The other Board presided over by LORD BUCKMASTER heard arguments in *Subbairya Bandaram v Mahamad Mustapha Maracayar* (Madras).

Certain charitable endowments were attached and sold as personal property in execution of a decree for money due from the settlor. The Defendant purchased the property and was in possession from 1898 until the suit was filed in July 1913. The suit was brought by the Appellant as trustee to establish the right of the charity. The main question for deter-

mination was whether the Defendant who had knowledge of the endowment had yet obtained a title by prescription. Judgment was reserved.

Mr. Kenworthy Brown for the Appellant.
Messrs. L. DeGruyther, K. C. and B. Dubé for the Respondent.

April 30th *Srimati Jinnataimessa Khatun v. Jogesh Chandra Roy Chowdhury* (Bengal).
Messrs. A. M. Dunne, K. C. and E. B. Raites appeared for the Appellant *ex parte* in this appeal which was dismissed with costs.

The only question argued was that an award had been obtained by the Respondent by material misrepresentation and concealment of facts.

April 30th Before LORD BUCKMASTER, LORD SUMNER, LORD SALVESEN SIR JOHN EDGE and MR. AMIER ALI was heard *Mirza Mahomed v. The Official Assignee*, an appeal from Lower Burma.

The suit was brought for a declaration that the provisions in the Will of one Yacoob Ali forming a "*wakf*" were invalid and claiming partition and possession of the major portion of the estate.

The main point argued in the appeal was as to whether the 3rd of his estate which the testator ordered to be set aside for the *wakf* was to be calculated as at the date of the testator's death or as at the time of distribution.

Messrs. N. Michlem, K. C. and Warwick Draper for Appellants, administrators *de bonis non*, of Yacoob Ali's estate.

Messrs. A. M. Dunne, K. C. and Geoffrey Laurence for the Respondent, the Official Assignee.

The Board decided that the charity was entitled to share in the enhanced value of the property on distribution.

May 1st and 3rd In *Satya Naram Singh v. Raja Satya Niranjan Chakravarti* (Patna). The main question is as to the power of the Raja of Handwa, who was a *ghatwal*, to alienate his estate so as to bind succeeding *ghatwals*. The existence of a *ghatwali* tenure is challenged by the claimant to the property (Respondent) who obtained a mortgage from the Handwa Raja.

Sr. George Lowndes, K. C. and Mr. K. B. Ryles for the Appellant.

Messrs. L. DeGruyther, K. C. and B. Dubé for the Respondent.

The Board is composed of LORDS BUCKMASTER and SUMNER, SIR JOHN EDGE, MR. AMIER ALI and LORD SALVESEN.

This appeal is still part heard.

G. D. M.

3-5-23

Correspondence.

LAWYERS AND LITERATURE

TO

THE EDITOR, CALCUTTA WEEKLY NOTES

SIR,

The Calcutta Police Court Bar is not of a very big size but it has been the nursery of so many literary celebrities that I need not make an apology in giving an account of them and my sole object in doing so in the pages of the Calcutta Weekly Notes through your courtesy is to furnish your readers with some idea of the intellectual side of the learned profession which is not dead to its environment. It is rather a curious accident that all the members of this particular Bar who have evinced a literary taste should have found in the Bengali language the vehicle of their thought. It would also surprise many to hear that the literary productions of the legal luminaries of the Calcutta Police Court have for the most part been of a satirical type. Men and manners have been criticised by these writers in essays, stories and poems suggestive of the criminal tendency in man's nature. The better side of human nature has not altogether escaped the eye of some of them and I shall begin my list with this latter type of authors. First and foremost of them are Mr. Keshub Chandra Gupta and Mr. Sourindra Mohun Mukherji who have already made their mark in the literary world of Bengal. Mr. Gupta has been editing *Archana* for nearly twenty years and many of his charming stories have been separately published and have passed through several editions. Mr. Mukherji has also been piloting *Blurati* for many years and his excellent novels numbering about a score are widely read. Mr. Shub Chandra Ghosh is a poet of no mean order but he is unknown to fame. Mr. Jatindra Mohun Ghosh retired from the field of literature long ago after publishing a metrical translation of Shakespear's *King Lear*. Mr. Lalit Mohun Dey has written several reli-

gious dramas. I pass over the green lawyers some of whom are coming to the front as story-writers, essayists and critics to the century figure of the coterie Mr. Privalal Das who is the historian, critic, humourist, essayist and researcher of the little world of the Calcutta Police Court. His productions during the last ten years are lying unbedded in the back volumes of a number of Bengali monthly magazines for want of an enterprising publisher. He has exhaustively criticised Rabindra Nath Tagore's poems and analytically discussed many of the ancient *Baishnab* and *Sakta* poems worthy of notice. He has shown real research ability in a lengthy composition entitled '*Bhanda-batta*' the well-known character in Mukundam's *Chandi* and in his 'References to India in the Poetical Literature of England' from Shakespear to Moore. The last in point of time but not the least is Kari Bahadur Tarak Nath Sadhu whose admirable book '*Bhola-athar Bhul*' on the mistake of Bholanath dedicated to Sri Ashutosh Mookerjee, Kt., contains innumerable pictures of society with the realistic touches. The author has poured into this volume the result of his experience at the Bar extending over a quarter of a century. Before I close the list I must mention the name of Dawes Swinhoe, Esq., Bar-at-Law, the retiring Chief Presidency Magistrate of Calcutta whose humorous poems in the Calcutta Review are delightful sketches of his own Court. I hope more interesting notices of the literary efforts of the members of the different Bars in and out of Calcutta from other hands will follow to add to the many charming items of legal news in the Calcutta Weekly Notes.

Yours truly,

HARI DAS GHOSE, B.L.
Pleader.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION Before
WALMLEY and SUBHAWARDY, JJ. S.
A 1913 OF 1921 DURGA MOHAN
GUHA RAY, Plaintiff-Appellant v.
DEBENDRA MOHAN SUR and *ors.*
Defendants-Respondents. The 18th April
1923.

Kabuliyat executed before Bengal Tenancy

Act- Stipulation for interest at 75 per cent. plus damages, whether penal and enforceable - Indian Contract Act, sec 74.

The appeal arose out of a rent suit. Defendants' predecessors executed a *kabuliyat* in favour of Plaintiff's predecessor in 1871. The *kabuliyat* was a *mahurari kabuliyat*. The stipulation was that rent should be paid in monthly *kists* and that in case of default interest on arrears was to be paid at 75 per cent per annum and if arrears were to be realised by suit, then interest on arrears, damages, costs of the suit, Mukteas & fees, etc., were to be paid. The Plaintiff claimed interest, only at the stipulated rate. Both the lower Courts disallowed the claim on the ground that the stipulation was hard and unconscionable.

Babu Brajabala Shastri with *Babu Santosh Kumar Basu* appeared for the Appellant.

Babu Radhabenode Paul for *Babu Isharanjan Chatterji* represented the Respondents.

Appellants relied on the case reported in 23 C. W. N. 130 (P. C.). On behalf of the Respondents it was argued that the Privy Council decision did not alter the law applicable in the present case. The stipulation was penal within the meaning of sec. 74 of the Indian Contract Act. Relied on 36 Mad. 229 (F. B.), 3 All. 260 (F. B.), 21 C. W. N. 108, 112, 740, 23 C. W. N. 291, 62 I. C. 717.

Held—The Privy Council decision reported in 23 C. W. N. 130 applied in this case. The appeal was allowed decreeing 75 per cent interest at the stipulated rate.

S. C. C. Appeal allowed with costs.

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The Judge

REPORTS (See Index.)

Knighthood of Mr. Justice Walmsley.

The Birth-day honours were announced too late last week to enable us to notice the Knighthood conferred on Mr. Justice Walmsley in our last issue. On Monday last when his Lordship took his seat on the Bench congratulations were offered to his Lordship on behalf of the Vakil Bar to which his Lordship replied as follows:

Babu Shib Chander Palit and gentlemen:—It is exceedingly kind of you to congratulate me on the honour that has been conferred on me. I can assure you that, on occasion like this I feel very diffident. I recognize how much I owe to my distinguished predecessors on the Bench and to the help and courtesy that I have always received from the Bar. I hope your expressions to-day will confirm the good relations that have always existed between us and that you will excuse the many mistakes that I have made as well as the outbreaks of impatience and lapses into indolence. Once more I wish to thank you very much.

The Irish Deportees' Indemnity Bill.

The chief point of interest in the Indemnity Bill, which, as previously amended, has passed the third reading in both the Houses of Parliament, is the establishment of a tribunal to consider applications for compensation by the persons who had been illegally deported to Ireland by the Home Secretary. Under the provision of the bill in question, the applicants would be entitled to make claims on the basis of actions in the Courts for false imprisonment. It is stated that subsequent prosecution will not debar a deportee from applying for compensation, though conviction of the deportee will naturally be taken into consideration by the tribunal. The provision marks an important departure from traditional practice, as the only professed object of Indemnity Bills so far

has been to secure immunity from legal responsibility to the officials concerned. According to English constitutional law the Crown is not legally responsible for the wrong of its agents, and whenever in the past, officials had been led to commit wrongful acts in giving effect to the policy of the Government for the time being, the Government naturally did not look beyond its immediate object of securing immunity to the officials with whose acts it was identified. The question of compensating the subject who might have been wronged by these unlawful acts had no doubt been a variable point forward in debate. But in view of the established doctrine of irresponsibility of the Crown, the claim of the injured subject for compensation had so long been viewed as borne of a moral rather than of a legal nature, and the practice had been to leave the matter of awarding compensation to the injured individual to the discretion of the executive. The clause in question in the present Bill, however, gives this claim a legal footing.

It may be of interest to note that in this matter of compensating the subject from the State funds for injuries resulting from official acts, the provision of the Bill in question had been long since anticipated by the practice of the French Administrative Courts. No doubt in respect of the State, as in respect of some external State, in case of war or of decrees creating a State by force (which are "acts of government" proper) no claim can be made by the injured subject either against the State or against the official concerned. But beyond this, the validity of acts of Government officials, for which the State accepts responsibility ("acts of administration," as they are called), can be put in question by the Administrative Courts and compensation may be awarded to the injured individual out of the revenues of the State.

It may be a question whether the deportations, had the matter arisen before a French Administrative Court, would have been held to be an "act of government" or "an act of administration." It is not improbable that the decision would have been that they belonged to the latter category, in which case the provision in the Indemnity Bill establishing a tribunal for entertaining and awarding compensation to the deportees would mean a close approximation of the English view of the "rule of law" to the French, which on several points is quite in advance of the English, contrary to the general impression that the "rule of law" is best realised in it if it be not the exclusive property of English constitutional law (*vide* Ghose's Comparative Administrative Law, pp 321-323, pp 641-648).

THE JUDGE

MODERN COMMENTARY ON ANCIENT TEXT

A portion of the past is living present, just as a part of the present is merely dead past. One such living past is the ideal of a Judge drawn in the old texts of Hindu law. And at the present moment when, if the truth is not to be hidden, the majority of our Judges from the highest Court to the lowest are not exactly giving satisfaction by the quality of their justice and the method of its administration, it may not be unprofitable or uninteresting to glance through these ancient texts. They lay down the essential qualifications and the bounden duties of a Judge. The texts were composed in ancient times but their truth is for all times. And we shall do them neither violence nor injustice in interpreting them according to our modern conditions.

In theory the King was the president of his Court of justice. In practice the duty of presiding was delegated to an officer called the Pradvivaka (प्राङ् विवाकः), so named, according to some texts, as it was his duty to ask questions of the parties to the litigation and to decide after consideration in consultation with the other members of the Court (1). These other members, who were three, five, or seven in number were called Savasadah (सभासदः) or

Savyah (सव्याः) as they were members of the Sava (सभा), that is the Court or the Board of justice. The texts we are going to quote and comment upon deal with the qualifications and duties of the Pradvivaka and the Savyah—the Chief Justice and his companion Justices.

What ought to be the requisite attainments for a judgeship? Let us hear Prajapati Yajnavalkya and Brihaspati.

A King duly coronated or a Brahmin endowed with varied learning (बहुश्रुतः) should take the seat of justice and preside over the trials of cases (2).

(Prajapati)

A King unable to attend to the administration of justice for pressure of other work should appoint with companion Judges a Brahmin learned in all branches of law (सर्वधर्मेभित्) (3).

(Yajnavalkya)

This is of the Chief Justice, what about the puisne Judges?

A King should make Judges persons who are endowed with learning and with knowledge of the Vedas (श्रुताध्ययनसम्पन्नाः) and who are learned in the law (धर्मेज्ञाः) (4).

(Yajnavalkya)

Seven, five or three Judges are to be appointed persons with knowledge of the ways of men and the world, versed in the Vedas and learned in the law (लोकवेदज्ञधर्मेज्ञाः) (5).

(Brihaspati)

The slight old world garb of the texts need not hide in any way that two attainments are there demanded of a Judge, viz, varied general culture and wide knowledge of the laws. For "Bahusrutah" (बहुश्रुताः) and "Sruta-

(2) राजाभिवर्कर्मयुक्तो ब्राह्मणो वा बहुश्रुतः ।

धर्मेत्यनगतः पश्येद्यद्वहाराश्रयः ॥ (प्रजापतिः)

(3) अपश्यता कार्यद्वाराद्यद्वहाराश्रयेण तु ।

सभेः सह नियेक्तयो ब्राह्मणः सर्वधर्मेभित् ॥

(याज्ञवल्क्यः)

(4) श्रुताध्ययनसम्पन्ना धर्मेज्ञा सत्यवादिनः ।

राजा सभासदः कार्यो रिपो भिन्ने च ये समाः ॥

(याज्ञवल्क्यः)

(5) लोकवेदज्ञधर्मेज्ञाः अथ पञ्च त्रयोऽपि वा ।

(बृहस्पतिः)

(1) विवादादुगतं पृष्ट्वा सवभ्यस्तन्युत्तरतः ।

विचारयति येनासौ प्राङ् विवाकस्ततः स्मृतः ॥

(आसः)

hyayanasampannah" (धृताध्ययनसम्पन्नाः) are merely ancient Hindu equivalents of the modern "men of culture," and it is needless to add that "Dharma" in "Sarvadharmabhid" (सर्वधर्मेभित्) and "Dharmagmah" (धर्मेभ्यः) is aw.

Is not the provision that the Judge should not only be learned in the law but should also be a man of wide culture, a counsel of wisdom?

A mere lawyer is apt to be a petty lawyer. For want of intellectual curiosity is often rather than not born of intellectual incapacity. And who knows any science or art relating to man at all deeply who does not know it in its setting in the fabric of human civilisation? "He knows not law who does not know the reason thereof." But the deeper reasons of law always lie beyond the sphere of law. Old Katvana is right when he declared "He does not know how to decide cases who has mastered only one science" (6).

The second necessary attainment of a Judge is knowledge of law. Is it a meaningless pedantry to emphasise that a Judge who would administer law should know the law? The ignorant may think so, but not those who know. For apart from the idea of some Judges that commonsense is the one key for all locks, is not judgeship made the reward of war service, and of other "services" having nothing to do with law and its administration? Are not amiable social qualities, intrepid darning or brilliant talking, sometimes passports on the way to the Bench? And we know the story of the English Lord Chancellor who explained his method of selection of Judges by narrating that when in search of a Judge he looked round the Bar for a "gentleman," and if he happened to know a little law it was all the more fortunate.

But doubtless these intellectual attainments alone do not make a satisfactory Judge. Some qualities of character and temperament are essential. What are they? Here is a gem from Katvana,—

दानं कुलो न मध्यस्थमुद्वेगकरं स्थिरम् ।

परस्परभौकं धर्मेष्टसुदृढं क्रोधवञ्चितम् ॥

Master over senses and passions, of good family, absolutely impartial, not causing anxiety

(6) एकं शास्त्रमधीयानो न विद्वत् कार्यनिर्वाह्यम् ।

(कात्यायनः)

and uneasiness, not hasty, having fear of the next world, virtuous, active, and devoid of anger.

Let us pause a little and take stock of this enumeration.

A Judge who cannot subdue his passions and restrain their manifestations is clearly not fit for his duties. We may not omit noting that in Sanskrit "senses" include both the afferent and the motor sense organs, and therefore one of the latter class requiring restraint in a Judge in the tongue.

Good family is no doubt merely an expectation. But we may be sure that a writer on Dharmasastra would not rate a family "good" because of its wealth or because of the anxiety of its members to keep always in the good graces of the executive authorities. For in the polity of the Dharmasastras wealth was not the determinant of the social hierarchy, and the freedom of law-making and of administration of justice from executive control was one of the avowed doctrines of the authors of the Dharmasastras as opposed to the doctrine of monarchical absolutism taught by the writers of the Arthashastra School.

That a Judge should be impartial may seem a trite observation for a partial Judge is not a Judge but a partizan. And yet how difficult it is to attain to absolute impartiality and how many forces there are, patent and latent, to lead away the Judge from its path—country, colour, race, class, popularity and patriotism, likes and dislikes, smile or frown of those who can give or withhold!

What fugant or lawyer would not applaud the insight of Katvana in requiring of a Judge that in his Court persons appearing may feel themselves at their ease. For the "strength" of many "strong" Judges is euphemism for just this uneasiness causing characteristic of their temperament. No one is confident of being allowed to place his case to his satisfaction before the Court, and every body is apprehensive of some rudeness or insult or outburst of temper. The ancient Hindu jurists do not seem to appreciate much even the awe-inspiring character of the Court and the Judge. And Manu goes to the length of specifically prescribing that a Judge should be soberly dressed

(विनोतवेषाभरणः), which his commentator Medha-

tithi explains in effect by saying that men are naturally in awe of Courts and Judges and this should not be heightened by the Judge wear-

ing a gorgeous attire for instance, a red dress Mann would have looked askance at gowned and wigged Judges, and to a cultured Medhatithi the red gown of our Sessions Judge would have appeared barbarous. If this is about correct dress it is needless to dilate upon correct demeanour. 'With humility and not with haughtiness should the Judge in Court proceed to decide cases,' says Prappati (7). As for Judges in temper Kautilya roundly prescribes—'if a Judge threatens, browbeats, sends out, or unjustly silences any one of the disputants in his Court, he shall be punished with fine, and if he dares or abuses any one of them the fine shall be doubled (8).'

A Judge should not be 'hasty,' which of course involves that he is not to make up his mind before hearing out the parties and listen to arguments only as an infliction of legalised evil. 'Hastiness in a Judge comes of pride of superior knowledge or superior intellect, and the more it is unfounded the greater is the hastiness.' Of Kautilya's text the dictum of Sir George Jessel is a commentary that a judge requisite of a Judge is infinite capacity of listening.

Is 'fear of the next world' superstitious in a Judge? At any rate it is nobler to be 'governed by that fear than by the fear of the Court of Appeal which makes some Judges listen with attention for two hours if there is appeal and grow impatient after twenty minutes when there is no appeal.

'Virtuous' as opposed to 'vicious'—no comment.

Commentators explain that 'active' means not lethargic. Obviously Judges who cannot help feeling sleepy during argument, who would not take the trouble of stating the reasons for their decisions, and who to avoid the trouble of discussing and deciding matters of law would somehow discover a finding of fact would not satisfy this test.

A Judge is to be 'devoid of anger,' and one, presumably angry of both varieties, the lightning and thunder variety as well as the internal

combustion variety. For the latter is at least not less dangerous than the former.

Our commentary on Kautilya's text has been long. But we expect our readers will agree that it deserved a longer one.

Now a man cultured and learned in law, endowed with the qualities of Kautilya's enumeration is not likely to be a seeker after judgeship.

It is the duty of the King to see "says the Mitakshara "by the greetings of wealth and honour that such Judges sit in his Court (9)'. Apparently a candidate for judgeship is not worthy of a judgeship.

I shall conclude by quoting two more texts. 'To Judges prone to be subservient to the executive power of the State, Kautilya gives the warning "Judges who follow the King in his path of injustice are partakers in that injustice. They are to prevent the sovereign from walking the path of lawlessness (10)'. 'It is better not to enter the Court' say Mann "than not to speak the truth. On who keeps silent or speaks what is not true covers himself with guilt (11)". Let the eye-I-agree Judges learn this lesson by heart a junior with a domineering senior, a senior under the grip of a masterful junior.

Was this ideal, some one may ask, attained by the Judges or a majority of them ever during the brightest periods of Hindu history. Possibly not. But that does not take away from the ideal which is to be kept in front and not shunned as something dreadful.

Conclude

* ARI CHANDRA GUPTA

(9) सर्वभूताः समासदः समायां × यथा सीदन्ति ×
तथा दानमान सत्कारैः राजा कर्तव्याः ।

(मिताक्षरा)

(10) कान्थायेनापि तं यान् यशुयानि समासदः ।

नपि तद्भागिनस्तथाबोधनीयः स ते वृषः ॥

(कात्यायनः)

(11) समा वा न प्रवेशया वक्तव्यं वा समञ्जसम् ।

अत्रवन्निवृत्तं वापि नरो भवति किञ्चित् ॥

(मनुः)

(7) प्रकीर्तनगतं पश्येत्प्रवक्ष्यामि शुभम् ।

(प्रजापतिः)

(8) धर्मस्थानाद्वदमानं पुरुषं तजयति भर्तृयत्नं

यत्तद्वदति अभियस्यते वा पूर्वदत्ते वा ह्यदत्ता
कुर्वीत । वाक्पातुष्ये दिगुजम् ॥

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Habeas corpus in the O'Brien case.

The following editorial notes from the columns of our English legal contemporary of the *Law Journal* will show how the English Judges are jealous of safeguarding the liberty of the subject against its encroachment by the executive. Whether the applicant for *habeas corpus* is an undesirable person was considered absolutely irrelevant by Lord Justice Scrutton and His Lordships' colleagues. The only question for the consideration of the Judges was whether the executive had any right of arresting, deporting or detaining applicant without legal process or trial before a Court of law. The Judges declared his arrest and detention as illegal and ordered him to be set at liberty. That the executive arrested him afterwards on a charge of conspiracy and sedition and are proceeding against him in the due course of law is quite a different question. The principle of *habeas corpus* is that the executive is not at liberty to detain any person in custody without placing him on his trial before a Court of law.

The judgment of the Court of Appeal (Bankes, Scrutton and Atkin, L.J.J.) in *Ex parte O'Brien* (May 9) is of far-reaching effect, and it indicates at once the jealous care with which the Courts guard the liberty of the subject and the return of the judges to their former healthy attitude of viewing with marked disavour all encroachments by the Executive. Incidentally their Lordships particularly Scrutton L.J., commented with considerable asperity on the practice of legislation by Orders in Council. All who love the best English traditions of individual freedom and the rule of law must rejoice in the decision, which was, in effect, that the Home Secretary acting under powers contained in certain obscurely worded Orders in Council, could not deport an inhabitant of England to a colonial prison under a warrant which amounted to a *lettre de cachet*. For the Secretary of State's order specified no time limit for the detention, and Mr. O'Brien might have been held in Mountjoy Prison, Dublin, for the rest of his life if the clamp put forward by the Home Secretary had been a good one. Undoubtedly, under the Regulations in question, the Executive had power to deport to Ireland a person who was suspected of acting, or of being about to act, in a manner prejudicial to the restoration of order in Ireland. But this was before Southern Ireland became the Irish Free State,

with the status of a Colonial Government and when the British Government had power in Ireland. Since, however, the Irish Free State has now an Executive of its own, it would require the very clearest legislation, in the most unambiguous terms, to make an English Court decide that the power to deport still exists. For it would mean that he who sent the prisoner away would have no power to bring him back and no power to order his release. Such a state of affairs would be hardly tolerable in time of war, and it is, as Scrutton L.J. observed, nothing to the purpose that the prisoner is an inoffensive person. The Habeas Corpus Act 1679 imposes stringent penalties on anyone who sends a prisoner beyond the sea and on anyone who aids or advises the deportation. These penalties include damages to the aggrieved person, disqualification for holding public office, and the penalties of *perpetuities*—which penalties include the forfeiture of land and goods, and a disability to sue in the courts—and to curb the Executive completely, the royal prerogative of pardon is taken away. Perhaps after this, England may have a rest from wartime Regulations. Meanwhile a Bill of Indemnity for the Ministers of the Crown has been presented by the Chancellor of the Exchequer in the House of Commons, and the more responsible members of the House may be relied upon to support it.

Appeal against Habeas corpus order.

The writ of *habeas corpus* was designed by the English Judges to curtail the arbitrary powers of the King and his Chancellor. Once a writ of *habeas corpus* was issued by any of His Majesty's Judges, no other Court was entitled to question it. Any one, no matter how high, disobeying the order was subject to severe penalty which was provided for by Parliamentary statutes. To make the orders of the Court inviolate in this respect, in accordance with the true spirit of English law, the law has denied jurisdiction by way of revision or appeal with regard to the orders passed by any of His Majesty's Judges in this respect. The following extract from our contemporary will surely be read with much interest in India.

An appeal by the Home Secretary from the judgment of Court of Appeal was rejected last Monday by the House of Lords on the ground of want of jurisdiction to hear it. *Habeas corpus* has this peculiarity, that while the prisoner can go on applying from one judge to another, and one court to another to help him out of prison, so soon as a judge or court has ordered his release the matter is at an end. The prisoner cannot be re-arrested on the same charge (*Habeas Corpus Act 1679*). The judges of the final court of appeal have established the principle that where the imprisonment has once been declared wrongful the prisoner is *de jure* free. The effect is that, even though he may still be in custody *de facto*, there is no appeal against the order declaring his imprisonment unlawful. There has, it is true, been an appeal in a *habeas corpus* case which was heard and determined by the House of Lords. This was *Barnardo v.*

Ford (1892, A. C. 326¹), where a question arose as to the custody of an infant, and the question to be decided was not whether a person was unlawfully detained, but which of two persons was entitled to the infant's custody. It will be agreed that this was a matter in an entirely different category from the point raised in *O'Brien's Case*. The one was a dispute between two persons neither of whom detained or sought to detain the corpus by way of imprisonment, while the other was a question of the liberty of the subject, of which, said Lord Penzance, 'the law of this country has been very jealous of any infringement'. It would obviously be a serious stumbling-block in the way of *habeas corpus* procedure if the Executive could delay the release of a prisoner what time they carried an appeal up to the House of Lords. The House on this occasion expedited the hearing of the application, but if the appeal had merely been set down in the list to come on in the ordinary way, it would not have reached for at least six months, and what in the meantime, was to become of Mr. O'Brien? Was he to be released, and arrested if the appeal succeeded? Or was he to be retained in custody, only to find his imprisonment illegally lengthened by six months if the appeal failed? It was this very pillar-post business that brought about the Habeas Corpus Act, 1874. The fact that O'Brien has since his discharge by the Court of Appeal been arrested on a charge of seditious conspiracy does not affect this point. Rather does it indicate the course which the authorities ought originally to have adopted.

Privy Council on Law's Delays in India.

Lord Buckmaster, presiding over the Judicial Committee of the Privy Council at the hearing of Indian appeals, early in May, repeated their Lordships' condemnation of the dilatory manner in which Indian appeals are prosecuted before the Board. In the matter of *Udham Singh and Gurdip Singh*, a petition for leave to appeal, his Lordship observed—

Their Lordships think that, in the interests of justice, it is impossible to refuse the application, but none the less they grant it with great reluctance, regretting that they find—notwithstanding their efforts—that it has been impossible to accelerate the procedure of business in the Courts of India, so as to prevent instances of delays, which bring discredit on the administration of justice. On June 11, 1920, leave to appeal, was granted by their Lordships to the present Appellant in another case, which raised a point closely allied with the point sought to be raised on their appeal. Although nearly three years have elapsed since that date, the record of that case is not yet before the Board, and it is impossible to say with certainty when that record will be here. In the present case the judgment sought to be appealed from was passed on November 23, 1921, and more than 12 months ago the High Court made an order refusing leave to appeal. The difficulty which their Lordships feel is due to this—assuming the first appeal succeeds, there would be injustice done in the second suit, unless the petitioner were at liberty to bring that case also before the Board. Their Lordships find themselves quite unable to deal as they would desire with the record of delay

to which they have drawn attention. It is said to be due to some causes in India for which the petitioners are not responsible. Their Lordships have not the means at their disposal to enable them to sift and examine into that allegation, but they think that, on the whole, they are bound to grant the application, and the two appeals will necessarily be consolidated. But they desire to say that the respondent will be at liberty to come before the Board at any time and ask that this leave to appeal may be rescinded if it is found that the appeals are not prosecuted with due and proper diligence by the petitioner.

It is difficult to judge from his Lordship's observations whether the responsibility for the delay rested with the High Court from which the appeal has been preferred or with the Petitioners. The suggestion of the Petitioners presumably was that it was due to the dilatory procedure of the Indian High Court concerned. We would invite the attention by the Honourable the Chief Justice of the High Court concerned to look into the matter so that all the High Courts in India do not get a bad name for the shortcomings of one or of the Appellant in this particular case. We must admit, however, that red-tapism and circumlocution which are so common in the Government offices and have in recent times invaded the High Courts' office management are to a great extent responsible for these delays. Government secretariat methods can never with profit be emulated in Courts of law, where delay so often results in grave injustice. We would like to see the High Court departments reorganised on the principles of business houses where orders are executed quickly. Against red-tapism in every shape and form, the High Courts should resolutely and consistently set their faces, as well for their own credit as for the convenience of the general public.

The Chief Presidency Magistrate—an error rectified.

We regret, we made a mistake in stating that Mr. Roxburgh, the present Chief Presidency Magistrate of Calcutta, belonged to the Assam Civil Service. We were misled by a remark to that effect in the public press. We are indebted to a correspondent for pointing out our error and telling us that Mr. Roxburgh has never been in Assam. We find from the last two Quarterly Civil Lists for Bengal that he was on leave for 9 months from May 1922, and before coming over to Calcutta he was the

Additional District and Sessions Judge at Chittagong and prior to that at Commilla. We never doubted that his 8 years' training as an Assistant and a Joint Magistrate and as an Additional Judge thereafter would enable him to discharge his duties of the Presidency Magistrate quite satisfactorily. But as the Chief Presidency Magistrate has before this, as a rule, been recruited from the Calcutta Bar, we saw no reason why the Government of Bengal should have departed from the practice and requisitioned a member of the Indian Civil Service to preside over the Presidency Police Court in Calcutta. We are having very good accounts of Mr. Roxburgh's work and we repeat that our protest was not against him personally but against the principle of the appointment.

A MODEL ADDRESS FOR LAWYERS' CONFERENCES

It was a quite unprepossessing little paper-pocket which the post-peon left on our table a week or so ago. The title which caught our eyes, as we dutifully opened it prior to consigning it to the usual resting place of most such commodities— *Welcome address at the Lawyers' Conference held in Chittoor on 14th April 1923*—was not arresting, but something in the initial vocative "Gentlemen and Brothers-in-law" pulled us up, and we are glad it did. For, as we read it through, we found ourselves treated to something which is so entirely different from the usual and the conventional in its line that we found it impossible to resist the temptation of sharing our experience with our readers.

It seems Chittoor has been invaded by the very embodiment of a spirit of resurrection in the person of its present Subordinate Judge, Mr. Shastriar. Literature, religion, the histrionic art, no phase of the social life of the place has escaped its revivifying touch. Says Mr. C. Doraiswami Aiyangar, in his address: "Our consolation was that a gentleman with such varied activities was not likely to approach us in the invincible precincts of our bar. Alas! We have not been safe even here. To him the bar appeared to be a dead mechanism working or being worked automatically without the least *Chaitanyam* in it. He has therefore infused some life into this organism as well. He has become the *Chith* of Chittoor on all sides."

After this compliment paid to the Bench in the person of Mr. Shastriar, it was natural

for the speaker to turn his attention with all possible modesty to the Bar. "We have," he says, "invited the members of the Bench also to this conference so that they may find how we are grims in our collected strength, though individually we are torn to pieces by them in our daily life."

This is most fitting occasion when we must proclaim our gloom as "this is not a world to hide virtues in." Let us frankly tell them that superlatives are insufficient to describe the most exalted nature of our profession. We claim that we are performing the highest order of social service. We claim that but for our existence many a poor ignorant and helpless party dragged or driven to Court should have been deceived by their mighty opponents. We claim that but for the elucidation of law and facts that we present to our judges there should invariably be miscarriage of justice. We are besides the distributors of riches among the people—Lakshmi, the goddess of wealth, is fickle-minded and we form a chief wing of her army.

Has the relation of the vakil to his client ever been more acutely depicted than in the following passage?

"The highest and purest form of love is said to be that which subsists between a man and his wife. Hence sages describe their devotion to God with the analogy of *Navaki Navakibhavam*. But sages forget that there is a still higher form of love and that is the one which subsists between a vakil and his client. A boy in Chittoor may marry a girl in Srirangam. The two have not met each other till the date of marriage. The *Mangalyam* is tied and at that moment creeps in an identity of feelings, sympathies and anxieties. Any ailment of one thereafter causes the intensest anxiety in the other. Similarly a vakil and a client unknown to each other become wedded by the acceptance of *vakalatnama*. The love, the enthusiasm, and the anxiety of the vakil towards his client are indescribable. Multiply these by the increasing number of clients which every vakil may get wedded to and then you know of what stupendous force a vakil's brain is made up of. Excepting the few restless hours of uncertain sleep all other hours of a day are his clients' properties,—here I adopt the Court grammar,—'Lawyer' virtue is not merely self sacrifice but self effacement. 'I am the Zemindar and I am the ryot, I am the husband and I am the wife, I am the widow and I am the reversioner' such are his daily transformations or *Parakayapraveshams*."

Who again (though he may not be of the profession) can help being affected on reading the following?

"Of all the avocations in the world ours is the most peculiar and unique. In all other walks of life a man gets his best and most arduous work to do when he commands the best health and vigour of life. But it is just the reverse in our walk. When we possess youth, health and vigour we get no work to be done. As we grow older and older our work becomes more and more. When we are able to digest rice we do not get the silver to procure it. As a vakil begins to digest silver and gold he becomes unable to digest rice and resorts to congee."

What he has to say on the relations between opposing pleaders, can be fittingly offered to our readers only in his own words, for it is impossible to improve upon it.

Spectators are often under the impression that when we

light in Court we are going to be deadly enemies all through our life. They forget that the stage Rama and the stage Ravana get back into the green room as the best friends. A friend of mine wittily remarked that vakils are like the two arms of scissors. They appear to cut each other but what is really cut is that which is caught between the two. When it rests they are bosom friends not separated even by the thickness of a hair.

Two more quotations from the address, and we feel confident that our readers will recognise with us in Mr. C. Doraiswami Aiyangar, High Court vakil, Chittoor, a humourist of rare power, whom the routine drudgery of his avocation has altogether failed to suppress.

Vakils from Madras appear in Munsif Courts, and when they come they put curious questions to the members of the local Bar. "Is your Judge a confirming Judge or a reversing Judge, a converting Judge or a quitting Judge? Is your Munsif a Plaintiff's Munsif or a Defendant's Munsif? Ready Munsif or adjournment Munsif? Trial Munsif or compromise Munsif? We find ourselves unable to answer such questions. Sometimes we are able to say—"He continues in appeals and reports in original trials. If the case is ready he adjourns and if ready he takes it up. Our Munsif does not like quarrels among citizens. A man may file a suit for a thousand rupees against another without any ground, and he can be sure of Rs. 200 by compromise. But to encourage him we add a rule that when Vakils from Madras appear every rule may have an exception. The question is universal but these answers are only in very rare cases.

My next concern is to the life of this conference. His came to stay with us or not. I know of a child which is taken golden wife. Once a District Munsif came with a train but—At once a train court was laid and the Vakils young and old had each a Sadkol but in his hand. Next a theosophist Munsif came and all were theosophists. Then came one who was fond of weekly poems and the members enjoyed sumptuous dinners. Next came one with Bhagavad Aishayam and all accompanied him with similar books every morning to a muni for Kalkshepam. It is unfortunate that the founder of this conference is suddenly called away to the distant south. But I am sure his child at least will stay with us and not run away with its father. When next the father returns which I trust and pray on your behalf also will be in the near future, the child must be able to present the appearance of a Mother's food baby, advertise and greet him.

LONDON NOTES.

(FROM OUR CORRESPONDENT)

The following is the record of business at the Judicial Committee of the Privy Council during the past week.

May 3rd 4th, 7th, 8th. The hearing was continued and concluded of *Kumar Satya Narayan Singh v. Raja Satya Niranjan Chakravarti* (Patna) which was mentioned in my notes of a previous week.

On May 3rd Mr. Parikh obtained special leave to appeal in the case of *Udhan Singh v. Gurdip Singh* (Lahore).

May 4th and 7th. *Alcock v. Ashdown* &

Co. Ltd. v. Chief Revenue Authority of Bombay (Bombay). The Appellants are a joint stock Company in Bombay who during the years 1912 to 1918 had made large profits a proportion of which was retained in the business as cash and securities. Such cash and securities they treated as capital employed in the business within the meaning of the proviso to sec. 6 (1) of the Excess Profits Duty Act 1919. The Collector of Taxes refused to treat the whole of the cash and securities as capital employed in the business. The Company appealed to the Respondent who confirmed the decision of the Collector, and refused to refer the matter to the High Court.

The Appellants thereupon applied to the High Court for a rule under sec. 45 of the Specific Relief Act calling upon the Respondent to state a case for the High Court. The rule was discharged and the Company now appealed to His Majesty in Council.

Judgment was reserved.

Messrs. Clauson, K. C., Lister, K. C. and Cyril King for the Appellants.

Messrs. Dunne, K. C. and Reginald Hills for the Respondents.

May 8th. *Maharaja of Kolhapur v. Shri Jagannath Vasuday Bhandit Maharaj* (Bombay). A Board composed of the LORD CHANCELLOR, LORD HALDANE, LORD PIERCE and LORD PARMEER have commenced the hearing of this appeal which raises a question whether one or other of two adopted sons is entitled to succeed to the Kolhapur Estate. The answer to this question depends on whether the summary settlement of 1863 was applicable to the property. There is a further question, whether the "son who was first adopted can succeed to the villages in Kolhapur seeing that the Maharaja has refused his sanction to the adoption.

Mr. DeGruyther, K. C., Sir G. Lowndes, K. C. and Messrs. E. B. Raikes and T. Ramsay for the Appellant.

Messrs. Upjohn, K. C., Fawcett Ludmore, K. C. and J. M. Parikh for the Respondent.

G. D. M.

9-5-23.

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Capital's monstrous perversion of facts.

We regret to find that "Ditcher" in the columns of the *Capital* charges us with "monstrous perversion of history" with regard to the origin of the first bomb outrage in Bengal. We are not in the habit of drawing upon our imagination or indulge in platitudes in our columns. We always take care to be sure of our facts before we rush into print. It is known to all well-informed members of the legal profession and public men that it was Mr. Kingsford's sentence of whipping on Susil Sen and others that gave rise to the first anarchical outrage in Bengal. Mr. Kingsford was transferred to Mozaffarpore from the Calcutta Police Court. A band of young men organised themselves for taking revenge on him and pursued him to Mozaffarpore and threw a bomb at a phaeton which they believed to be Mr. Kingsford's but which was Mrs. Kennedy's and killed Mrs. and Miss Kennedy. This caused such a revulsion of feeling even amongst the maturer men of the revolutionary party in Bengal, that some of their leaders, after their arrest at Muraripukur, made confessions deploring and condemning the outrage. As a rule, we never enter into any controversy with our brother journalists, but when one of them so far forgets himself as to charge us with perversion of history we cannot help correcting him. We hope such a veteran journalist as "Ditcher" will in future take care to be sure of his facts before he proceeds lightly to charge a contemporary with perversion of facts.

Then, we certainly did not expect to find in the columns of the *Capital* anything like the following regarding the farcical attack on Holwell Monument by some crack-brained up-country youths and a few other fanatical compatriots of theirs:

"It is the bazar gup that the silly iconoclasm is influenced by some intriguers who do not want a Civilian as Chief Magistrate. This may not be true, but its existence shows how necessary it is to be wary."

We are surprised that any respectable journalist should give currency to such silly bazar gossip assuming that it had any existence anywhere outside of Ditcher's own office.

Executive Legislation.

Lord Justice Bankes in pronouncing judgment in the O'Brien case made some pertinent observations on the subject of legislation by Orders in Council. Said His Lordship:

"It may not be out of place to observe upon the practice of legislation by means of Orders in Council, that though the practice may be a convenience to Parliament, it is one which leads to inconveniences and difficulties and dangers, of which the present case is only one example. Laws are made the drafting of which has never been subjected to criticism in Parliament, and, when made, they are not included in the Statute Book. The result is that in the first place, they are difficult to find, and when found, more often than not, they are difficult of interpretation, whether it be by a lawyer who is called upon to interpret them, or by a Minister of the Crown whose duty it is to administer them."

With these words, says our English contemporary, the *Law Journal*, every lawyer, whether on constitutional or professional grounds, will most cordially agree. During the war this departmental legislation by Order in Council was not without some justification. . . . But legislation by Orders in Council which had assumed disturbing proportions even before the war grew amazingly during the five years the great struggle lasted. So rapid in legislation has been the growth of this delegated legislation that it threatens to destroy the basic principle of Parliamentary Government.

As in Great Britain, so in India we have a large number of statutes which authorise the

executive to make rules. Some system of legislation by the executive is inevitable, first because the business of legislative bodies has become far too heavy for its abolition; and, secondly, because, there are matters of detail in every Government department which cannot be successfully dealt with by legislative bodies. How then can the interest of the community and the liberty of the individual subject be safe-guarded against the legislative activities of the executive? Certain safe-guards have been suggested.—

“First—Delegation of legislative power only to trustworthy authorities which command the national confidence. Secondly, definite delimitation of the boundaries within which the delegated power is to be exercised. Thirdly, consultation with interests affected before exercise of the delegated power. Fourthly, publicity. Fifthly, machinery for revoking or amending legislation made under delegated powers.”

These safe-guards, if enforced and observed, will to some extent minimise the evils of executive legislation. But the ultimate and most effective safe-guard is a judiciary which does not take heed of the Baconian exhortation. Let Judges also remember that Solomon's throne was supported by lions on both sides let them be lions, but yet lions under the throne, being circumspect they do not check or oppose any point of sovereignty. The Bureaucracy to-day, by far the most powerful organisation in the State, threatens to reduce the legislature to a subordinate position, and whatever its professions may be, is at heart despotic. But this much must be said to its credit that it quietly submits to the decision of the judiciary. That is a point of difference between ancient tyrannies and modern bureaucracies.

I

GIFTS FOR RELIGIOUS AND CHARITABLE PURPOSES

BY BIMOLA CHARAN LAW, M.A., B.L., VAKIL,
HIGH COURT, CALCUTTA.

Gifts for religious and charitable purposes lie outside the pale of the perpetuity rule. In order to constitute a valid endowment, said Mr. Justice Sale, in *Profulla Chandra v. Jogen-dra* (1 C. I. J. 614), “all that is necessary to set apart specific property for specific purposes, and where these purposes are clearly religious and charitable in their nature, the trust is not invalid merely because it transgresses against the rule which forbids the creation of a perpetuity.” Charity as understood in English

law derives its signification from the Statute of Queen Elizabeth (43 Eliz. ch. 2). As Grant M. R. observed in *Morice v. Bishop* (9 Ves. 399), “the word charity in its widest sense, denotes all the good affections men ought to bear towards each other and in its most restricted and common sense, relief of the poor. In neither of these senses, is it employed in this Court. Here its signification is derived chiefly from the Statute of Elizabeth. Those purposes are charitable which the Statute enumerates or which by analogies are within its spirit or intendment.” The forms of charity generally accepted by English lawyers are these—(1) relief of poverty, (2) advancement of education, (3) advancement of religion and (4) other purposes beneficial to the community. The last named objects are not the less charitable because they benefit the rich and the poor alike (see 1891 A. C. 531). “In India,” say West and Bühler, “religious and charitable purposes are coupled in the Hindu authorities, and the example given is a reservoir of water, or the like constructed for the public good. Under this heading rest houses for travellers, groves of trees, roads, conduits, schools, as well as the distribution of alms have invariably been held to come (West and Bühler, 3rd Ed., pp. 206-7). Besides these, an idol in India is symbolical of religious uses and gift to an idol is a gift for religious and charitable purposes.

The distinction between Indian and English law in this respect was thus pointed out in a Madras case “The personal law of the Hindus is intimately connected with their religion, and therefore allows gifts in perpetuity to religious objects to a much greater extent than in English law. Their absolute gift of land or money in perpetuity to an idol and for the religious purposes have been recognised in many decisions, 15 Mad. 446. Mr. Justice Muttuswami Aiyer is quoted as observing, that “neither the English law which forbids bequests for superstitious uses, nor the rule which prohibits the creation of perpetuities is applicable to gifts to idol in this country.”

Examples of charitable gifts which have been declared valid in several cases are:—(1) a gift for *sadavarta* (14 B. I.), (2) for *choulttries* (4 M. H. C. R. 44), (3) for hospital (6 C. W. N. 521), (4) for university (37 Cal. 166), (5) for lecturership (9 B. I. R. 377), (6) for an educational institution and for meeting the expenses of a *Shivalaya* (8 Ind. Cases 695), (7) for feeding indigent Brahmins (34 Cal. 5); (8) for

performing the testator's funeral ceremonies and for Sradh (6 B. 24, 4 C. 443), (9) for celebration of Pujas and worship of idol (25 Cal. 112), (10) for an annachatra (6 Bom. L. R. 56), (11) for feeding and paying Brahmins on Sivaratri day (12 C. W. N. 1083). Gifts in favour of charitable or religious objects are generally upheld by the Court, provided the object has been indicated with sufficient certainty.

Object must be certain

A gift for "Dharma" merely, without specifying anything else, is regarded as invalid. The question was raised in *Ganga Bhan v. Tayor Mulla* (1 Bom. H. C. R. 71), *Carsundus v. Vaidravandas* (14 B. 483), *Ranchordas v. Parbati Bai* (3 C. W. N. 621) and other cases. In the last mentioned case a Hindu died leaving a Will whereby he gave certain properties to his widows, and bequeathed the residue of his estate to certain trustees in trust for some "good dharam." Their Lordships of the Judicial Committee remarked: "In Wilson's Dictionary, 'Dharma' is defined to be law, virtue, legal or moral duty. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control."

In *Morabji v. Nenban* (17 B. 351), a testator by his Will directed "that if his daughters died without issue, the property of his daughters should be used by his executor for Dharam and also for Sadavart." It was held that the bequest was valid to the extent of one half in favour of Sadavart, but the other half in favour of Dharam was too vague to be enforced. A different view from the above was taken in the case of *Parthasarathi v. Thiravengada* (30 Mad. 340), by Mr. Justice Subramanyya Ayer. The learned Judge held that the word "Dharma" when used in connection with gift of property has a perfectly well-settled meaning in Hindu law, and connotes *istha* and *putta* donations. The word is a compendious term referring to certain classes of pious gifts and is not a mere vague and uncertain expression. The Chief Justice Arnold who sat with him took a different view, and as that view agreed with that of the trial Judge, the judgment of the Chief Justice prevailed.

In *Bai Bapi v. Jamunadas* (22 B. 774), a testator left a legacy to his wife in the following terms: "Rs. 2,000 to be credited in our shop in the name of my wife Bapi Bai. Interest at 6 per cent. to be paid to her every

year. If in her life-time she demands the money to use in a good work (Sarakam) it should be given to her, but if she has not taken it in her life-time it should go to certain other persons. The Court held that this was not a bequest for good works but a bequest to the testator's wife with a direction to use it in good works (and as that direction was void for uncertainty, she was entitled to the money as if the Will had contained no such direction).

In one case—*Trikumdas v. Haridas* (31 B. 583), there was a gift for popular usefulness or for purposes of charity. The Court held nevertheless that the gift was void for uncertainty.

In *Gokul Nath v. Issicar Lochan* (14 Cal. 222), the testator directed that his executors should get a Siva's temple erected at a reasonable cost in a suitable place within the compound of the buck-built Bantakhana; there was a further direction that the surplus of his income after meeting all the expenses specified in the Will, was to be used "in just and proper act for the testator's benefit. It was held that the first direction was not void for uncertainty but the second was void.

A gift of property to trustees to be used for such charitable and good works as they might think proper, was also held to be void in *Jamna Bai v. Dharsey* (1 Bom. L. R. 893).

A different view was, however, taken in *Parbati v. Rambaram* (8 C. W. N. 653). In this case the direction given by a testator in his Will was as follows:—"As to the rest and residue of the estate, I give and devise the same to my executors in trust to spend and give away the whole thereof in charity, in such manner and to such religious and charitable purposes as he may in his discretion think proper. The Court upheld the direction as valid. A gift of property to an idol, who is named but is not in existence is valid (*Bhupati Smrititirtha*, 37 Cal. 128), but when the dedication is not to any particular deity which is to be installed subsequently but "to the 'Thakurji' in his Thakurvara without mentioning the particular Thakurji to whom the property was dedicated it is void for uncertainty (see 33 All. 793).

Another essential element in a charitable or religious endowment is that the endowment must be a *bond fide* and not a colourable one to effect a perpetuity in his family. The dedication must be an absolute dedication and the donor must not retain any beneficial interest in it. As Mr. Mayne says, "The endowment is"

not complete where the founder applies his own property to the creation of a Pagoda, or any other religious or charitable foundation keeping the property itself and the control of it absolutely in his own hands. The community may be greatly benefited by this arrangement so long as it lasts, but its continuance is entirely at his own pleasure. It is like a private chapel in a gentleman's park and the fact that the public have been permitted to resort to it, will not prevent its being closed or pulled down, provided that there has been no dedication of it to the public. It will pass equally unencumbered to his heirs or to his assignees in insolvency. He may diminish the funds so appropriated at his pleasure or absolutely cease to apply them to the purpose at all. In short the character of the property will remain unchanged and its application will be at his own discretion." Mr. Rankishna in his treatise on Hindu law cites in this connection a case reported in 11 Indian Cases 625 (*Akhil v. Rebati*). In this case a Hindu testator by his Will dedicated all his properties to a deity and stated that therein his heirs should have no right of ownership, but in the next clause of the Will he directed that 1/4th of the profit should be devoted to the worship of the deity, 1/4 to the repair of the house of the deity and the remaining moiety, his heir should get from the manager for the purpose of rendering help in the *sheba* of the idol. Another clause provided that an heir who goes away will not thereby lose his share in the profits. It was held that there was a valid dedication with regard to one-half of the property only. A good example of illusory endowment is furnished by the case of *Suppalal v. The Collector of Tanjore* (12 M 387). There a member of a joint Hindu family executed a trust deed by which it was provided that neither her nor his heirs should encumber or alienate the property, but that in case of necessity, his heirs might maintain themselves out of the income while administering the trust of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of a personal decree obtained against the settlor. In a suit by the heir against the execution purchaser, it was held that the suit must be dismissed. Express words are, however, not necessary to constitute dedication. When the donor reserves no interest in the property, the mere

fact that some of the heirs were allowed to live in the house which was dedicated, would not make the dedication invalid (see *Binode v. Sitaram*, 25 C 112)

(To be continued.)

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and NEWBOULD, JJ. F A No. 201 of 1921. UPENDRA NATH BAITALIK, Appellant v. HARI NARAYAN BONDOPADHYA and ors., Respondents. The 17th April 1923

Civil Procedure Code (Act V of 1908), sec 35—Appeal against decree refusing full costs if lies

The Appellant instituted a suit on a mortgage bond for Rs. 1,500 which amounted to Rs. 5,566-13-9 including interest. The Defendant denied all liability. The first Court decreed the claim in full but allowed only half costs remarking that "as the claim has increased for the provision of compound interest which is legal no doubt but when it has increased the claim much I allow half costs out of the sum decreed." The Plaintiff appealed against this portion of decree disallowing half costs. A preliminary objection was taken that no appeal lay as the matter was one under the discretion of the trial Court.

Held—That a question of principle was involved in the case. The discretion meant judicial discretion. When the claim was fully decreed and there was nothing against the Appellant on record he would be entitled to full costs as a matter of right.

Babu Radha Benode Pal for *Babu Ashiranjun Chatterji* for the Appellant.

Babu Sisir Kumar Ghosal for the Respondent

S C C. Appeal allowed with costs.

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Traffic in Women and Children.

The Bill to give effect to certain articles of the International Convention for the suppression of the Traffic in Women and Children had a very chequered career in the Legislative Assembly. It raises questions which are of very grave importance to the Indian public and public morals generally. Vice in this world cannot be stamped out by legislation. But legislation can go a great way in providing safeguards and protection against helpless women and children being led into a career of vice. The International Convention after decades of deliberation in 1910 arrived at the conclusion that the best means of affording such protection would be to punish the procurer. The principles of the International Convention in this respect were adopted by the Second Assembly of the League of Nations in 1921. The Articles of Convention will appear from the following extract from the statement of Objects and Reasons of the Bill.

Article 1—"Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries."

Article 2—"Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished notwithstanding that the various acts constituting the offence may have been committed in different countries."

Article 3—"The Contracting Parties whose legislation may not at present be sufficient to deal with the offences contemplated by the two preceding articles engage to take or to propose to their respective Legislatures the necessary steps to punish these offences according to their gravity."

The principles in this International Convention were endorsed in the International Convention regarding the Traffic in Women and Children which was adopted by the Second Assembly of the League of Nations. In Article 1 of this Convention it is provided that the High Contracting Parties in the event of their not being already parties to the International Convention of the 4th May 1910 shall transmit with the least possible delay their ratifications of, or adhesions to, that instrument in the manner laid down therein. Further, the term *under age* which did mean under 20 completed years of age according to paragraph B of the Final Protocol of the Convention of 1910 is now interpreted as meaning

under "1 completed years of age by virtue of the provisions of Article 5 of the International Convention, adopted by the Second Assembly of the League of Nations."

In view of the Resolutions adopted by the Council of State on the 31st January 1922 and by the Legislative Assembly on the 7th February 1922, the International Convention adopted by the Second Assembly of the League of Nations was signed at Geneva on behalf of the Government of India by His Majesty's Minister at Berne on the 28th March 1922 with the following reservation:

"India reserves the right of its discretion to substitute the age of 18 years or any greater age that may be subsequently decided upon for the age limits prescribed in paragraph B of the Final Protocol of the Convention of May 4th, 1910, and in Article 5 of the present Convention."

Further, on the 26th March 1922, India's accession, subject to a similar reservation, to the White Slave Traffic Convention of 1910 was notified to the French Government by His Majesty's Ambassador at Paris.

It should be noted that the International Convention held under the auspices of the League of Nations changed the name of White Slave Traffic to *Traffic in Women and Children* and included within its scope India which is a signatory to the League.

On the 7th of February 1922 a Resolution was moved by Sir William Vincent in the Legislative Assembly to the effect that the Government of India do accept the International Convention subject to the reservation that the Assembly may in its discretion substitute the words "sixteen completed years" for "21 completed years." Sir William Vincent recognised in the course of the debate that "there is a considerable volume of opinion in the Assembly" in favour of 21 years. In view of such fact he gave an assurance to the Assembly that "when the legislation comes before the Assembly, it will be quite open to any member, if the Government of India have not accepted 21 as the proper age, to propose that 21 should be fixed as the age-limit." On such understanding the Resolution was accepted by the Assembly.

Those who are familiar with the Indian Penal Code know that the sections relating to kidnapping and abduction, secs. 360, 362 and 366 cover to a certain extent Art. 2 of the International Convention. That is, when persons are taken away by force or deceitful means for immoral purposes, the procurer may be punished with imprisonment up to ten years. But it is to be noticed that Art. 1 of the Inter-

national Convention go further than the provisions in the Indian Penal Code. It says that when a person up to the age of 21 is procured for the gratification of the sensual passions of other persons by persuasion, inducement or otherwise, the procurer should be punished even if the person procured is a consenting party. Under the Indian Penal Code no offence is committed by the procurer if a girl over 16 is a consenting party. The object of Art. 1 of the Convention is to put an effective check on poor, needy, respectable but helpless women of even maturer age being led into a career of vice, by punishing the procurer. The Indian Penal Code in sec. 361 already provides for "kidnapping of minors from lawful guardianship" and in secs. 372, 373 for obtaining or disposing of "minors for purposes of prostitution." But it is to be noticed that the Indian Penal Code fixes the age of minors for such offences at 16 for females, whereas the International Convention with the consensus of all the civilized nations, fixes the age at 21. (For fuller information refer to Mr. J. Chaudhuri's exposition of the law in the Official Proceedings of the Assembly, 7th of February 1922)

The Government of India, in introducing legislation for giving effect to the International Convention departed from the recommendations of the International Convention in two very important respects. First, it did not explicitly provide that the procurer should be punished irrespective of the consent of the person procured and further fixed the limit of age of girls in India at 16. The result of it is that if an orphan or a widow or such other helpless girl happened to be above 16 and was led into a career of vice or prostitution by inducement or otherwise by a procurer, with her consent that would not constitute any offence and the procurer could not be punished in such cases. When a Bill of this character was placed before the Assembly for consideration on the 26th of February last, Mr. Joshi, of the Servant of India Society, moved an amendment that 18 (the ordinary age of majority in India) be substituted for 16. It was supported by Mr. J. Chaudhuri and was opposed by Government but the amendment was carried by the Assembly. The Home Member (Sir Malcolm Hailey) has since then adopted the unusual course of recirculating the Bill after the Bill was passed by the Assembly and the Council of State.

We shall at present say nothing about the constitutionality or otherwise of the course adopted by the Government of India. We shall only mention the fact that a Bill, even when passed by the Indian Legislature, does not become law, until it is assented to by the Governor-General. This is an extraordinary power like certification that is meant to be exercised by the Viceroy on extraordinary occasions. How the acceptance by the Legislature of the spirit, though not the letter, of the International Convention, in India is such an occasion, is more than we can comprehend. The arbitrary conduct of the Indian Executive in this connection has not attracted much attention because of the Viceroy's certification of the salt tax, which immediately preceded, has thrown it into the shade.

Quite apart from the arbitrary method by which the decision of the Legislature has of late been sought to be set aside by the Executive, we are sure that public opinion all over India will be unanimous that it is not only minor girls of 16 and below, but widows, orphans and other helpless women of this country should be protected against the nefarious trade of procurers up to the age of 18 (which is the statutory age of majority). We are disposed to think that the Indian public would be in favour of extending protection to Indian women up to the age of 21, the age which has been fixed by International Convention for European women. Why the Government of India went out of its way to frame a Bill which provides protection to European women against procurers up to the age of 21 and to Indian women up to the age of 16 only, we have always failed to comprehend. It is still more surprising that when the Assembly by way of compromise suggested that the age of Indian women for protection against procurers and traffickers in women should be raised to 18, that even was not acceptable to the Executive in India.

Now that the Bill is being circulated for opinion, we are sure that the whole of India with one voice would maintain that the age of protection of Indian women should be the same as that for their European sisters, namely, 21. We would advise the members of the Bengal Council not to waste their steam over the Bengal Bill which speaks of deportation of procurers and otherwise proposes to confer arbitrary powers on the police. They would do better if they turned their attention

to the Traffic in Women and Children Bill which has already been passed by the Indian Legislature and is now awaiting the assent of the Viceroy and which is intended to strike at the very root of the evil. Let the Bengal Council and the Provincial Councils pass resolutions that they approve of the Indian Legislature's decision to raise the age limit of protection of Indian women against procurers up to 18 or to 21 as fixed by International Convention for European women and that would answer their purpose much better than the Bill before the Bengal Council. The Bill passed by the Assembly provides punishment for procurers like all other kidnappers and abductors up to 10 years' rigorous imprisonment. Those who are anxious to obtain fuller information on the subject are referred to the Debates on this question in the Reports of the Legislative Assembly of the 7th February 1922, 26th February 1923, 9th March 1923 and 21st March 1923. Since the European nations after 20 years' deliberation have decided that the proper remedy for coping with the social evil is to punish the procurer, we ought to follow the same course and bring pressure of public opinion on the Government of India to agree to the International Convention and put it into operation by legislation for the protection of European and Indian women alike.

Bills before the Bengal Council.

A number of Bills will come up for consideration at the approaching sessions of the Bengal Council. There is the Aerial Ropeways Bill of which the object is to authorise, facilitate and regulate the construction of aerial ropeways in the province. We have nothing to say as regards the provisions of this useful measure which appears to have been carefully considered by the Select Committee. But before it is passed into law, we should like to draw the attention of the members of the Council to the question of cost. The Bill provides for the appointment of an Advisory Board consisting of the Chief Engineer of the province as Chairman and two expert advisers as well as of a number of inspectors to supervise the construction and maintenance of the ropeways. We believe that the fees realised from the promoters of the ropeways will not be sufficient to meet the remuneration of the Government staff and that the provincial revenues will have to be drawn upon to balance the deficit. At a time when many a pressing improvement has been shelved on the ground

of "no funds available", we doubt the wisdom of passing a bill which will increase the burden on the depleted resources of the provincial exchequer.

The Calcutta Suppression of Immoral Traffic Bill which has been before the public since last February has attracted some amount of adverse criticism even from those whose support might have been expected. The reason is that, although the object of the bill is a very laudable one, the provisions sought to be enacted to stamp out the social evil in question are of a drastic and impracticable character. Cl. 6 of the Bill authorises a police officer not below the rank of an Inspector to enter a brothel and remove any one who happens to be there for an immoral purpose. But where are the girls to stay after they have been removed by the Police pending proceedings in the Juvenile Court and where are they ultimately to go after they have been separated from those with whom they have been living? As there are not many rescue homes in Calcutta it will be worse than useless to pass into law a measure like the present, until a sufficiently large number of homes are established by Government, the Calcutta Corporation and philanthropic societies or individuals. It will increase Police work, harass and oppress people, innocent or otherwise, but it will not do any good to those whom it is meant to benefit. To eradicate the social evil in question, legislation should make a serious attempt to strike at the procurer's trade by the infliction of really deterrent punishment as we have already pointed out.

GIFTS FOR RELIGIOUS AND CHARITABLE PURPOSES

By BIMOLA CHARAN LAH, M.A., B.L., VAKIL,
HIGH COURT, CALCUTTA

(Continued from p. cxxxii.)

II

CONDITIONAL GIFTS.

A conditional gift is a perfectly valid thing in Hindu law. Even Manu laid down that "should money be given for a pious purpose by one man to another who asks for it, the gift shall be void if the money is afterwards not used in the manner stated" (Chs. VIII, V, p. 212). A donor can attach any condition to the gift, provided it is something which is not repugnant to the nature of the interest created, and is not immoral, and does not contravene any provisions of Hindu law. An example of conditional gift is furnished by

the case of *Manganma v. Kittu* (12 Mad. 393) There a *karar* executed to the father of Sitaram, a minor grandson of the executant, provided that the property should be delivered to Sitaram on his attaining majority, and then proceeded as follows:—

"If the said Sitaram shall have descendants, neither your male descendants nor any one else shall have any interest in any of the property, if the said Sitaram happens to be without descendants then your male offspring shall enjoy the property equally. Sitaram attained his majority but died without issue. His elder brother sued for possession of the property under the above clause." *Held*—That since the Plaintiff was a person capable of taking, subject to the life interest at the time when the gift was made, he was entitled to succeed.

This case therefore sanctions a condition of defeasance attached to a gift or a provision of gift over. The law on this point was laid down in the case of *Surjomony v. Deenobandhu* (9 M. L. A. 123). There the Will of a testator after devising all his real and personal estate among his five sons provided that if any one of his five sons would die, without leaving any son, son's son born of his sons, then in that event neither his widow, nor his daughter should get anything, but the property would go to the other sons. L. J. Knight Bruce held:— "there is nothing against the general principle of Hindu law in allowing a testator to give property, whether by way of remainder or by way of executory devise, upon an event which is to happen, if at all, immediately on the life of a being."

In the case of *Bhuban Mohini v. Harish Chandra* (4 Cal. 23), there was no provision for gift over. There the donor gave an absolute estate to his sister Kasiswari followed by this proviso "that no other heir of hers shall be entitled." This was held to mean that if Kasiswari died having no issue then living, her interest was to cease. In effect the construction was that if Kasiswari left issue the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent, he or his heirs would lawfully re-enter. Both these cases were reviewed in *Kristoromoni v. Narendra Krishna Bahadur* (16 Cal. 383), where their Lordships of the Judicial Committee laid down the law thus:—

"It is competent for a Hindu testator to provide for the defeasance of a prior absolute

estate contingently upon the happening of a future event, but an important part of the rules relating thereto is that (1) the event must be one that will happen, if at all, at latest immediately upon the close of a life in being (*Surjomony v. Deenobandhu*); secondly, a defeasance by way of gift over must be in favour of some person in existence at the time of the gift (as decided in *Tagore case*), the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid."

Another important case on this point is the case of *Lakshmi Narayan v. Vallmal* (31 Mad. 250). Here by a *razinama* filed in Court, it was agreed that certain properties should be held and enjoyed in common by R and P and in the event of R becoming issueless, the said properties should belong to P. R having subsequently sold the property to L, died issueless. The Court held that assuming R had an absolute estate in a moiety of the properties there was a clear gift over of this moiety on his dying without issue to the 4th Defendant. Hence the alienation by R in favour of L was invalid beyond the life-time of R. As stated above a Hindu can attach any condition to a gift provided such condition is not immoral or opposed to the principles of Hindu law. Mr. Ramkrishna in his *Treatise on Hindu Law* cites 3 typical cases of conditional gift which although they are cases of gift by Will, are good authorities on the general law of conditional grant (Ramkrishna's Hindu Law, Vol. II, p. 277). In a case reported in 32 I. A. 105 (*Sri Birbhadrar v. Chiranjibi*) a testator bequeathed to his brother out of pure generosity and grace by providing him with a maintenance of rupees 500 per annum from his self-acquired property. There was a suit for partition by the brother against the testator. The bequest could take effect only on the fulfilment of certain conditions, viz., (1) the brother's suit against the testator should terminate in the testator's favour, (2) the brother should make a humble request for maintenance, (3) the brother should not be entitled to any legal claim on the deceased's estate either for maintenance or for partition. The brother claimed maintenance as of right and the amount claimed was twelve times the amount covered by the bequest. It was held that the bequest could not take effect unless the conditions were fulfilled. An application by the brother's representative or son was not a fulfilment of the condition.

(To be continued.)

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Repressive Laws and the Central Legislature.

We notice that on the Legislative Assembly re-assembling at Simla last week Lala Girdhari Lal Agarwala moved that the Criminal Law Amendment Act, Part II, be repealed. The Home Member opposed. It is no wonder that the majority of members who appear to have acquiesced in the Executive Government resigning from their undertaking that they would not impose any taxation without the concurrence of the Assembly, have complacently also allowed them to resign from another assurance. As human memory is short, we shall refer to the chapter and verse of this assurance. It may be in the recollection of the public that on the Reformed Legislature meeting for the first time at Delhi in 1921, a Committee was appointed pursuant to a resolution moved by the Hon'ble Mr Srinivasa Sastri for considering to what extent the Repressive Laws may be repealed and amended. This Committee after prolonged sittings, in the course of which representative witnesses from different parts of India were examined, submitted an unanimous report on the 2nd of September 1921. In this report they recommended the repeal of all the 13 Acts and Regulations that received their consideration with certain reservations with regard to Reg. III of 1818 and the corresponding Madras and Bombay Regulations, the Seditious Meetings Act and the Criminal Law Amendment Act. With regard to the Seditious Meetings Act and the Criminal Law

Amendment Act, in view of the then state of the non-co-operation movement, the Committee observed.—“In view of the grave situation which exists and which may become more serious, we also think that it would be prudent to defer actual repeal of these Acts until such time as the situation improves. Many of us hope that it may be possible for the Government to undertake the necessary legislation during the Delhi Session. We can make no definite recommendation on this point at present. We trust that the repeal of these Acts may be expedited by a healthy change in the political situation.”

During the next Delhi Session, on the 13th February 1922, a motion was made by Sir William Vincent for the repeal of some of the Regulations and Acts in accordance with the recommendations of the Repressive Laws Committee, and Criminal Law Amendment Act, Part I, which related to trials by Special Tribunals was then repealed, but not Part II, which related to the suppression of associations declared to be unlawful by Executive order. Owing to the activities of the non-co-operation movement during the Prince of Wales's visit, the Criminal Law Amendment Act, Part II was made use of for the arrest and imprisonment of the Congress and Khelafat volunteers and the repeal of Part II was deferred. Although there was considerable doubt about the legality of the course then adopted by the Government, the Legislature did not object to its repeal being deferred. The non-co-operators have done a distinct disservice to the rights and liberties of the people of this country by not questioning the legality of the Executive proclamations under the Act.

The Home Member, no doubt, quoted ancient history regarding pre-war revolutionary movement in Bengal. That there have been no political outrages in Bengal since the termination of the War, he did not mention. He

therefore relied on the C. I. D. report that the movement is dormant and not dead. But when there has been no outward sign of its recondescence for the last five years, we are more disposed to rely on facts as we find them than on C. I. D. reports. Then again the Home Member referred to the bogey of Civil Disobedience, although a Special Committee of the Congress after touring the whole of India, declared it to be impracticable and impossible. So in our view the Home Member utterly failed to make out a case for its continuance in disregard of the recommendations of the Committee quoted above. Now that the Indian Executive commencing from the Secretary of State to the District Magistrate are of opinion that non-co-operation movement is moribund and peace and order prevail in India, we do not see any reason why the Indian Legislature did not insist on the Government of India giving effect to the recommendations of the Repressive Laws Committee. In a vast country like India, temporary and local ebullitions are bound to arise at times. For coping with them, the Code of Criminal Procedure confers ample powers on the Executive. The conspiracy sections of the Indian Penal Code which were subsequently enacted are sufficient for the suppression of unlawful associations and the retention of Part II, Criminal Law Amendment Act is both unnecessary and arbitrary. To retain discretionary and absolute powers in the Executive as conferred by Part II of the Criminal Law Amendment Act is demoralising to the Executive and uniting to people at large.

We also invite attention to the recommendations of the Repressive Laws Committee in respect of Regulation III of 1818 and the corresponding Madras and Bombay Regulations. It will be noticed that it was decided to limit the operation of these Regulations to their original purpose, namely, of putting restraint on the movement of undesirable foreigners and dealing with the inflammable materials on the N. W. Frontier. It was understood that these Regulations will not be put into operation against British subjects, that is, they will not be arrested and detained or deported without a trial. Under the Removal of Racial Distinctions Act, sec. 491 of the Code of Criminal Procedure has been extended to all European and Indian British subjects alike. When the Act comes into operation, people outside

Presidency towns will be entitled to apply for a writ of *Habeas Corpus* on the Appellate Side of any High Court in India. But the provision in sec. 491 which provides that no writ of *Habeas Corpus* is to run where a person has been detained under Reg. III of 1818 has not been repealed. This is a question which affects the rights and liberties of a British and Indian subject alike. During the last Delhi Session of the Assembly, the then member for the Rajshahy and Chittagong Division (who was also a member of the Repressive Laws Committee) drew the attention of the Home Member to this question and he promised to supply the information later on. (See p. 2631, Assembly Proceedings, 1923). Will some member of the Legislative Assembly obtain the necessary information and urge on the Government of India to give effect to the recommendations of the Repressive Laws Committee in this respect? The Government of India have recently put Reg. III into operation in two cases, one in Peshawar and another in Calcutta. The O'Brien case has affirmed the time-honoured principle of English law that no one should be detained in custody by order of the Executive without a trial. How long are we to be denied the fundamental rights of a British subject?

The recommendations of the Repressive Laws Committee were in the following terms.—

"We recognise the force of these arguments, in particular the difficulty of securing evidence or of preventing the intimidation of witnesses. We also appreciate the fact that the use of the ordinary law may in some cases advertise the very evil which the trial is designed to punish. But we consider that in the modern conditions of India that risk must be run. It is undesirable that any Statutes should remain in force which are regarded with deep and genuine disapproval by a majority of the Members of the Legislatures. The harm created by the retention of arbitrary powers of imprisonment by the Executive may, as history has shown, be greater even than the evil which such powers are directed to remedy. The retention of these Acts could in any case only be defended if it was proved that they were in present circumstances essential to the maintenance of law and order. As it has not been found necessary to resort in the past to these measures save in cases of grave emergency, we advocate their immediate repeal. In the event of a recurrence of any such emergency we think that the Government must rely on the Legislature to arm them with the weapons necessary to cope with the situation."

"Our recommendation in regard to Regulation III of 1818 and the analogous Regulations in the Bombay and Madras Presidencies is subject, however, to the following reservations. It has been pointed out to us that, for the protection of the frontiers of India and the fulfilment of the responsibilities of the Government of India in relation to Indian States, there must be some enactment to arm the Executive with powers to restrict the movements and acti-

vities of certain persons who, though not coming within the scope of any criminal law, have to be put under some measure of restraint. Cases in point are exiles from foreign or protected States who are liable to become the instigators or focus of intrigues against such States persons disturbing the tranquillity of such States who cannot suitably be tried in the Courts of the States concerned and may not be amenable to the jurisdiction of British Courts and persons tampering with the inflammable material on our frontiers. We are in fact satisfied of the continued necessity for providing for the original object of this Regulation, in so far as it was expressly declared to be 'the due maintenance of the alliances formed by the British Government with Foreign Powers, the preservation of tranquillity in the territories of Native Princes entitled to its protection and the security of the British Dominions from foreign hostility,' and only in so far as the inflammable frontier is concerned, from 'internal commotion.'

"We desire to make it clear that the restrictions which we contemplate in this connection are not of a penal or even irksome character. We are satisfied that they have not been so, in cases of the kind referred to above, in the past. Indeed in several instances they have been imposed as much in the interests of the persons concerned as in the interests of the State. The only desideratum is to remove such persons from places where they are potential sources of trouble. Within such limits as may be necessary to achieve this object they would ordinarily enjoy full personal liberty and a freedom from any kind of stigma such as would be associated with restrictions imposed by criminal law. We therefore recommend the amendment of Regulation III of 1818 limiting its application to the objects outlined above."

CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

The most important of the recent enactments amending the Criminal Procedure Code is the Racial Distinctions Act (XII of 1923). The Act has introduced changes of a far-reaching character as regards the rights of European British subjects. The present Article traces the Criminal jurisdiction over such persons, with reference to the powers of the Legislature and the Courts of law from early times, and indicates the various alterations introduced by the Act.

I. POWERS OF THE INDIAN LEGISLATURE OVER EUROPEAN BRITISH SUBJECTS

[Before 1833].—The Old E. I. Co. had powers under the Charters of Charles II (1) to make laws affecting British-born subjects, but such powers ceased, in 1709, on the surrender of their Charters to Queen Anne, and since then, and until 3 and 4 Will. IV c. 85 (2), the E. I. Co (then called the *New or United Co.*) and the Indian Governments had no legislative powers (except a limited one within the local limits of Presidency Towns) over such persons (3). The Governor-General in Council had, however,

(1) *Reg v. Reay* (1870) 7 B. H. C. R. 6; Charters of the E. I. Co., pp. 63, 64, 88, 89, 90, 91 &c.

(2) "C. 123" in the Report is a misprint: there is no such Statute.

(3) *Reg v. Reay*, 1871) 7 B. H. C. R. 6, 16—19, 23.

restricted powers of legislation over unlicensed British born persons (4).

Restrictions on unlicensed British-born subjects.—Such persons were forbidden by various Statutes to go to, reside in, or trade with, the East Indies without licence, and the E. I. Co. was empowered to arrest and send them to England for trial for doing so (5). The provisions of ss 104, 123 of 53 Geo III, c 155 in the matter, extended throughout the limits of the E. I. Co.'s Charter (6). The restrictions were imposed in the interests of trade and not religion (7), though the right of travel or residence in India was also deemed incompatible with the political and prudential measures necessary for the safety of the British Government in India (8). The restrictions were removed, as to certain areas, by 3 and 4 Will IV, c. 85, ss 81—83 (rep. by 53 and 54, Vic. c. 33) (9). S. 86 first enabled such persons to hold lands in such areas. See also Act IV of 1837.

[Since 1833].—Power to make laws for all persons, including European British subjects, was conferred by 3 and 4 Will. IV c 85 s. 43, and has been continued since by 24 and 25 Vic. c. 67, s 22, G. I. Act 1915, s. 65 as amended by G. I. Act 1919.

II JURISDICTION OF THE COURTS 'A' UNDER THE E. I. CO.'S CHARTERS AND THE STATUTES.

[1661—1726].—By the Charter, 13 Charles II, 3 Ap 1661, the Governor and Council were empowered to judge all persons, including British subjects, in civil or criminal causes according to the laws of the kingdom. All British subjects in the service of the E. I. Co were liable to punishment by the President and Council for offences in the East Indies (10). By the Charter, 20 Charles II, 27 March 1668, the Governor, officers, ministers, factors and agents were empowered to govern all British subjects, and to establish justice by Courts and forms of judicature as used in England, etc (11).

Until 1726 there was thus only one Court in India for the trial of European British subjects for all offences (12).

(4) See 53 Geo III, c 155, s 101.

(5) 9 and 10 Will. III c 44; 5 Geo. I c 21; 7 Geo. I c 21; 9 Geo I c 28; 24 Geo III, c 17, s 35: *King v. Gordon* (79) East's N. 228.

(6) *Ousley v. Plowden* (1257) Boul 145, 180.

(7) *King v. Symons* 1814) 2 Str. N. C. 93, 01, 1; 2.

(8) *Aler Cauffman v. Govt.* (1894) 18 B. M. 636, 653.

(9) Boul p 172 et seq; and 33 Geo. III, c. 32, ss. 129—145.

(10) Charters of E. I. Co pp 76, 77; *Reg v. Reay*, p. 9.

(11) Charters of E. I. Co pp 90, 91; 7 B. H. C. R. 6, 9.

(12) *Reg. v. Reay* (1870) 7 B. H. C. R. 6, 22, ["1720" is a misprint.]

[1726—1753].—The Charter, 13 Geo. I of 24 Sep. 1726, created the Governors or Presidents and five Councillors of Madras, Bombay and Fort William, Justices of the Peace and Courts of Quarter Sessions and of Oyer and Terminer (13). The latter Court had jurisdiction over all offences, except treason, committed by such subjects within the three towns and all the subordinate factories (14).

The Charter, 26 Geo II, 8 Jan. 1753, re-enacted substantially the criminal jurisdiction under the former Charter (5).

[1773—1774] The 13 Geo III, c. 63, known as the "*Regulating Act*," passed in 1773, was the first Statute which expressly referred to British subjects (16). S 13 constituted the Supreme Court at Fort William, a Court of Oyer and Terminer and Jail Delivery, and defined its local jurisdiction. But s 19, while repealing the Charter, 26 Geo II, as regards the Mayor's Court at Calcutta, left unaffected the jurisdiction thereunder of the Governor (now Governor-General) or President and Council as Courts of Quarter Sessions and of Oyer and Terminer and Jail Delivery, though, curiously, s 20 directed the records of the latter to be delivered to the new Supreme Court. It was only cl 36 of the Letters Patent, 26 March 1774, that abolished the Court of the Governor or President in Council in Oyer and Terminer, and transferred its jurisdiction to the Supreme Court; while cl. 21 recognized the continuance of the Court of Quarter Sessions (17).

By s. 14 the jurisdiction of the Supreme Court was made to extend to all British subjects resident, under the protection of the E. I. Co. in Bengal, Bihar and Orissa, and the Court was empowered to try complaints against them for crimes committed therein (18). Cl 19 of the Letters Patent gave the Court criminal jurisdiction over offences committed by such subjects in Bengal, Bihar and Orissa.

(To be continued.)

E. H. MONNIER.

GIFTS FOR RELIGIOUS AND CHARITABLE PURPOSES.

BY BIMOLA CHARAN LAW, M A., B.L., VAKIL,
HIGH COURT, CALCUTTA.

(Continued from p. cxxxvi.)

III

In 12 C W. N. 668 (*Surendra v. Kala*), a Hindu by his Will gave his widow a life interest in a house, provided that, on her death, their adopted son should have the house and provided he was of good behaviour and obedient to the widow. It was held that the condition, viz., that the adopted son should be of good behaviour and be obedient to the adoptive mother, and should survive her, was a condition precedent to the adopted son taking under the Will. In *Shyama v. Naba* (11 Indian Cases 634), a testator bequeathed certain property to his daughter's son N, "should he live in my dwelling-house with his sons, son's son and other heirs in succession." On failure to reside in the testator's house, there were gifts over on the same condition, 1st to the testator's grand-daughter's husband, and lastly to any of his agnatic relations or any other Brahmin who might be brought in and settled in his house by his wife. At the death of the testator, his grand-daughter was not married. After his death, his widow and N sold the testator's house. It was held that the gift to N failed by reason of his ceasing to reside in the testator's house. (See Ramkrishna's Hindu Law, Vol II, pp. 277-278).

As examples of illegal conditions, may be cited cases where the grantors attempt to create an estate unknown to Hindu law. In *Tagore v. Tagore* (9 B. L. R 377) an attempt to create an estate tail was held to be invalid and opposed to Hindu law.

In *Purnasash v. Kalidhone* (38 Cal 603) two brothers, governed by the Dayabhaga School of Hindu law, executed an agreement, by which they purported to provide for the permanent devolution of their respective estates in the direct male line including adopted sons, with the condition that in the case of failure of lineal male heirs in one branch, the properties belonging to that branch should go to the other, subject to the same rule, and only in the absence of male descendants in the direct line in either branch, were the properties to go to female heirs and their descendants? It was held that the clear intention of the instrument was to vary the rule of Hindu law, and to control the devolution of the pro-

(13) See post

(14) 7 B H C R p 19

(15) Charters of the E. I. Co. pp 430—432: 7 B. H. C R. p 19.

(16) *Reg v. Roay* (1870) 7 B H C R 6, 12

(17) See 2 Sm & Ry Appx xciv. Ss. 13 and 14 were repealed by G. I. Act, 1915, and s 19 by Act XIV of 1870.

(18) 7 B H C R p. 12: *L R v. Mutal* (1813) 41 Cal. 227; 204—206, 213, 239

perties until the indefinite failure at some remote period of the line of two brothers, and that such an attempt to alter the mode of succession was on the principle laid down in the Tagore case, illegal and void.

In *Tarakeswar Roy v. Shoshu Sekhar Roy*, 9 Cal. 952, property was given to the nephew of the testator, without any power of alienation, the testator further directed that if any of the nephews would die, the property would go to the surviving nephew, and then male descendants and not other heirs. The Court held that the testator's attempt to alter the course of inheritance was invalid, and the estate taken under the above clause was only for life.

In *Lakshmakha v. Boggaramanna*, 19 Mad. 501, the owner agreed by an instrument to hold the property so long as there is male issue in his family. On failure of such issue, he agreed to hand it over to Boggaramanna, under whom the Plaintiff claimed. The Court held that the meaning appeared to be that Boggaramanna should take on failure of male issue, at any time, however remote. It is in fact an attempt to create a new line of inheritance by excluding all heirs other than direct male descendants. The instrument was declared to be invalid. (See also *Vallabdas v. Thakur Gobind*, 14 B. 360).

There is a case reported in 32 Mad. p. 315 (*Mooriyat v. Mooriyat*), where a person governed by Marmakattavam Law executed a deed of gift in favour of his wife and three daughters under which they and their female descendants were to enjoy the properties hereditarily, males being excluded. It was held that the condition excluding males was invalid.

Conditions restraining alienation or partition of property given are also invalid.

In *Mookond Lal v. Ganesh*, 1 Cal. 101, a Hindu testator gave all his immoveable property to his sons, but postponed the enjoyment thereof by a clause, that they should not make any division for twenty years. The restriction was held to be void.

In *Ashutosh v. Durga*, 5 Cal. 438, a similar condition provided in a Will that the heirs of the testatrix should have no power of gift or sale over the property bequeathed, and that it should not be attached or sold on account of their debtor, was also declared invalid.

In *Sookhomoy Dey v. Monohari Dasi*, 11 Cal. 504, the testator attempted to create a sort of perpetuity in his family; the property was to remain intact, certain portion of the profit only being taken by his son and grandson. There

was a further clause against alienation and for the accumulation of the profits as long as the family would remain joint. All these conditions were declared invalid.

In *Rakishon v. Debendra Nath*, 15 Cal. 409, the testator, having given away the properties to his sons in certain shares, attempted by a later document to impose certain restrictions upon the powers of alienation and enjoyment. The subsequent document provided that the sons shall not be able to be personally in possession of their shares, they shall not be able to make any gift or sale or any other kind of alienation. It was held that these conditions were void.

In *Anantha Tirtha v. Nagamattur*, 4 Mad. 200, the gift was made to a Brahman, with a condition super-added by another instrument executed on the same date that he should not be able to sell, mortgage or otherwise alienate the property. As the gift was not a religious endowment, but a personal gift to a Brahman, the Court held that it was not exempted from the rule against perpetuities, and the conditions were void.

In *Rajendra v. Shamchand*, 6 Cal. 106, there was an agreement between five brothers who formed a joint Hindu family by which it was provided that none of the parties or their representatives nor any person, should be able to divide the real and personal property belonging to the family. A son of one of the brothers sold his share to a stranger. In a suit by the purchaser for partition it was held that the general scheme of the arrangement was binding upon the parties only and not upon any purchaser, and much less upon the purchaser from an heir.

This case is an authority for the view that an anti-partition agreement is binding upon the parties personally. A contrary view was however taken in *Radha Nath v. Tarrack*, 3 C. W. N. 126, where it was held that it was entirely optional with the parties either to abide by this arrangement or not. See also 7 Bqm. 738, 28 Cal. 720 and 31 All. 3.

Another question sometimes arises, namely, whether a direction for accumulation contained in a deed of gift or Will is valid according to Hindu law?

A direction to accumulate the income is not *per se* invalid in Hindu law, and there is nothing in the policy of Hindu law which is opposed to such a direction. There were directions to accumulate in the cases of *Soorjamoney v. Deenobondhu*, *Biswanath v. Bama-*

sundari (12 M. I. A. 47) and *Sonaton v. Jagat-sundari* (8 M. I. A. 66), and though the question as to whether any direction to accumulate was valid or not was not the subject-matter of decision in either of these cases, yet they impliedly held such directions to be valid.

In the case of *Kumar Ashura Krishna v. Kumar Krishna*, 2 Bl R O C p. 11, a Hindu testator by his Will attempted to create a trust for the accumulation for 99 years of the surplus income of his estate in the purchase of zemindaries, etc., from time to time, and empowered his trustees to continue such trust after the expiration of the ninety-nine years term. The Will contained no disposition of the beneficial interest in the zemindaries to be purchased. The trusts were held to be invalid, as by the direction to accumulate the testator was attempting to create a perpetuity. Similarly in *Sookhomoy Das v. Monohari* (11 Cal 604), an attempt to create a perpetuity by directing that the property should remain intact in the family, and that the income should be accumulated as long as the family would remain joint was held to be invalid.

In the case of *Amrita v. Swarnamayee* (24 Cal 589), Mr Justice Jenkins, after an elaborate examination of the authorities in point, came to the conclusion that direction for accumulation is permissible in Hindu law provided they are within reasonable limits, and in the absence of special provision the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator. This decision was reversed on other points by the Court of Appeal, but the question regarding the validity of a direction to accumulate was not challenged. In 25 Cal 662, Mr Justice Trevelyan simply remarks, "that a direction to accumulate cannot be valid unless there be a present gift to support the direction to accumulate." The question again came up for decision before Mr Justice Harrington in *Rajendra Lal v. Raj Coomari* (11 C. W. N. 68). His Lordship held that, as pointed out by Mr. Justice Jenkins in *Amrita Lal v. Swarnamayee*, there is nothing *per se* illegal in a direction to accumulate made by a Hindu, and that if such a direction is neither so unreasonable as to its conditions as to be void against public policy nor given for the purpose of carrying out an illegal object, nor its effect inconsistent with Hindu law, it should be given effect to. His Lordship gave several examples of cases, where such directions would be invalid, viz., (1)

when the effect of it would be to make a gift in favour of a donee in future with no gift *in presenti*, (2) when considering the length of time for which the monies were to be accumulated or the excessive sum to which the accumulation were to amount or for other reasons such direction might be held to be void as against public policy. It is settled law that a direction to accumulate for the benefit of a minor or for payment of debt is perfectly valid.

(Concluded)

Correspondence.

LAWYERS AND LITERATURE.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

In response to the invitation extended by Babu Haridas Ghose, B.L., Pleader, to add to the list of lawyer literateurs, I take this opportunity to mention some more lawyers of literary fame both of Calcutta and Mofussil Bars.

The Calcutta Police Court Bar can boast of at least another noted author, besides those mentioned by Mr Ghose. That is Babu Hemada Kanta Chaudhuri, M.A., B.L., who began literary life by winning prizes in the Eden Hindu Hostel Sonnets Competition under the patronage of the late Sri Gooroodas Banerji, Kt. Before leaving College Hemada Babu brought out his now famous *Purir Chithi* with a fore-word by Sir Gooroodas and highly appreciated by Dr. Tagore. Several other story-books, the latest being *Ruper Ghari*, written by Mr Chaudhuri, have kept up his reputation as a writer of juvenile literature, and the monthly *Siksha-o-Sahitya* claims him as a Joint Editor with Rai Sahib Ishan Chandra Ghosh, M.A.

Babu Saulesh Nath Bishi, M.A., B.L., Vakil, is Editor of the *Jana-Sewah*, and Babu Prafulla Kumar Bose of the Police Court Bar is author of several dramas, both Bengali and English.

At the Rajshahi Bar, Babu Bimala Charan Moitra, B.L., is following in the footsteps of the late poet Rajani Kanta Sen, B.L. and Babu Akshoy Kumar Moitra, B.L., C.I.E. Another illustrious member of that Bar, Babu Sasadhar Roy, M.A., B.L., is now at the High Court and is too well-known to require any mention here.

I hope further such names will be forth-

coming and relieve the monotony of legal reports in the pages of the Weekly Notes

Yours truly,

DAMINI KANTA CHAUDHURI, B.L.,
Pleader.

NAOGAON, RAJSHAHI,
4-7-23.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

Re. the article headed "Production of documents in Court" from the pen of Mr Surendra Nath Ray, Munsif, as published at page lviii of the current volume of your Notes, I beg to make certain observations and crave the hospitality of the columns of your esteemed Notes for publishing them

Mr Ray is of opinion that the words "first hearing" in Or XIII, r 1, C P C, must be the date on which the suit can be taken up for trial for the first time. According to him it is the date in the summons in case of suits in which summonses are issued for final disposal and in case of suits in which summonses are issued for settlement of issues, the date after the settlement of issues. Thus the same expression in the rule aforesaid would have different meanings when dealing with these different sorts of suits. The rule, however, is expressed in general terms and does not admit of such different interpretations unless we read into it something extraneous. The reason assigned for torturing the words "first hearing" in case of suits in which summonses are issued for settlement of issues, to mean a date other than the date of the first hearing is that the Court cannot with such suits dismiss them for default for non-appearance of the parties or decree them *ex parte* on the date mentioned in the summons. With every respect I beg to differ from the view. That the Court can dismiss such a suit for default for non-appearance on that very day without any meaningless adjournment to another date is clear from Or. IX, r. 3, C P C. Then Or. XV, r. 1 of the Code lays down that where at the first hearing of a suit, it appears that the parties are not at issue on any question of law or fact, the Court may at once pronounce judgment. It is a truism to say that when the Defendant does not appear to contest the suit the parties are not at issue on any question. There is thus no bar to the Court's proceeding to decide the suit *ex parte* even on the first date of hearing. I am afraid, therefore, that the

reason assigned for the differentiation is non-existent.

It may so happen that the legislature uses a plain word in a technical or restricted sense. To see whether the plain words "first hearing" are used in the rule in any other than their plain meaning we might look to the other parts of the Code to find in what sense they have been used there. The words occur in Or. X, r 1 and 2. There they certainly mean the first date of hearing. They occur also in Or. XV, r 1, and I think with the same meaning. A restricted interpretation should not be put upon plain words unless there be something in the Act itself which can justify such an interpretation reasonably and not arbitrarily. Dealing with the procedure laid down in the Code for the production of documents by the parties it appears that Or. VII, rr. 14 to 18 refer to the documents to be filed or to be entered into the list to be filed by the Plaintiff along with the plaint. After the institution of the suit summons is issued to the Defendant and as observed before there are two sorts of summonses. This distinction is provided for in Or V, r 5. Under Or. V, r 7 in both the cases the summons orders the Defendant to produce all documents in his possession or power upon which he intends to rely in support of his case. In the generality of cases thus a diligent Defendant can never complain if he be asked to produce his document on the first date of hearing. I should mention here that the legislature expects that in fixing the first date of hearing, the day shall be so fixed, as to allow the Defendant sufficient time to enable him to appear and answer on such day. *Vide* Or V, r. 6 of the Code. Thus if the "first hearing" in Or XIII, r. 1 be taken to mean the first date of hearing, it does not work any hardship on the Defendant. He is not put under any practical impossibility. The only person who can complain is the Plaintiff as it cannot always be expected that he would anticipate the defence. The legislature is not unmindful of this difficulty. While providing for filing of documents or their entry into the list to be filed along with the plaint by the Plaintiff, it provides in Or. VII, r. 18 (2) that that rule would not apply to documents produced in answer to any case set up by the Defendant. The Plaintiff, however, still becomes ordinarily liable to produce all such documents on the first date of hearing under Or. XIII, r. 1. But r. 2 of the order obviates the difficulty by giving the Court powers to accept these

documents even when produced afterwards on sufficient reasons being shown for their non-production in time. This rule, I think, is a complete answer to the contention that the first hearing may mean any date but the first date of hearing. On account of this rule the Plaintiff would not be prejudiced by the provision of r. 1. The legislature thus guards against the production of forged documents, insists upon prompt production of documents which is a matter of great advantage to the parties but at the same time sees that no party is prejudiced by too stringent application of the rules. I am afraid there is no reason for supposing that there is here any oversight on the part of the legislature. The general principles have been laid down with sufficient clarity and at the same time the discretion of the Court has not been fettered. I do not see where the legislature has laid down that the time for filing documents should or should not be extended. Each document sought to be produced after the first date of hearing should be accepted or refused on the sufficiency or otherwise of the reasons put forward for its production out of time. No other provision can be fairer than this. Time taken in producing a document is one of the elements to be considered in accepting it. It is generally reasonable that all such documents to be filed out of time should be filed without the least possible delay and there is no harm in the Court's fixing a short time within which the parties must file those documents, provided that they are those which could not have been anticipated before. I think it would be reasonable to construe the first hearing in the rule to mean the first date of hearing, that it applies with equal force to both sorts of suits and I do not think that there has been any oversight in this connection on the part of the legislature. On a comparison of the present r. 1, Or. XIII with sec. 138 of the old Code, it would appear that the present rule has been made more stringent and that too after the decisions in *Gour Hari v. Pran Hari*, 21 W. R. 42, and *Watson & Co. v. Kanhya Bahadur*, 9 W. R. 294. Not only was there no oversight on the part of the legislature but it enacted the present rule deliberately with a set purpose. We should be slow to find fault with an Act of which Sir Rash Behari Ghosh was one of the sponsors.

Yours truly,
NABANATH MUKERJI,

Munsif, 2nd Court, Magura, Dist. Jessore.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY and B. B. GHOSH, JJ. SECOND APPEAL No. 1866 OF 1921. HARI CHARAN GHOSH, Plaintiff-Appellant v. HIRAJAL GHAR, Defendant-Respondent. The 6th March 1923.

Adverse possession—Inception of possession as agent—Whether permissive character of possession continues after the death of the principal—Possession of agent's son, whether prima facie adverse to the principal's son.

The Appellant instituted this suit against the Respondent to recover possession of the disputed property on establishment of his title to the same. His case was that the disputed property was purchased by his father in a mortgage sale, and since the date of sale, the father and after his death the Plaintiff was in possession of the property for more than twenty years. The trial Court found that the Plaintiff's father was a mere agent of the Defendant's mother and the purchase was effected by the former with money belonging to the latter. He held, however, that the Plaintiff had acquired a good title by adverse possession. On appeal the lower Appellate Court held that as the Plaintiff's father obtained possession of the property as an agent of the Defendant's mother, neither he nor his son could be presumed to hold it adversely to the Defendant's mother or the Defendant. He therefore dismissed the Plaintiff's suit. Against the decision the Plaintiff preferred a second appeal.

Held—That the permissive character of an agent's possession would not continue after the death of the principal and that after the death of the agent, the possession of his son would be *prima facie* adverse to the heirs of the principal.

Babus Ram Chandra Mozumdar and Bijan Kumar Mukherjee for the Appellant.

Dr. Dwarka Nath Mitter and Babu Narayan Chandra Kar for the Respondent.

S. C. C. Appeal allowed and case remanded.

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REPORTS (See Index.)

Sir John Woodroffe Reader of Indian Law at Oxford.

We are glad to note that Sir John Woodroffe, who retired from the Bench of the Calcutta High Court last year and who is so well-known throughout India not only for his legal learning but as an Orientalist, who has entered into the spirit of the ancient civilization and culture of India, has been appointed Reader of Indian Law at the University of Oxford. He succeeds Sir John Trevelyan, who will also be remembered as a no less distinguished Judge of the Calcutta High Court and like him also a well-known author of several works on Indian law of which his work on Hindu law is the most popular and useful. It is interesting to note that before Sir John Trevelyan the same chair was filled by Sir William Mackay, also a very distinguished Judge of the Calcutta High Court and author of the well-known work on jurisprudence which has made his name familiar to every student of law. That three Judges of the Calcutta High Court have in succession filled the same chair at the Oxford University may be said to establish an intellectual tie between these centres of culture in the Far East and West.

The late Mr. Shirley Tremearne.

The death of Mr. Shirley Tremearne on the 7th of July last at Bangalore at the ripe age of seventy-five removes from amongst us the familiar figure of a very prominent citizen of this cosmopolitan city in India. He had come out to India for a career of his own choice and he made it by his own exertions, talent and courage. He began life in India as an 80 Rs. clerk in the office of the Accountant General in Burma where he went failing to secure anything better in Calcutta. But he longed to return to Calcutta,

which of all cities in India afforded opportunities to a man with an initiative and a will to make one's headway as a public man and a business-man too. He first got a transfer to the Currency Department at Calcutta and through his boss there he got an introduction to Sir Richard Couch, Chief Justice of the Calcutta High Court, who took a liking for the promising young man and appointed him his Private Secretary. Mr. Tremearne served in the same capacity under three successive Chief Justices, the last two being Sir Richard Garth and Sir Comer Petheram. He became thereafter an Assistant Registrar, but gave up the High Court for taking up the management and direction of trading and commercial concerns. But his early connections with the High Court had developed in him a devotion to law and an attachment for the Bar. In fact his love for the Bar was so great that even after he had severed all connections with the High Court and made for himself the position of a leading journalist and a prominent business man in Calcutta, he was a regular weekly visitor to the Bar Library and took particular pleasure in spending some time in talking on public topics with the more independent section of its members. He always took his seat at the corner table where Sir Charles Paul, Mr. Jackson and Mr. Hill and others usually sat and exchanged with them views of persons and things and public questions as well.

The Calcutta High Court and the Calcutta Bar have always been noted for being immune from Executive influence. It is here that Mr. Tremearne developed a similar spirit of independence against the Indian bureaucracy. He never believed in the cant that India was made by the Civil Service or for the Civil Service. He threw his lot with the people of the country amongst whom he had made his fortune and also many friends and thoroughly sympathised with their political aspirations. He adopted India as his home and as a citizen of

Calcutta he spared no time or trouble for her civic advancement. For more than 20 years he served as a commissioner of the Calcutta Corporation where he earned the esteem of his colleagues and of the public by his tact and independence and keen concern for the welfare of the city. He was a director of many companies and wielded great influence in commercial circles both by his force of character and as a fearless journalist. He was always progressive in his views and never allowed racial prejudice to cloud his judgment and foresight of public affairs. "The Capital" which he founded in 1888 is the most appropriate and lasting memorial that he has left behind him and we earnestly hope that it will keep his spirit and personality alive through its columns in the onward march of time.

Regulation III of 1818—Detention without trial.

From reports of Parliamentary proceedings received by the last English mail we find that Sir Walter de Frece asked the Under-Secretary of State for India if he could give any information as to the trial of the alleged Bolshevik agent Shakh-t Usman at Peshawar for alleged conspiracy in India and whether the trial had thrown any light upon Bolshevik propaganda in that country. Earl Winterton replied that this man had been arrested, but so far as we knew, has not yet been brought to trial.

In our editorial columns last week we referred to this arrest at Peshawar as also that of a Mahomedan Editor of a vernacular paper in Calcutta under Regulation III of 1818. From the question of the member of Parliament above referred to, it will appear that he presumed that these men were being tried in the regular course of law. We do not take any exceptions to these arrests on suspicion. But we think it right that these persons, if they are British subjects, which we presume they are, should be tried. We have shown in our last issue that a Joint Committee of the Central Legislature in India recommended that no British subject should be indefinitely detained under Regulation III of 1818. It is but right therefore that they should be put on their trial. If they have acted as agents of a foreign power, they may be proceeded against under the Official Secrets Act which was recently passed. If they, or either of them, have been engaged in any hostile conspiracy in India, they may be tried under the conspiracy section of the Indian

Penal Code. If it is felt undesirable to hold a public trial, they may be tried in camera. Had they been foreign agents engaged in any conspiracy in India, they might have been deported out of India under Reg. III of 1818. The reason why we object on principle to their indefinite detention under the Regulation is, if we allow such discretionary power of detention to the executive in respect of any British subject, simply because the allegations against him are very grave, then the executive will be at liberty to detain indefinitely others as well on the strength of grave allegations or reports from secret service men. The Repressive Laws Committee recommended that such detentions without trial should cease in India as a natural sequence to the Reforms. We hope, that the putting of Reg. III of 1818 into operation again does not indicate a reversion to a reactionary policy on the part of the Government of India which is discernible in other directions.

Assembly's Resolution recommending limitations on Viceroy's powers of certification.

The purport of the Resolution of the Legislative Assembly passed by a majority of votes last week on a motion by Mr. J. N. Basu (Member from Burma) is that it recommends that the power of the Governor-General to pass a Bill by certification when either of the Chambers of the Central Legislature fails or refuses to pass it in the form recommended by the Governor-General under sec. 67B of the Government of India Act be limited to cases where the "safety or tranquillity of British India or any part thereof is concerned." Sec. 67B also includes the words "or interests" after "tranquillity." The word "interests" is too wide and the Assembly has recommended that this word be omitted. The recommendation of the Assembly in the present state of the Indian constitution, amounts to a mere expression of a pious wish. This is so, first because a resolution of the Assembly is not binding on the Governor-General in Council. In the next place, even assuming that the Governor-General in Council, who are a much more bureaucratic body by tradition than the Governor-General himself, are at all disposed to receive with favour the recommendation of the Assembly, it is not within their competence to modify the provisions of the Government of India Act in any way. They will be, we believe, the last persons to recommend to Parliament that the

Government of India Act should be amended in accordance with the recommendations of the Assembly. So the attitude of the Executive Government both in this country and in England will be that the resolution will be reserved for the consideration of the statutory commission that will come out to this country seven years hence.

There is, however, a more expeditious means by which constitutional changes may be brought about. The British constitution of to-day is a creature of convention, and not of statutes. The Legislative Assembly was proceeding on the right track since it came into existence in 1921 in creating conventions of its own. One of the conventions that it has established, which was recognised both by the President and the Government of India, is that its members are entitled to make nominal cuts in non-votable items. This is a specific instance where convention has overridden the strict letters of the law. Then again with regard to the Finance Bill, the Assembly refused, in 1921, to refer the Bill to a Joint Committee of the Council of State and the Assembly as was then proposed by the Government and the Assembly asserted its right of independent deliberation with a view to establish its supreme control of all Money Bills on the analogy of the House of Commons. With regard to taxation, Sir Malcolm Hailey, the then Finance Member to the Government of India, gave a distinct assurance, that no taxation would be imposed without the assent of the Assembly. This assurance was adhered to by the Government of India when in 1922 the doubling of the salt-tax was disallowed by the Assembly, although the Budget deficit was then much more serious than it was this year.

Sir Montague Webb and some of his colleagues of the Assembly have as intimate a knowledge of the Indian Finance as the present Finance Member, who is a mere novice in his office. Those who have studied the Inchcape Report know that the last Budget could have been balanced by retrenchment. Even Sir Basil Blackett's then Secretary, the Hon'ble Mr. Cook, admitted in his speech in the Council of State that there was a further margin for retrenchment to the extent of 3 crores. No responsible minister under any constitutional form of Government would have insisted on the imposition of an unpopular tax under such circumstances and no

Governor of any self-governing Dominion would have dared to defy a representative Assembly in the manner that Lord Reading has done. It is therefore generally believed that the certification was resorted to more for the purpose of a reassertion of the autocratic power of the Government of India than for balancing the budget. If the Members had then resigned on the issue forced on them and brought about a dissolution, the situation to-day would have been quite different. It is neither seditious nor unlawful, on the contrary it is perfectly constitutional to bring about dead-locks and dissolutions in such circumstances. It is by such means that the constitution will grow, conventions will be established and the executive will be made responsible to the legislature as they have been in England. Parliamentary struggles always furnish safe-guards against unconstitutional movements in every country.

CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS

II — JURISDICTION OF THE COURTS (A) UNDER THE E. I. Co's CHARTERS, AND THE STATUTES.

(Continued from p. cxl.)

[1780-1786].—The 21 Geo. III, c. 70, s. 3 (*rep.* by G. I. Act, 1915) saved the jurisdiction of the Supreme Court in respect of orders of the Governor-General in Council relating to such persons (1).

The 26 Geo. III, c. 57, s. 29 (*rep.* by Act XI of 1872) rendered (European) British subjects in India amenable to the Courts of Oyer and Terminer, and the Courts of General and Quarter Sessions, for offences in Asia, Africa, America and beyond the Cape of Good Hope to the Straits of Magellan, within the trading limits of the E. I. Co. S. 30 (*rep.* by 55 and 56 Vic., c. 19) gave the Governor or President and Council at Madras, in their Courts of Oyer and Terminer and General Sessions of the Peace, civil and criminal jurisdiction over all (European) British subjects within the specified territories not included in the Charter of 1753 (2).

By 24 Geo. III (sess. 2), c. 25, s. 41 (*rep.* by 35 and 36 Vic., c. 63) passed in 1784, the King's (*i.e.*, European British) subjects were amenable to the Courts in India for offences in Native States, and 33 Geo. III, c. 52, s. 67 (which came

(1) 7 B. H. C. L. 6, 12, 13. *Re Amer. Khan*, (1870) 6 B. L. 592, 445.

(2) 7 B. H. C. L. p. 13.

into force on 1st Jan. 1794, and was repealed by Act IX of 1872) contained a similar provision (3).

[1797].—The 37 Geo. III, c. 142, s. 9, established the Recorder's Court for the Fort and town of Madras and the town of Bombay and factories subordinate thereto. S. 10 conferred jurisdiction on it over (European) British subjects, in any factory subject to the Governments of Madras and Bombay, and cognizance of all complaints for crimes committed by them therein (4). S. 18 repealed the Charter 26 Geo. II, as to the Mayor's Court and the Court of the Governor or President and Council of Oyer and Terminer and Jail Delivery, and transferred then powers to the Recorder's Court. The exclusive powers of the Governor in Council in Oyer and Terminer, under the Charters of 1726 and 1753, over all persons including (European) British subjects, now became exclusively vested in the Recorder's Court (5).

[1800].—By 39 and 40 Geo. III, c. 79, s. 5 (rep. by G. I. Act, 1915) the Recorder's Court at Madras was abolished, and all the powers granted to it under 37 Geo. III, c. 142, passed to the Supreme Court to be created there.

[1807].—The 47 Geo. III (sess. 2), c. 68, ss. 4 and 5, (rep. by Act II of 1869), appointed the Governors and Councils of Madras and Bombay, justices of the peace for the said towns and for the settlements and factories subordinate thereto, and empowered them to appoint justices of the peace for the same.

Jurisdiction of the Courts in India up to 1813.—Until 1813 the King's Courts (Supreme Court and the Recorder) had exclusive jurisdiction to try European British subjects for offences committed in the Mofussil (6).

The criminal jurisdiction of the E. I. Co.'s Courts was till then limited to "natives" and Europeans not being British subjects. By various Regulations Mofussil Magistrates were empowered to arrest British-born persons, and after inquiry forward them to the Presidency towns for trial (7). Reg. XVII of 1813 (repg. Regs.

VIII of 1806, ss. 4—19, and X of 1806) provided for trial in the Supreme Court of complaints against European public officials as such.

[1813].—The 53 Geo. III, c. 155, s. 105 (rep. by Code, 1872) was the first statute which empowered Magistrates, who were J. P.'s, to try offences by such subjects in the Mofussil (8). Till then they had been exempt from the jurisdiction of the E. I. Co.'s Courts (9). The Statute was promulgated partly in Madras in 1820 (10).

Ss. 101 rep. by 53 and 54 Vic, c. 33, and 103 (rep. by Act X of 1875), related to informations in the Supreme Courts and the Recorder's Court against European British subjects, unlicensed or committing offences in the interior.

S. 105 empowered a Zilla Magistrate, who was a J. P. (11), to entertain complaints by natives for certain offences, 'not being felonies (e.g., manslaughter, (12), against their person or property, (13) and prescribed the procedure and punishment. Act VII of 1853 (rep. by Act XVIII of 1862) extended s. 105 to offences against other persons also, and conferred jurisdiction on Joint Magistrates and other competent Magistrates.

Such Magistrates had jurisdiction to try European British subjects only under s. 105 (14) (except for contempts), (15) and not for offences under the Penal Code, (16) which were triable exclusively by the Supreme Court, or the High Court in its Extraordinary Original Criminal Jurisdiction (17).

As to appeals from convictions by J. P.'s, see 9 Geo. IV, c. 71, ss. 48 and 49. Appeals from convictions by J. P.'s in the Mofussil and Magistrate-acting under 53 Geo. III, c. 155, s. 105 lay, under Act IV of 1843, to the E. I. Co.'s Courts. S. 410, Code 1861, allowed appeals to the Court of Session:

(To be continued.)

E. H. MONNIER.

V, 1799, s. 18 III of 1800, s. 18 III of 1818, s. 29 VII of 1827, s. 10. *Reg. v. Reay*, 7 B. H. C. R. 6, 11, 15, 26. See *Mondville v. Da Costa*, (1802) 1 Str 140, 143.

(8) 7 B. H. C. R., p. 26.

(9) Recital to s. 105, found correct, 7 B. H. C. R., pp. 20, 21.

(10) 1 Mor Dig lxxi.

(11) Marginal note to sec.

(12) *Q. v. Sheriff*, (1866) 6 W. R. 13, 14.

(13) Not for offences against others. *Q. v. Siddulph*, (1840) 1 T. & B. 607, 509; *Re Russell*, (1838) Fult. 362. *Re Poulie*, (1836) Fult. 313.

(14) *Re Pattle*, (1836) Fult. 313, 327.

(15) Fult., p. 326.

(16) *Reg. v. Dixon*, (1869) 6 B. H. C. R. 14 [follows S. N. A. Rep. 1863, pp. 291, 223, 309]; *Reg. v. Wells*, (1870) 7 B. H. C. R. 1.

(17) *Q. v. Brace*, (1865) 3 W. R. 64, 66, 66.

(3) *Reg. v. Watkins*, (1805) 2 M. H. C. R. 444. *Emp. v. Sarmakh*, (1879) 2 All. 218, 230. See 9 Geo. IV, c. 71, ss. 56 (rep. by G. I. A., 1915), 127 (rep. before).

(4) 7 B. H. C. R. 6, 14, 24. *Re Natraya*, (1912) 36 Mad. 72, 75, 76. Ss. 9 and 10 were rep. by 55 and 56 Vic, c. 19 and s. 18 by Act XIV of 1870.

(5) 7 B. H. C. R. 6, 19, 20, 24.

(6) Recital to 53 Geo. III, c. 155, s. 105; *Reg. v. Reay* (1870) 7 B. H. C. R. 6, 22, 24.

(7) 1 Mor. Dig. xevi. *Har. Analysis* Vol. I, 427—430. *Reg. Begs.* XXII, 1787, s. 12; XXVI, 1790, s. 12; IX of 1793, s. 10. II, 1796, ss. 2—4. VI, 1803, s. 18. XV, 1804. *Mad. Begs.* VI, 1802 s. 19. IV, 1809, ss. 2, 3. *Both Begs.*

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REPORTS (See Index.)

The Assembly's censure on the Government of India for their guarantee in respect of the Alliance Bank of Simla in liquidation.

Sir Basil Blackett had to swallow a much bigger humble pie in answering the indictment of that level-headed, sober and venerable leader of the moderate party, Sir Sivaswamy Iyer, during the censure debate on the extraordinary action of the Government of India in connection with the liquidation of the Alliance Bank of Simla than he had to, in meeting the argument of the non-official members during the Budget debate in March last. What he lacked in argument or in power of debate he knew then he could make up by having recourse to the extraordinary power of the Viceroy in overriding the adverse vote of the Assembly by certification. Sir Sivaswamy, however, asked him, though not in so many words, how it was that when he had raised so much dust and taxation over a prospective deficit of 3½ crores, he quietly and complacently agreed to the Government of India giving a guarantee of 4½ crores out of public revenue to the liquidators of the Alliance Bank, before satisfying himself about the true position of the Bank. We take the following from the telegraphic summary of the debate:

"Sir Sivaswamy opposed any pledging of public revenues. He did not believe in the reality of the lurid financial picture painted by Sir Basil Blackett with regard to a threatened financial crisis. The Alliance Bank failure could not possibly have brought about a general collapse of credit and never during the past half a century had failures destroyed confidence in an entire banking system. On the ground therefore neither of philanthropy nor of financial stability was Government justified in incurring a pecuniary liability. It is, he added, a strange irony of fate that a Minister who played the role of financial censor to the Assembly in March last and in the fervour of his orthodoxy, described the financial policy of

his predecessors as "a Rake's Progress" should have himself embarked upon such an unsound and dangerous policy in the following month.

Sir Basil Blackett has one stock argument to offer in justification of all his confused canons of finance, be it in the matter of taxation or in the matter of backing up of a private concern out of public revenue and that is that the credit of India would have suffered if he had not acted as he did. He forgets that the credit of India has always stood high in the world and will continue to stand high, unless he makes a mess of it. It is no wonder that the Assembly passed the vote of censure by a large majority. The Hon'ble President of the Assembly once observed rather plaintively that in the result of an adverse vote or censure, the Government of India do not resign. But may we ask what does the member in charge on whom censure is passed do? How does he swallow it? The Indian Executive, the higher we go, seem to develop an uncommon power of digestion of this unpalatable article which men in their position throughout the civilized world try to avoid.

Money Bills and the powers of the Legislative Assembly and the Council of State.

Mr Samanth moved a resolution in the Legislative Assembly last week to the effect that the Government of India Act be so amended that all Money Bills are to originate in the Legislative Assembly and that the Council of State is not to amend them in any way. We cannot congratulate this veteran member of the Assembly on the terms of his resolution and are not at all surprised that it was lost. His motion was inopportune and ill-advised. We are in sympathy with his object but not with his discretion or judgment. Members who desire to introduce constitutional progress ought not to risk a defeat in the Assembly, as that has the effect of rather retarding such progress than helping it. We have already said that constitutional progress may be much more readily secured by the elected non-official

members of the Assembly acting together and getting constitutional conventions established by a majority of votes than by passing pious resolutions recommending to the Governor-General in Council to get one or other of the provisions of the Government of India Act amended by Parliament. Neither of them would be in a hurry to do it before the statutory period. Resolutions hastily framed or hurriedly moved and not approved by the Assembly stand no chance of being seriously considered even at the end of such period. One should, therefore, take counsel of one's colleagues and make sure of the Assembly's support before moving such resolutions.

Mr. Samarth was a life-long colleague of Sir Pherozesha Mehta and Gokhale and is one of the few old type congressmen living. He is a man of sterling independence, and although he is a nominated member from Bombay, he always votes in the Assembly according to his own conscience and not according to official wishes. He was examined before the Joint Parliamentary Committee before the passing of the Government of India Act. It is therefore with great respect for him that we beg to point out that his resolution was misconceived and runs counter to the scheme of the Government of India Act. We need hardly remind him that this very question was raised in the Assembly on the 17th of March 1921 when the then Finance Member (the Hon'ble, now Sir, Malcolm Hailey) moved that the Finance Bill be referred to a Joint Committee of both Houses. This motion was strongly opposed by the non-official members of the Assembly, both in the House and in the lobby on the ground that with regard to Money Bills the voice of the Assembly, like that of the House of Commons, should be supreme. The members objected to the proposal of reference to a Joint Committee, where according to the Legislative Rules, the Assembly and the Council are to have equal representation. Mr. Eardley Norton was selected by the non-official members to oppose the motion and for fuller information his speech may be referred to. In view of the strong non-official opposition, the Finance Member withdrew his motion and the Bill was considered by the Assembly alone as it is done in the House of Commons. In 1922 and 1923, the same procedure has been followed with regard to the Finance Bills. This has established the constitutional convention that the Finance

Bill originates in the Legislative Assembly and it was unwise on the part of Mr. Samarth to move that it should form a part of the statute law. For constitutional conventions are as binding as any statute law. The further convention that was established at that date was that while all other Bills may be referred to a Joint Committee of both Houses a Finance Bill is not to be so referred.

Then the debate which took place in the Assembly on the 24th of March 1921 is of no less constitutional interest so far as the second portion of Mr. Samarth's resolution is concerned. We shall very briefly give a resumé of it. After the Finance Bill of 1921 was passed by the Assembly with amendments, it went before the Council of State in the usual course. The Council of State amended the schedule of the postal rates reducing the postal rate for letters not exceeding the weight of $\frac{1}{2}$ tola to $\frac{1}{2}$ anna. The Bill came back to the Assembly for its approval of the amendment. The debate then turned on the question whether the Council was entitled to amend the Finance Bill after it had passed the Assembly. It is admitted by those who reviewed the constitutional powers of the two Houses on that occasion that the Council of State could amend the Finance Bill as any other Bill, but the Assembly was not bound to accept the amendment. If the two Houses came into conflict in this way, what was the remedy? Certification was not suggested by even the official members at the time. Sec. 67 (3) of the Government of India Act gives powers to the Governor-General to summon a Joint Sitting of the Council of State and the Assembly for the removal of such conflicts. The only draw-back of this provision is that such a Joint Sitting of both Houses cannot be held until six months after the conflict arose. But a Finance Bill cannot be hung up for six months. The Assembly might have put an indirect pressure on the Council of State to accept the Assembly's decision. But in this case as the Council of State had recommended a reduction of the postal rate, which was likely to meet with public approval, the Assembly after an assertion of their constitutional right, accepted the amendment.

Sec. 67 (3), Government of India Act, has adopted the provisions for Joint Sitting of a bicameral legislature for removal of conflict between the two Houses from the more recent Australian constitutions. The analogy of

Canada as cited by Sir Malcolm Hailey is hardly appropriate. In conclusion, we would venture to point out that Mr. Samarth's argument by analogy of the House of Commons is somewhat anomalous and antiquated. Framers of modern constitutions, as in the Australian Commonwealth, have avoided the anomalies of the British constitution, which are of peculiar historical origin. The provision in sec 67 (3) is modern. It establishes the ultimate supremacy of the Assembly not merely with regard to Finance Bills but also in respect of every measure of legislation. The Assembly consists of 144 members and the Council of State only 60 and it is evident that in a *Joint Sitting* of the two Houses, the voice of the Assembly will ultimately prevail. The Council of State is meant only as a brake on too hasty legislation. The framework of the Government of India Act is in some respects modern. In some others it is quite antiquated, such as the power of certification, a power which has been obsolete since the days of the Stuarts. The power conferred on the Legislative Assembly, as, after all, thus hedged in by a steel-frame. It, however, the people and their representatives are in earnest in demanding and exercising their constitutional rights, the steel-frame must sooner than later give in.

Hindu Civil Marriage Act.

Dr. Goun's Bill to amend the special Marriage Act, 1872, has passed the Council of State, and will, we have no doubt, receive the assent of the Governor-General in due course. The bill, as our readers are aware, is a purely permissive measure enabling Hindus, Jains, Sikhs and Buddhists to contract what is called a civil marriage under the Special Marriage Act. Marriages under the bill will be monogamous.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

20th June 1923

The Judicial Committee commenced their Trinity sittings on May 31st and 2 Boards were constituted.

On June 4th, an appeal from Bengal, *Annada Mohan Roy v. Gour Mohan Mullick*, was heard by LORDS SUMNER and PHILLIMORE, SIR JOHN EDGE and MR. AMEER ALI. The Respondents who were presumptive reversioners to the estate of Gopal Lal Seal, deceased, entered into agreements with the Appellant

to transfer to him their rights in the estate and when they should vest. Both Courts in India decided against the validity of the agreements and the Board confirmed their decision without calling on the Respondents.

Messrs L. DeGruyther, K. C., and 1 *Mepd* for the Appellant
Sir Geo Lowndes, K. C., and Mr. E. B. Ranks for the Respondents

On June 11th, 5th, 7th was heard the appeal of *Lal Ram Singh v. D. C. of Partabgarh* (Oudh). The suit out of which this appeal arose was brought by Naram Singh to decide whether he or Raja Awadesh Singh, a minor, represented by the Respondent, was entitled to the Rampur Estate. A compromise of litigation between antecedents of the present litigants is claimed by the Appellants to be invalid. The Respondent, while upholding terms of the compromise, contends that all questions relating to its validity have become *res judicata*. He also alleges a custom of lineal primogeniture. Judgment was reserved.

Sir G. Lowndes, K. C., and Mr. Kennorthy Brown for the Appellants

Messrs DeGruyther, K. C., W. Wallack, and B. Dubé for the Respondent

On June 7th, judgment was delivered in *Alcock Ishdoun & Co., Ltd. v. Chief Revenue Authority, Bombay*. The appeal was allowed.

June 8th. Before LORDS HALDANE, BRICKMASTER and PARMOOR. *Poozshane Bomanji Pehl v. Bai Goolbar & ors.* (Bombay). The litigation commenced in an originating summons taken and for the determination of the construction of a settlement. Judgment was reserved.

Messrs Upjohn, K. C., Tamlin, K. C., and E. B. Ranks for the Appellant

Messrs Clauson, K. C., and R. J. T. Gibson for the Respondents

June 8th, 11th and 12th. Before the same Board. *Ma Than Than v. Ma Pwa Thi* (Lower Burma). The Plaintiff-Appellant claims to be the adopted daughter, and the Respondent-Defendant, the widow of an U. Po. K'aw, a Buddhist resident in Rangoon. The Appellant seeks a declaration that an award and deed of release, which allotted to her less than her legal share as a daughter, are not binding on her. The Court of first instance decided in her favour but the Court

of Appeal reversed that decision. Judgment was reserved

Messrs. Dunne, K. C., and E. B. Raikes for the Appellant.

Messrs. Montgamery, K. C., and B. Dubé for the Respondent

June 8th. Before the Board presided over by LORD SUMNER. *Midnapur Zamindary Co., Ltd v Uma Charan Mandal* (Bengal) The Plaintiffs-Appellants were purchasers of a tenure sold for arrears of rent under Bengal Act VIII of 1865 and sought under sec 16 of that Act to annul all under-tenures held by the Defendants-Respondents. The latter contended that the under-tenures had not come into existence after the creation of the tenure and the lower Courts had so found. The Board dismissed the appeal without calling on the Respondents.

Messrs. DeGruyther, K. C., and K. Broun for the Appellants

M. B. Dubé for the Respondents

June 8th and 11th *Madharao Waman Sandalgekar v. Raghunath* (Bombay) The lands in dispute in this suit are the Watan Inam of the Respondent family. The Appellants claimed to have acquired a right to be perpetual tenants of the Watan lands by adverse possession. Judgment was reserved.

Sir G. Lowndes, K. C. and Mr K Broun for the Appellant

Mr. E. Raikes for the Respondent.

June 11th. *Jamnabai v. Fazalbhoy Hep-toola* (Bombay) These appeals are concerned with certain immoveable properties which Ineum Natho, the deceased husband of the Appellant, and Khinji Jiva, his partner, first held as tenants in common. The questions for decision arise on a settlement of accounts and the Appellant further contends that she is not bound by her Counsel's consent. The appeal was dismissed.

Messrs. DeGruyther, K. C., and Parikh for the Appellant.

Sir G. Lowndes, K. C., and Mr. E. B. Raikes for the Respondent.

June 12. *Maharaja of Kolhapur v. Bala Maharaj* (Bombay) Judgment was delivered in the above appeal heard on 8th and 10th May. The appeal was dismissed.

June 12th, 14th and 15th. *Raja Srinath Rai v Maharaja Pratap Udai Nath Sahi Deo* (Patna). This was an appeal by an auction-purchaser of the Raj of Bundu who as Plaintiff sought to have an entry in the record-of-rights altered. The entry showed the Bundu estate as being "putra putradik" and resumable by the Maharaja of Chota Nagpur on the failure of heirs male of the original grantee. The Appellant contended that Bundu was an independent taluk. The lower Courts held opposite views. Judgment was reserved.

Sir G. Lowndes, K. C., Messrs Douglas McNair and K. S. Shavaksha for the Appellant

Messrs. A. M. Dunné, K. C., and Ramsay for the Respondent.

The Indian list has now been concluded and Canadian appeals will be heard for the rest of the month

G D M

21-6-23.

CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

II.—JURISDICTION OF THE COURTS (A) UNDER THE E. I. CO.'S CHARTERS, AND THE STATUTES.

(Continued from p. cxlviii.)

[1823].—The Supreme Court of Bombay was established under 4 Geo. IV, c. 71. The powers of the Recorder under 37 Geo. III, c. 142 (*rep.* by Act XIV of 1870), including his exclusive criminal jurisdiction over British-born subjects in the Mofussil, were transferred by s. 9 to the Supreme Court (1).

The Native Criminal Judges at Madras had no jurisdiction over Europeans or Americans, but only the Courts presided over by European Judges (2).

The E. I. Co.'s Courts had criminal jurisdiction over native subjects of Government for crimes beyond the British territories (3).

(To be continued.)

E. H. MONNIER.

(1) *Reg. v. Reay*, (1870) 7 B. H. C. R. 6, 25.

(2) *Mad. Regs* VII, 1827, ss 4, 5 III, 1833, s. 2: Acts XXXIV, 1837, s. 2: VII, 1843, s. 43.

(3) *Mad. Regs* XI, 1809, II, 1829: XII, 1832: *Bom. Reg* III, 1809.

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Kenya Settlement.

We are not surprised at the settlement arrived at by the British Cabinet and Parliament with regard to the dispute between the European and Indian settlers over their respective status and civil rights in that colony. When the Empire was in danger and the Central Powers in Europe were threatening to march upon Paris and Calais and the Indian troops were keeping the enemy at bay, we heard a great deal about the Indians being admitted to equal partnership in the Empire, the gateways of which, be it in Constantinople, Egypt, Mesopotamia or East Africa, they were so valiantly guarding. While they materially helped to win the war in Europe, the battles of the Empire further south and east, in Egypt, Turkey, Palestine, Mesopotamia and East Africa were principally won by them. The British settlers in Kenya would have been swept into the sea but for the Indian troops. We remember Sir Theodore Morrison, then a member of the Secretary of State's Council, writing to the *Times*, that East Africa, in view of the invaluable services of Indians, should be made a self-governing Indian Colony. But after the war has been won and peace restored, it is very ordinary human nature, mean though it be, to forget the services of the benefactor and to break promises with people who have at present no means of enforcing them. The colour-bar is being now restored all over the Empire and the Indians are to be kept out of the high lands in Kenya and beyond, which they helped to open out and develop even in the pre-war days by the construction of railways and as the pioneer traders in the colony. Although there are more than twenty-two thousands Indians in the

Colony, they are to have communal representation and elect only four members in the Legislative Council, whereas a little more than nine thousand Europeans are to elect eleven. What a lesson in equality of status of Indians in the British Empire!

The Indians under their hoary civilization may be somewhat exclusive in their social habits but they are by nature averse to any aggressive exploitation of their fellow-beings. If the British Government has to protect the natives in Africa, it is, as history shows, against the aggression of the European adventurers that they need such protection and not against the Indian settlers. If the Europeans cannot compete with Indians in business in Africa, it is because the Indians are a thrifty, moral and industrious people. Simultaneously with the Kenya settlement, General Smuts has announced his aggressive campaign for the segregation of Indians in separate locations in the towns, where they have attained prosperity and acquired property amongst white settlers by their industry and enterprise. General Smuts justifies his action by reference to the Indian caste system. He is evidently ignorant of the fact that the caste system imposes restrictions only in respect of inter-dining and inter-marriages and no civil disqualifications. Indians both in the past and in the present have always been at liberty to break through caste rules. The social restrictions of caste have never stood in the way of acquiring property, or trading as they please, or living where they like. Caste never imposed any civil disability on them. The political caste system that is now being introduced by the much vaunted modern civilization is utter barbarity in the eyes of the Indian people. Until India gets politically autonomous and powerful, she has no chance of getting fair treatment anywhere in the Empire. It proves the wisdom of the Sanskrit adage—

देवा इमेन घातकाः

“Even the gods oppress the weak.”

An all-India Bar.

We find that Mr. Rangachariar has introduced a Bill in the Legislative Assembly for the founding of an Indian Bar. We have not yet received his draft Bill. But all the same we must say that his is a very ambitious and stupendous project. There are seven High Courts in India including Burma besides the Chief Courts and Judicial Commissioners' Courts which exercise similar jurisdiction. Each High Court has its own rules for the enrolment of legal practitioners of different grades. Before a common Indian Bar can be founded the conditions and circumstances under which the different class of legal practitioners practise in the Courts have to be ascertained. Then the question will arise whether it is desirable to reduce the number of the different grades of legal practitioners. There are at present six different classes of them - advocates, attorneys (solicitors), vakils, pleaders, mukhtars and revenue agents. Are they to be merged, the sub-division reduced and if so to what extent? In doing so, the different High Courts as also the different classes of practitioners will have to be consulted. So Sir Malcolm Hailey gave a rather cold reception to Mr. Rangachariar's Bill and sarcastically observed that if there was any chance of his Bill going through during the present life of the Legislature he would have opposed its introduction but as there was none, he did not.

Mr. Rangachariar's Bill is a more comprehensive Bill than Mr. Neogy's which picks out the vakils from amongst the legal practitioners and seeks by legislation to enlarge their privileges to that of advocates and solicitors. He overlooked the fact that it is the High Court which under cls. 9 and 10 of the Charter Act of 1865, enrolls and exercises control over vakils under rules framed by such Courts. It is doubtful whether the provisions of his Bill are *intra vires*. Had it been passed it would have come into conflict with cls. 9 and 10 of the Charter Act and the Judges might have difficulty in giving effect to its provisions? Mr. Rangachariar is too shrewd a lawyer to create any such conflict or confusion by legislation. So he has framed a measure for the creation of an All-India Bar. We are in entire sympathy with the idea. But it cannot be created in a hurry and without consultation with the High Courts and the various sections of the legal profession. It will take time to collect and consider the opinions. In the meantime we are in entire

agreement with Sir Asutosh Mookerjee's view that vakils should be enrolled as advocates and we are also at one with him when he says that the proper agency for doing it is the High Court. A lawyer of his ability would not commit the blunder of suggesting that it can be done by the insertion of a stray clause in the Legal Practitioners Act without drastically changing the Charter and some subsequent Parliamentary statutes. So we would advise the vakils not to cool their heels over Mr. Rangachariar's Bill or Mr. Neogy's Bill, both of which will expire with the present Sessions of the Legislature, but to move the Calcutta High Court for framing rules for the enrolment of vakils as advocates. This will pave the way for an All-India Bar.

CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS

II.—JURISDICTION OF THE COURTS (A) UNDER THE E. I. CO.'S CHARTERS, AND THE STATUTES.

(Continued from p. cliv)

[1862].—In 1862 the Supreme Courts were abolished by 24 and 25 Vic., c. 104, and their criminal jurisdiction over European British subjects passed to the High Court, which then exercised exclusive jurisdiction, subject to s. 105 of 53 Geo. III, c. 155 and some India Government Acts (1), *e.g.*, Code, 1861, ss. 163, 165 (2).

(B).—UNDER THE INDIA COUNCIL ACTS.

[1836].—Act XI of 1836 made British-born subjects and their descendants, who were Principal Sadder Ameen, Sadder Ameen, and Munsiffs amenable to the Mofussil Courts, in civil cases, for their acts as such officers.

[1859].—Offences under Act I of 1859 were by s. 112, and Code 1861, s. 21 (now s. 29) made triable by Magistrates (3).

Under Act XV II of 1859 (*rep.* by Act X of 1875) an European British subject was triable by the Supreme Court (and the High Court) for all offences not expressly punishable by J. P.'s in the Mofussil (4). A Magistrate had, therefore,

(1) *Reg. v. Reay*, (1870) 7 B. H. C. R. 6, 19, 20 Q. v. *Brae*, (1865) 3 W. R. 64, 65, 66.

(2) 3 W. R., p. 66.

(3) *Re Evans*, (1865) 2 M. H. C. R. 473. *Re Reardon*, (1875) 8 *Ibid.* 85.

(4) *H. C. P.* 22 Dec. 1868, 4 M. H. C. R. Ap. xxiii: *Q. v. Hearn*, (1871) 3 N. W. P. 128: *Quere* whether 2 M. H. C. R. 473, and 8 *Ibid.* 85 were cases of such persons.

no jurisdiction to try European British subjects under Acts I of 1859, s. 83 (5), XXIV of 1859, s. 48 (6), and V of 1861, s. 29 (7).

As to the power of a J. P., a non-European British subject, to try British-born subjects under Act I of 1859, s. 83, before and after the Code, 1872, see *infra* (8).

[1861]—S. 24, Code, 1861 made its provisions generally inapplicable to European British subjects, (9), but particular sections conferred jurisdiction, in respect of them, on J. P.'s or Magistrates being J. P.'s in the Mofussil, e.g., 39—42, 163, 165, 410 (10).

Jurisdiction of the High Court—[Code, 1861, s. 404]. The Bombay Court set aside the conviction of such person by a Magistrate, and ordered commitment to itself (11). The Calcutta Court held it could not, under s. 404, order such person, when discharged by the Magistrate, to be committed (12). In *Q. v. Sheriff* (13) where the accused was not proved to be an European British subject, the Court only quashed the order of acquittal.

[S. 410]—The High Court on the Appellate Side could not hear an appeal, or deal with the case of such persons at all except to point out entire want of jurisdiction (14).

[1861—1866]—Act XXI of 1863 established the Recorder's Court at Rangoon with criminal jurisdiction over European British subjects in British Burma, but supervision in capital cases was reserved to the High Court at Calcutta. This power has been taken away by subsequent legislation.

Act IV of 1866 created the Chief Court of the Punjab with criminal jurisdiction over such persons, and, the same is now exercised by the High Court for the Province.

[1872—1898].—The Code of 1872 repealed s. 105 of 53 Geo. III c. 155, and such persons were then governed by Chap VII and ss. 435—438, which were not *ultra vires*. (15)

The Code of 1852 gave European British subjects the benefit of the law, as to offence and procedure, administered by the High Court ss.

408, prov. (a), 416—456 having preserved their rights under the Code of 1872 (16).

The Code of 1898 preserved the law under the preceding Code generally.

[1923]—Act XII of 1923 has completely altered the position of European British subjects as regards the Courts competent to try them, the personal qualifications of Sessions Judges and Magistrates, the procedure and the sentence.

(1) COURTS.—The exclusive jurisdiction of the Chartered High Courts over European British subjects has been taken away: see the amendments to s. 4 (j). Power has now been given to second and third class Magistrates, which they never had before, to try such persons, in certain cases s. 29A. The qualifications of nationality (that is, of being an European British subject), and of *status* as a justice of the peace, have been abolished as to all Magistrates and Sessions Judges.

(2) PROCEDURE.—COGNIZANCE BY MAGISTRATES NOT COMPETENT TO ENQUIRE INTO OR TRY OFFENCES BY SUCH PERSONS—[Code, 1861].—The relevant sections were ss. 40, 40A and 41 read with s. 38. A District Magistrate, not being a justice of the peace could hear a complaint, take the prosecution evidence and the statement of the accused and dismiss the case (17).

[Code, 1872]—See s. 73.

[Codes, 1882—98, s. 445]—An Indian Magistrate could take cognizance and proceed under ss. 200, 203 or 204, but if he acted under s. 204 he had to send the case to the District Magistrate or to an European first class Magistrate having jurisdiction, under s. 443, to enquire into or try the same, a complaint could not be sent by the first named Magistrate *immediately*, and without following the provisions of ss. 200—203 to, nor be disposed of, by the District Magistrate (18).

Act XII of 1912 has repealed s. 445, and a first class Indian Magistrate may now issue process and himself proceed thereafter with the inquiry or trial subject to the new Chaps XXXIII and XLIVA, and a second class Indian Magistrate may proceed with the trial themselves in the cases mentioned in s. 29A.

(3) TRIALS BEFORE MOFUSSIL MAGISTRATES (a) Competency.

Under Code 1861, s. 37, a District Magistrate, though not a J. P., was competent to hold a preliminary enquiry in the case of an European

(5) 4 M. H. C. R. Ap. xxiii.

(6) H. C. P. 13 June 1870, 5 M. H. C. R. Ap. xxv.

(7) 3 N. W. P. 128.

(8) H. C. P. 18 Dec 1873, 7 M. H. C. R. Ap. xxxii, xxxiii.

(9) *Reg. v. Reay*, (1870) 7 B. H. C. R. 6, 25, 26.

(10) *Q. v. Brac*, (1865) 3 W. R. 64, 65, 66.

(11) 7 B. H. C. R. 1..

(12) 3 W. R. 64.

(13) (1866) 6 W. R. 13.

(14) *Q. v. Brac*, (1865) 3 W. R. 64, 66.

(15) *Q. v. Meares*, (1874) 22 W. R. 54.

(16) *Q. v. Morton*, (1884) 9 Bom. 388, 398.

(17) *Q. v. Brac*, (1865) 3 W. R. 64.

(18) *Abdul v. Jack*, (1906) 10 C. W. N. ccl, ccli.

British subject (19), but could not commit to the Supreme Court: no person, other than a J. P., being empowered to do so under s. 39 (20).

As to the jurisdiction under 53 Geo. III, c. 155, s. 105, see *ante*, and s. 42, Code, 1861. By s. 4 of Act XXII of 1870 nothing therein conferred jurisdiction over such persons on Magistrates who were not J. P.'s.

The qualifications of Magistrates and J. P.'s, under the Code of 1872, to inquire into or try charges against European British subjects, were laid down in s. 72: see also s. 74, para. (1).

By the Codes, 1882—1898, a Magistrate who was not a J. P., and (except the District and Presidency Magistrates), not also an European British subject himself, was incompetent, under s. 443, to try such subjects (21). The section did not bar cognizance by an Indian Magistrate, not a J. P.; but an inquiry, or a trial under Chaps. XX—XXII (22), and proceedings under s. 107 (23).

(To be continued.)

E. H. MONNIER.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION Before MOOKERJEE, J. S. A. FILE NO 2558 OF 1922. SATCHIDANANDA THAKUR and others, Plaintiffs-Appellants v. MOHESH CHANDRA DAS and others, Defendants-Respondents. The 9th May 1923

Bengal Tenancy Act (VIII of 1885), sec. 105—Second appeal in a proceeding for settlement of rent under sec. 105—Court-fee on memorandum of appeal.

The landlord filed a second appeal to the High Court in a proceeding for settlement of rent under sec. 105 of the Bengal Tenancy Act. The appeal related to one tenancy and the memorandum was stamped with a court-fee of eight annas only. The tenancy was held by four co-tenants who were joined as Respondents in the appeal. The Taxing Officer, on

report of the Stamp Reporter, was of opinion that a stamp of eight annas had to be paid for each of the four co-tenants of the tenancy under the Notification issued by the Government of India in exercise of powers conferred by sec. 105 (3), Bengal Tenancy Act, viz., notification No. 2254F, dated the 8th August 1918, which provided that an application under sec. 105 of the Bengal Tenancy Act for settlement of rent should bear "a stamp of eight annas for each tenant making or joining or joined in the application." In the opinion of the Taxing Officer, therefore, the court-fee stamp paid on the memorandum of appeal was short by one rupee and eight annas, but the question being one of general importance he made a reference under sec. 5 of the Court Fees Act.

Held—That the memorandum of appeal was properly stamped. The Notification of 8th of August 1918 must be read along with s. 63 (4) of 1914 made by the Local Government in exercise of powers under sec. 189 of the Bengal Tenancy Act providing for joinder in one application under sec. 105 of the Bengal Tenancy Act of any number of tenants under the same landlord in the same village. So read, it is perfectly clear that by "each tenant" in the Notification is meant "each tenancy," and a stamp of eight annas is required for each of the tenancies joined and not for each of the co-tenants of one tenancy. The Notification and the rule have in view joinder of separate tenancies in one application for which alone a special rule is necessary, while no special rule is required for joinder of the co-tenants of one tenancy as under the general law they are all necessary parties and must be joined. It is well-known that subsec. (3) of sec. 105 of the Bengal Tenancy Act was added by the Amending Act of 1898; and Notification issued thereunder to modify the decision of the Full Bench in *Upadhyaya Thakur v. Persigh Singh*, 1 L. R. 23 Cal. 723 (F. B.).

Babu Atul Chandra Gupta for the Appellants.

Babus Dwarika Nath Chakravarty, Senior Government Pleader and Surendra Nath Guha, Junior Government Pleader for the Government.

H. C. S.

(19) *Q. v. Brae* (1885) 3 W. R. 64.

(20) *Ibid.* 66.

(21) *Baladev v. Clarke*, (1913) 18 C. W. N. 885.

(22) *Abdul v. Jack*, (1906) 10 C. W. N. col. colli.

(23) *Hopcroft v. Emp.* (1908) 35 Cal. 163.

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REVIEWS

REPORTS (See Index.)

Indian Bar.

We publish below the Reports of the Select Committee (which are in identical terms) on Mr. Girdharilal Agarwala's Bill and Mr. K. C. Neogy's Bill.

"In view of the recent announcement on behalf of the Government that they propose shortly to convene a Committee for the purpose of examining the whole question of the constitution of an Indian Bar, we are of opinion that it would not be advisable to proceed at present with legislation affecting only one of the many questions which would necessarily come under the consideration of such a Committee, and in view of an assurance which we have received that the question raised by this Bill will be specifically referred to that Committee, we recommend that no further proceedings should, for the present, be taken in respect of the Bill. We accordingly refrain from expressing any opinion on the subject-matter of the Bill and have not attempted to amend it."

We noticed last week that Mr. Rangachariar had, during the Session, introduced a Bill in the Assembly for the creation of an Indian Bar. Evidently Mr. Rangachariar introduced it in view of the fact, as stated above, that the Government of India propose to appoint a Committee for considering the question of constituting an Indian Bar. We presume that Mr. Rangachariar's proposals will be referred to this Committee for general consideration as also the questions in Mr. Neogy's and Mr. Girdharilal Agarwala's Bills. Mr. Neogy's Bill, we have noticed in these columns before. Mr. Agarwala's Bill proposed that vakils should not be required to sign *vakalatnamas*. The obvious difficulty with regard to his proposal was that in that case the Court would not know who was actually acting for the Appellant or the Respondent. In every appeal or original suit, some lawyer should be in charge of the case on behalf of a party with whom the

Court can communicate for doing the preliminaries prescribed by law before the suit or appeal comes up for hearing. It may be that the lawyer who acts may also plead in Court or it may be that one lawyer may act and another may plead. In either case there must be a lawyer on record who will be held responsible for acting in its connection at every stage of its progress. Whether this be done by the signing or acceptance of a *vakalatnama* or warrant of attorney or some document in some other form under a different designation is immaterial. But it cannot be dispensed with.

We have often said that we have no objection to the merger of the professions. If there is to be an Indian Bar, one of the questions that will have to be considered by the Committee is, whether every member of the Bar will be free both to act and plead, as is the practice in many parts of India and the Dominions or there is to be any subdivision as there is in the High Court of England and partially in the Calcutta High Court where some may only act and others only plead. Or, are these matters to be left to be regulated by the High Courts, as at present? If there is to be an All-India Bar, there should be one uniform practical and theoretical test for enrolment to it. A mere University degree or certificate from the Inns of Court in England should not be a passport to it. There should be a State examination and regulation for All-India or for each Presidency or Province, which a person of the requisite legal qualifications, be he a law graduate of a University or a Barrister or Advocate from the United Kingdom, will have to pass and satisfy before he is admitted to the Indian or Provincial Bar. We presume that the intention of the Government of India is that no one need go out of the country to qualify himself for practising in the law Courts in India or any section thereof. If the Bar is thus thoroughly Indianised, it will logically follow that the services must also follow suit.

Transportation and Rigorous Imprisonment.

What shall we do with our criminals?—is one of the questions which have been engaging for years the serious consideration of administrators and criminologists. There are a large number of criminals in every country who, we believe, are beyond redemption. Born and brought up in an atmosphere of crime, nothing perhaps will persuade them to give up a career of crime and live a life of honest citizenship. The only thing that we could do is to shut them up so as to prevent them from committing depredations on society, and the only way to get rid of them is to work for the disappearance of the class from which they are recruited and of the environment in which they are reared. But apart from these, there are many who have no intention of pursuing a career of crime and who, given the chance once more, will pick up the thread of life where they dropped it either through inadvertence or a temporary aberration of the moral sense.

Our ideas and methods with regard to punishment have during recent years undergone a considerable change. Civilized Governments are now committed to the position that one of the objects of punishment is the reformation of the criminal himself. With this object in view, a broad distinction has been made between adult and juvenile offenders, and special courts and reformatories, etc., have been set up for dealing with the latter. In our province, two Acts have been recently passed to enable the Government to establish industrial schools for juvenile offenders, and although for want of adequate funds, nothing practical has so far been done, it must be admitted that the Acts are an indication of the spirit of the times, and an earnest of our sincere desire to help the unfortunate youth to grow up to be honest and useful citizens.

The Indian Penal Code has provided for the more serious offences long terms of rigorous imprisonment and transportation. A bill was introduced last year into the Assembly for the purpose of abolishing transportation and substituting for it rigorous imprisonment. The Select Committee to which the bill was referred did not attempt to amend it, but recommended that Local Governments should be consulted before proceeding further with it. The difficulty the Committee felt in amending the bill arose from the fact that it does not provide for an equitable scale of equivalence

between rigorous imprisonment and transportation. It is generally assumed that transportation is a much more severe form of punishment than rigorous imprisonment, but, as Colonel Stanyon, M. L. A., Bar-at-Law, an ex-Judge, in the valuable note which he has published on the bills shows that in fact it is not so. "Transportation," he says, "is a form of punishment which gradually lessens in severity with time, as the convict becomes reconciled to his exile, initial misery and despair being replaced first by apathy and then by attachment to the new life or by the prospect of approaching return to the old. He grows accustomed to and trained in labour and by good conduct earns increased liberty of movement, lightening of toil or more congenial work and other concessions and privileges."

In the note to which we have referred, Colonel Stanyon tries to determine a common measure between transportation and imprisonment. His general idea is that the former as a mode of punishment is not so hard as rigorous imprisonment and that a fair substitute for a sentence of transportation for a term of years is not a term of rigorous imprisonment for so many years, but that a fair equivalence for it will be found in a comparatively short term of imprisonment with hard labour followed by a term of imprisonment with moderate labour and concluding with a term of simple imprisonment. To give our readers an idea of the scheme proposed, we reproduce the following:—

Transportation.	Imprisonment.
For life or 20 years...	3 years' rigorous imprisonment, class I (i.e., with hard labour). 4 years' rigorous imprisonment, class II (i.e., with moderate labour). Rest of term simple imprisonment, class I (i.e., with light work and degradation).
For 14 years ...	3 years' rigorous imprisonment, class I. 4 years' rigorous imprisonment, class II. 7 years' simple imprisonment, class I.

We agree with Colonel Stanyon's view suggested in the note that a long term of imprisonment with hard labour and degradation fails to achieve the objects for which judicial punishment is designed. A long term of such imprisonment turns the man into a beast. Not

only does it degrade him morally, but, in the majority of cases, it destroys his practical sense and initiative. When he comes out, he finds himself absolutely helpless and naturally follows the line of least resistance. The prison has no terrors for him, on the other hand, it feeds and shelters him and relieves him of the responsibility of thinking and working for himself. So back to the prison he goes. A short term of imprisonment of a punitive character which will impress on the convict the desirability of keeping in future within the bounds of law, followed by imprisonment with moderate labour which he himself will undertake without demur and perhaps with pleasure, will go a long way in realising the objects for which punishment is inflicted.

CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

(3) TRIALS BEFORE MOFUSSIL MAGISTRATES.

(Continued from p. clix)

The restrictions to the competency of Magistrates under ss 28 and 29, created by the former ss 443 and 459 (1), have been removed by Act XII of 1923. The qualifications of *status* as a J. P., in the case of all Magistrates, and of nationality, in the case of first class Magistrates, exist no longer. Under the repealed s. 443 only first class Magistrates had jurisdiction over European British subjects: but second and third class Magistrates have now been given powers to try such subjects under s. 29A in certain petty cases.

(ii) *Offences triable by them* [Codes, 1882—98 s. 447].

The repealed s. 447 (1) limited the offences triable by District and first class Magistrates, under ss. 28 and 29, by the measure of punishment awardable by them (1). The general law in ss 447 and 449 was not superseded by the Aden Notification of 6th May 1884 (2).

The present s. 34A (b) now prescribes the limit as to sentences.

(iii) *Procedure on trials* [Code, 1882, ss. 451A, 451B: Code, 1898, s. 451].

The normal procedure under Chaps. XX, XXI, and XXII was varied by the bracketted section. The privileges, on a trial before a District Magistrate were restricted sentences and trial, by Jury (3).

A District Magistrate had the same authority and powers as a Sessions Judge in jury trials (4), including the power under s. 307 (5).

A trial by the former with more jurors than were permissible in sessions trials was *ultra vires* (6).

[Act XII of 1903].—Cl 27 of the Act repealed ss. 443—453, thereby abolishing trial by Jury before a District Magistrate, and introduced an entirely new procedure in the case of offences committed by European British subjects in the Mofussil and punishable with imprisonment (see the new Chap. XXXIII, ss. 443—449). In cases outside the scope of the Chapter the ordinary procedure under Chaps. XX—XXII, applies, subject to the provisions of Chap. XLIVA.

(iv) *Sentences on such subjects*.—[Code, 1872, s. 74 Codes, 1882—98, s. 446].—Under s. 446 the District Magistrate could only have passed a sentence of 6 months' imprisonment, and a fine of Rs. 2,000 or both; and a first class Magistrate only one of three months' and a fine of Rs. 200.

The new s. 34A (b) confers on the above-named Magistrates equal powers of punishment, as under s. 32 (1), excluding whipping, whether the case falls under Chap. XXXIII (s. 445) or under Chap. XLIVA. Second and third class Magistrates can only punish as under s. 29A.

(4) *TRIALS BEFORE MAGISTRATES WITH SPECIAL JURISDICTION*—[Codes, 1882—98, ss. 39, 34].

(i) *Competency*.—The personal restrictions under the repealed ss. 443 and 459, as to the necessity of the *status* of a J. P. and as to nationality, have been abolished.

(ii) *Offences triable by them* [Codes, 1882—98, s. 447].—The limitation of their jurisdiction to try offences under s. 447 has been removed by its repeal.

[Act XII of 1923].—Such Magistrates may try European British subjects for the same additional offences as Indian British subjects, except those excluded by the restriction as to punishment under s. 34A (b).

(iii) *Procedure*.—The normal procedure under Chaps. XX—XXII, prevails in cases under Chap. XLIVA, but is apparently subject to the modifications introduced by Chap. XXXIII in cases within it.

(iv) *Sentence*.—The measure of punishment is

(1) See Code, 1872, para 2, added by Act XI of 1874, s. 12.

(2) *Q. E. v. Mangal Tekchand*, (1883) 10 Bom. 263, 270.

(3) *Emp. v. Powell*, (1904) 27 All. 347, 400.

(4) *Q. E. v. M. C. Arthy*, (1897) 9 All. 420, [appd. in *Re Solomon*, (1889) 14 Bom. 160, 163].

(5) 9 All. 420.

(6) *Emp. v. Booth*, (1903) 26 All. 211.

laid down in s. 34A (b) in lieu of the restricted limits under the old s. 416.

(5) **TRIALS BEFORE PRESIDENCY MAGISTRATES.**—Notwithstanding the repeal of s. 443, which specially exempted such Magistrates from the condition of nationality, their position has not been affected by Act XII of 1923.

(6) **TRIALS BEFORE THE COURT OF SESSION.**—(i) *Competency* [Code, 1872, ss. 72, 77].—No Sessions Judge, unless himself an European British subject, had jurisdiction to try such subjects.

[Codes, 1882—98, s. 444].—The qualification of nationality was required only in the cases of the Additional and Assistant Sessions Judges, and a further restriction was imposed on the latter.

[Act XII of 1923].—All restrictions have been removed by the repeal of s. 444, and the Judges put on the same footing

(To be continued.)

E. H. MONNIER.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

July 11th The following judgments have been delivered

Petit v Goolbar (Bombay) Appeal dismissed (June 28th)

Raja Naganna Naidu v Venkatappaya (Madras). Appeal allowed (June 29th)

Lal Ram Singh v. D. C. Partabgarh (Oudh) Appeal dismissed (July 3rd)

Ma Jhan Jhim v Ma Pua Jhit (Lower Burma). Appeal allowed (July 6th)

The Imperial Bank of India v F. Rai Gyaw Jhu (Lower Burma) Appeal dismissed (July 10th)

Madhavrao Haman Sandalgekar v R Venkatesh Deshpande (Bombay) Appeal dismissed (July 10th)

On July 9th, applications were made in the following suits before VISCOUNT HALDANE, LORDS BUCKMASTER and SUMNER

Bhau Singh v King-Emperor.—

Mr. S. J. MacDonald applied for special leave to appeal to the Privy Council. He informed the Board that 7 men had been charged with murder, that on the same evidence 2 had been acquitted and 5 including the applicant convicted. He contended that the conviction was against the weight of evidence, was entirely based on hearsay evidence and that the accused had not been able to produce the evidence he desired.

VISCOUNT HALDANE pointed out that the Board was not a Court of Criminal Appeal, that there was evidence on which the lower Court came to a conclusion and that there was nothing on the face of the record to justify that conclusion being challenged. Leave was refused without calling on Mr Kenworthy Brown for the Crown.

In Imperial Tobacco Co., India, Ltd v. Boman —

The applicant having lost in both lower Courts applied for a stay of execution which was refused.

In Yusuf Ali Khan v The Collector of Bareilly, Ahmed Ullah Khan and others -

Mr. J. M. Parikh applied for restoration of an appeal which he said was struck out of the list, in his ignorance, as his Counsel in the lower Court who was in charge of the appeal had died. Leave was given for the appeal to be restored and to come into the list not later than January, the Appellant to pay all costs incurred through his dilatoriness

Mr. W. Wallace for the Respondents

12-7-23

G. D. M.

Reviews.

THE JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, May 1923.

In this issue we miss the articles, editorial notes and reviews which were such an interesting feature of the Journal. A summary of legislation of the United Kingdom and the British Dominion beyond the Seas for 1921 is given.

THE BOMBAY LAW JOURNAL, JULY 1923. Edited by N. H. Pandya, M.A., LL.B., Att.-at-Law and B. G. Kher, B.A., LL.B., Att.-at-Law. Subscription Rs 10 (annual)

This publication marks a departure from the usual run of law journals in India. It is not burdened with reports. It consists of some articles, notes and comments which will repay perusal in one's leisure hour. It has an article on "A Popular View of the Lawyer" which tells him some home truths which we expect many lawyers may not relish. But we must say that they are truths all the same and it does not do anybody any harm to know what others think of him.

THE Calcutta Weekly Notes.

Vol. XXVII.]

MONDAY, AUGUST 13, 1923.

[No. 38.]

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THE CALCUTTA UNIVERSITY AND SOME NECESSARY REFORMS.

A great deal of controversy has of late raged over the Calcutta University. As the controversy has been of a personal character, we have refrained from taking any part in it. But as we are as deeply interested in the question of University Reforms as many of our lawyer friends who are intimately connected with the University, we propose to divert public attention from the personal elements of the controversy and direct attention to some of the fundamental issues on the question of University Reforms not under the cover of anonymity but with a full sense of our editorial responsibility.

It has since sometimes past been admitted that the Calcutta University has been in need of reforms not only with regard to undergraduate education but with regard to post-graduate teaching as well.

The Sadler Commission has given us an ideal scheme, which we cannot adopt all at once in remodelling our University because of the deplorable condition of our provincial finance since the Meston Settlement and the refusal of the Government of India who appointed the Commission to come to our aid in any way.

Although our financial stringency stands in the way of carrying out the recommendations of the Sadler Commission in all their details, yet if our educationists are in earnest they can surely adopt the broad outlines of the recommendations in the existing system of education

at our University and in the advanced secondary schools without throwing an undue burden on either our public purse or on the students and their guardians who are generally of very moderate means.

SOME FUNDAMENTAL DEFECTS.

Every one who has kept himself in touch with University and secondary school education in this Presidency is well aware of its palpable defects. I can only point out here the more glaring ones.

MATRICULATION STANDARD, TOO LOW

The present matriculation standard is too low as a school-final or as a passport to University education according to modern ideas. For instance, the London University prescribes a much higher standard for matriculation. It requires a knowledge of the elementary principles of natural science, a fair standard of mathematics and of some modern language as also of some other subjects as a good grounding for receiving university, professional or technical education. I shall not deal at present with technical or professional education but confine myself to academic education.

In the older universities at Oxford and Cambridge, they do not hold any public matriculation examination but each college satisfies itself that the boy admitted has acquired from the public schools or other educational institutions the requisite knowledge and qualifications for profitably pursuing his studies in the scientific or literary course which he intends to take up. So the first reform, that every well-wisher of the Calcutta University has long felt to be urgent, is that the matriculation standard of the University should be brought into line with that of the other modern Universities.

THE RAISING OF THE MATRICULATION STANDARD.

The Sadler Commission suggests that this should be done practically by the founding of Intermediate Colleges and of an In-

intermediate Board for regulating the studies up to the Intermediate standard. The University education is to commence after the students have passed through the Intermediate colleges. The practical difficulty about the adoption of this scheme is that it is at present beyond the means of our provincial finance or the resources of our private educational institutions to recast and reconstitute our schools and colleges on the lines suggested by the Sadler Commission.

But all the same I do not see any reason why we should give the go by to the suggestions of the Sadler Commission altogether and make no attempt to remodel our schools, colleges and university following the suggestions of the Sadler Commission, so far as it lies within our means.

REORGANISATION OF THE SECONDARY SCHOOLS.

I have suggested the raising of our matriculation standard to that of the London University standard. I know that the better class of the secondary schools in Bengal will be able to teach up to that standard. It must be remembered that what were called the "second-grade colleges" were very popular in the mofussil at one time. Under the guidance of an Intermediate Board, I am sure, many of the prosperous matriculation schools in the mofussil would be only too glad to raise their standard to that of London matriculation and make suitable arrangements for teaching up to that standard, although it may be beyond their means to convert them into Intermediate Colleges on the scale recommended by the Sadler Commission. It is immaterial if these schools are then called high schools, second grade or Intermediate colleges. The only additional outlay that such high schools or second grade colleges will require will be in respect of a laboratory for teaching the elementary principles of Physics and Chemistry. But a laboratory for such purposes may be provided with a very moderate outlay.

As my statement in this respect may be questioned, I shall state my personal experience in the matter. When elementary physics and chemistry formed compulsory subjects in the Intermediate Course of the Calcutta University in the early nineties of the last century, I was a lecturer on these subjects in the Metropolitan Institution (now Vidyasagar College) and had to teach these subjects to the largest classes of any college in Calcutta.

The college fees at the time were only Rs. 3 per month which is now the average fee charged in the matriculation schools. We could then, without any Government or outside aid, fit up a small laboratory. Handicapped though we were, we spared ourselves no pains for teaching the elementary principles of the experimental sciences. I had a very good mechanical hand for my assistant. With his help I could teach these experimental sciences quite satisfactorily to my large classes without throwing any heavy burden on my college. My students got a very good grounding on the elementary principles of these subjects and many of them, who have distinguished themselves now in various walks of life, will be able to bear this out. So I would not accept the *ipse dixit* of educational theorists, if they maintain that it would be beyond the means of our high schools to teach the elementary principles of physics or chemistry, without an outlay which would be beyond their means.

It is very unfortunate that the Calcutta University has now discarded natural science as a compulsory subject for the Intermediate and has made no provision for including it amongst the compulsory subjects for matriculation.

It may be asked that if the better class of secondary schools can raise their standard to that of the London Matriculation, what would the other schools do, who cannot. I would say that they would fulfil the same useful purpose as they have done as feeders of the second grade colleges in the mofussil. Besides the Public Schools in England which teach up to a high standard and prepare students for the University, there are also the preparatory schools, far more numerous, which prepare students for the Public Schools. In the same way the average run of schools will fulfil the functions of preparatory schools to the high schools, or "the Intermediate colleges," if it be any advantage to call them as such.

Admission of boys from the preparatory schools to higher schools may be determined in the manner suggested in Sadler Commission's Report.

From my past experience in the teaching line and from my present experience of colleges and schools, as a working member of the Governing Body of some of them, I can say, without any hesitation, that the remodelling of our schools and colleges on the lines I suggest would be quite feasible and not beyond our public or private resources.

COLLEGES AND THE UNIVERSITY.

I would next deal with the colleges and University education, properly so called. I may say here in passing that my suggestions in this connection would not necessitate any drastic changes in the constitution of the colleges which teach both the Intermediate and the Degree courses at present. Most of them have attached schools to which they may transfer the teaching of elementary scientific subjects up to the London matriculation standard. Those that have not, will be as fully occupied in preparing under-graduates for University examination.

SAVING OF TIME AND EDUCATIONAL EXPENSES

If the matriculation standard is raised to the London standard, it will not be necessary to extend the graduation course, be it honours or pass, to more than three years, as it is in the English Universities. After the first year of residence, an under-graduate may be required to pass a preliminary examination in either the arts or science subjects which he takes up for his degree examination. As the under-graduates at the English Universities ordinarily take their honours degree in three years after matriculation, I see no reason why the Indian students would not be able to do likewise. The advantage of bringing the Calcutta University into line with the English Universities is that it will considerably shorten the academic career of our young men. Many of them will be able to stay with their parents or guardians in the mofussil during the preparatory period for University education. This will also effect a saving in their educational expenses. In the struggles of modern life we cannot afford to waste either time or money.

It may be said that if the matriculation standard is raised, boys will have to stay a longer time at school. But this is a mistake. I may mention that Indian boys and girls who study in European Schools, pass the London Matriculation or the Senior Cambridge Local examination, both of which are of a much higher standard than the Calcutta University matriculation, quite easily at the same age that they matriculate at the Calcutta University.

Although the minimum age at which boys may matriculate here is 16 yet the average age of the matriculates of the Calcutta University is nearer 18 than 16. Much of the time that is now wasted in our schools in cram and revision of some elementary subjects may be

more usefully employed in imparting a fair amount of knowledge of a much wider range of subjects.

Some continental educationalist remarked to me, many years ago, when I was making a tour of some educational centres there, that a boy between the age of 12 and 18 can assimilate more food and knowledge and that much more quickly too than a full grown man. It may not be out of place here to mention that in Germany when a lad leaves a secondary school at the age of 18, his knowledge of classics, art, literature or of the scientific subjects he has studied at school is far more comprehensive and complete than that of our honours graduates or post-graduates.

If the secondary school education is thus improved on the lines suggested, bifurcation will commence after matriculation and our boys may take to vocational or technical training at once and others joining the University would be quite competent to qualify themselves for the pass or honours degree in the course of three years, even if the graduation course here is raised to the standard of the English Universities, which is equivalent to our present post-graduate course.

POST-GRADUATE COURSE AT THE CALCUTTA UNIVERSITY A MISNOMER.

I may mention here that all that pass at the Calcutta University as post-graduate studies are but under-graduate studies at the English Universities. Take the ordinary arts subjects—Classics, modern languages, history, philosophy, mathematics. The M. A. standard of the Calcutta University is copied out of the (B. A.) honours graduation course at Oxford, Cambridge or London. Then, if we compare the question papers for the B. A. honours degree at the English Universities with those for the M. A. at Calcutta, we find that the former require a higher standard of knowledge in the subjects concerned.

In the B. Sc. honours course in physical science and chemistry, attempt is being made in Calcutta to approach the London and other English University standards. But since the first two years at the Calcutta University is devoted to the study of elementary science and some miscellaneous subjects, the under-graduates in the course of two years after the Intermediate cannot get enough time for working up to the graduation standard of scientific studies of the English Universities.

UNIVERSITY AND COLLEGES SHOULD CO-OPERATE IN TEACHING UNDER-GRADUATES.

The Colleges affiliated to the Calcutta University which teach honours subjects for the B. A., will be quite competent to teach when the honours standard is raised to that of the English Universities. The B. Sc. standard is being raised and the colleges which teach B. Sc. honours are progressively increasing their equipments. Science subjects require additional outlay but not so much the arts subjects. We find that many of the college lecturers or men of equal qualification are also lecturers in the post-graduate classes of the university. If the colleges experience any difficulty in engaging men of the superior professorial rank, the Calcutta University like the English Universities ought to come to their aid by entrusting part of under-graduate teaching to be done by University professors as in England. The post-graduate teaching is financed by the University largely out of examination fees realized from under-graduates. If post-graduate studies are absorbed into graduation course at the University, it follows that the University will be in a much better position to supplement the teaching work of the colleges.

I may here mention that the chief function of the English Universities is to look to the education and teaching of the under-graduates and not of post-graduate students.

THE DRAWBACKS OF THE PRESENT POST- GRADUATE SYSTEM

Some six years ago, some influential members of the Calcutta University, framed a scheme for the securing of a monopoly of teaching of post-graduate students on a large scale for the University and to devote all available resources of the University for that purpose. The scheme met with adverse criticism from the very beginning. This gathered volume and when in 1919, the Calcutta University proposed an increase in the examination fees for financing the post-graduate scheme, an universal protest was raised against it in the public press and while presiding over a public meeting I briefly pointed out, as I have explained above, that the bulk of what the University had undertaken as post-graduate teaching formed the subjects of under-graduate studies at the English Universities and that the teaching should be done in co-operation by the colleges and the University. The Sadler

Commission's Report which was issued subsequently also recommended that much of what passed off as post-graduate studies might with advantage be included within the honours course for graduation.

I would point out briefly some of the drawbacks of the present post-graduate system. The post-graduate classes have to a large extent to depend upon the fees from the students of the post-graduate classes. Those who have taken pass B. A. degrees are freely admitted. A pass degree cannot now be obtained in less than four years after matriculation. A boy may slack during these four years knowing that if he can pursue his study for further two years in the post-graduate classes, he would get his M. A. degree and then he will be practically on the same footing as a B. A. honours man when the latter takes his M. A. degree. This is not fair to the B. A. honours men. If however B. A. honours is raised to the level of the English Universities (which is equivalent to the M. A. standard of Calcutta) all students who are keen on taking honours will uniformly work for it for three years after matriculation. Assuming that they matriculate at the average age of 18, then they will be able to finish their University course at the age of 21 and will be in a better position to look out for a career in the world.

I cannot pass without saying that the present post-graduate system has cheapened the M. A. degree of the Calcutta University to a very considerable extent, to the detriment alike of its recipients and the University. I shall give only one instance. The M. A. degree in mathematics was difficult to obtain in Calcutta in pre-post-graduate days. It was only men of high mathematical attainments who got a first class. In some years one or two only got a first class and in some years none at all. But now a bifurcation has taken place in mathematical studies for the M. A., and a pass B. A. is freely admitted into the M. A. class. It is not uncommon to find our University turning out half a dozen or more first class M. A.'s in pure mathematics and the same number in mixed mathematics. It has been reported to me, from time to time, that a first class M. A. in pure mathematics is found incompetent to teach elementary Statics and Dynamics in the I. A. or I. Sc. classes. I have sought for an explanation of this and the following is the explanation that has been offered to me. An M. A. in pure mathematics need not have studied any Statics or Dynamics

after his I. A. or I. Sc. examinations. If he was a pass B. A., he was no longer in touch with such subjects and in the post-graduate classes he had only to study pure mathematics, and depended largely on the lecture notes for getting through his M. A. examination. Such attempts at specialization without a good grounding in the general principles of mathematics, both mixed and pure, have led to the present unsatisfactory results.

PROVINCE OF POST-GRADUATE EDUCATION PROPER.

I shall now say a few words about the proper province of post-graduate studies and about the M. A. and other post-graduate degrees.

If B. A. honours course here is raised to that of the English Universities, hardly any exception can be taken to the conferment of the M. A. degree to every graduate of the University of some standing on the payment of some fees to the Universities, as at Oxford and Cambridge. This cannot put any artificial value on the recipients of such a degree, because at Oxford and Cambridge the academic merit of a man is determined by reference to the place he occupied at the time of graduation and his subsequent work and not from the honorary M. A. degree.

If however, it is desired to confer the M. A. or M. Sc. degrees as marks of higher academic distinction, this may be done by requiring the candidates to submit theses. The D. Sc. degrees in London are also given by reference to researches of special merit. At Cambridge and Oxford it is only recently that post-graduate research degrees and Doctor's degrees are being conferred. But this is also done for works of like merit.

In the English Universities the post-graduate students are mostly left to themselves to prosecute their further studies or research. They usually work in the libraries, laboratories and museums and receive only guidance from University professors. The system which prevails at present at Calcutta of teaching the post-graduate students on the system of school-children by holding classes for several hours during the day and giving lecture notes, was condemned in the Sadler Commission report but it continues all the same as before.

I may mention in this connection that even in under-graduate teaching at the English Universities, more importance is attached to the promotion of a spirit of self-help and self-culture amongst the under-graduates under

the guidance of the College tutors and University professors than to teaching them by lecture notes.

If the Calcutta University directs its attention and its resources to an improvement in the quality and standard of under-graduate education it would thereby impart also a great impetus to post-graduate studies.

Sir J. C. Bose, Sir P. C. Roy, Sir Asutosh Mukherjee, Prof. Jadunath Sirkar and other distinguished alumni of the Calcutta University of the pre-post-graduate days are not what they are because of what they were taught at the University but because of the opportunities they got there and thereafter for self-culture. The same may also be said of our younger men who are now attaining distinction in India and across the seas by their original work.

CONCLUSION.

I shall now sum up my suggestions for reforms in the system of education in the Calcutta University which would bring it into line with the leading English Universities :—

(1) The matriculation standard should be raised to that of the London University and the better class of secondary schools should be re-organised to teach up to that standard.

(2) The pass or honours graduation course for the Bachelor's degree should ordinarily extend to three years.

(3) The teaching of the under-graduates should be undertaken by the Colleges, the University also co-operating with the Colleges in such teaching by admitting students to University lectures without any additional fees, as at Oxford or Cambridge, or charging only moderate fees where necessary. The University is also to arrange for and provide increased facilities to the under-graduate to work in the University laboratories or public libraries and museums as may not be available at the Colleges. Since the income of the University is chiefly derived from examination fees realized from under-graduates it should be devoted for their benefit.

(4) The University should furnish facilities to deserving honours graduates for post-graduate studies by offering fellowships, scholarships, stipends or otherwise. Opportunities should also be given to them to work in the University laboratories, libraries and museums and also for proceeding to foreign Universities, if and when necessary.

(5) The University should be chiefly a cor-

porate body of the Colleges, as it is in all other multi-collegiate Universities.

Should the University be reformed on the lines indicated, a great deal of the expenditure now incurred by the University, may be more usefully directed to imparting much sounder under-graduate and post-graduate education. Larger Government grants may also then be demanded for the same purpose. The Sadler Commission's recommendations cannot be adopted, at present, in all their details. But I have shown, that the main recommendations of it can be engrafted on our present system of school, college and University teaching without any serious dislocation of the existing institutions and that, not at any prohibitive cost. We may make a beginning and as our provincial finance improves, the provincial council will surely make larger grants for progressive improvement in our University education. If public co-operation is sought for securing endowments for founding University chairs, fellowships, laboratories, etc., for the benefit of under-graduate education and facilitating post-graduate research, such co-operation and endowments, as past experience shows, will not be wanting.

The controversy that has so long raged over the past and present University administration has been of such a personal character, that the constructive suggestions that have been made by an expert Commission and others interested in University education are being entirely overlooked. I would appeal to all concerned to sink their personal differences and turn their attention to the urgently needed reforms in the system of University administration and education. The changes that I have suggested, would meet with criticism and even opposition, as every proposal for reform is bound to, where it is likely to interfere with any vested interests in any way. I would welcome constructive criticism. But I shall refuse to be dragged into the vortex of personal controversies, which have diverted public attention from the most vital issues concerning University Reforms. In making the suggestions I have made, I have scrupulously tried to avoid personalities. I may also say that I have no personal or partisan interest to serve in advocating the reforms. My interest, in common with that of the educated community at large, is the imparting of a better and a sounder education to our youths, within the minimum of time, at a moderate cost and without exhausting their health, energy and

patience by submitting them, as at present, to the slow grinding process of imparting an inferior education extending over a six years' period of residence at the University. I hope my suggestions will receive the sympathetic support of all disinterested members of the educated community and particularly of the parents and guardians who are interested in the welfare of our young hopefuls.

J. CHAUDHURI.

CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

(6) TRIALS BEFORE THE COURT OF SESSION.

(Continued from p. clx.)

(ii) *Offences triable by the Court.* [Codes, 1882—98, s. 447].—The Court could try European British subjects only for offences not punishable with death or transportation.

[Act XII of 1923].—By the repeal of s. 447, the jurisdiction of the Court under ss. 28 and 29 comes into unrestricted operation, subject only to s. 65 (3) of the G. I. Act, 1919.

(iii) *Procedure on trial.* [Code, 1872, s. 78, para. (2). Code, 1882, s. 451. Code, 1898, s. 450].—European British subjects had the right of trial by a mixed jury, even in cases ordinarily triable with assessors appointed under s. 269. The word "*European*" in s. 451, Code, 1882, meant a person born in Europe (1).

[Act XII of 1923].—The distinction between European and Indian British subjects in this respect has been removed by the repeal of s. 450. Whether the case falls under Chap. XXXIII or XLIVA, the right of trial by a mixed jury only arises when the offence is triable by jury under s. 269. The new ss. 275 and 281A, give European and Indian British subjects, other Europeans, and Americans equal rights as to the constitution of the jury and assessors.

(iv) *Sentence.*—The limitation under s. 449 (1), Codes, 1882—1898, has been abolished by Act XII of 1923. s. 34A (a), for which the sanction required under s. 65 (3) of the G. I. Act was obtained, excludes only whipping from the sentences awardable under s. 31 (2).

(7) TRIALS BEFORE THE HIGH COURT.—[Codes, 1882—98, s. 447 (2)].—The Court had exclusive jurisdiction when the offence was punishable with death or transportation for life.

[Act XII of 1923].—Such offences are now triable by the Court of Session in cases within the new Chap. XXXIII, s. 446 (1), subject to

s. 526A. That Court has the same jurisdiction in cases under Chap. XLIVA. As to the constitution of the jury and assessors in High Court trials: see ss 275, 284A.

(8) INQUIRIES UNDER CHAP. XVIII.—[*Codes, 1882—98, ss. 413, 417 (2)*].—No Magistrate, unless a J. P., and no first class Magistrate, unless also an European British subject, could hold the inquiry. The commitment, when the offences were punishable with death or transportation for life, was to the High Court.

[*Act XII of 1923*].—Owing to the repeal of s. 443, and the reference to it in s. 206, it is not necessary that the committing Magistrate should be a J. P. or an European British subject, but he must still be a first class Magistrate (see s. 294). Commitments, in cases under Chap. XXXIII, have now to be made to the Court of Session [s. 446 (1)]. Similarly in cases within Chap. XLIVA, the former s. 447 (2) having been repealed, the commitment must be to the Court of Session [s. 206 (2)].

(9) APPEALS.—[*Codes, 1882—98, ss. 408, prov. (a), 416*].—An European British subject had, on conviction by an Assistant Sessions Judge, a District or other first class Magistrate, an option of appealing to the High Court even in petty cases and in cases tried summarily.

[*Act XII of 1923*].—The option has been taken away, by the repeal of the above provisions, in cases falling under Chap. XLIVA. In cases covered by Chap. XXXIII, special provisions have been made in ss. 445 (3) and 448, for appeals.

(10) HABEAS CORPUS.—Ss 456 and 458, *Codes, 1882—98*, have been repealed. S. 491, as amended, puts European and Indian British subjects on the same footing in British India. S. 491A preserves the rights of the former, under the latter part of the repealed s. 458, in territories beyond the limits of the appellate criminal jurisdiction of the Chartered High Courts.

(C) UNDER THE LOCAL COUNCIL ACTS.

The Madras High Court held it had no jurisdiction to try European British subjects when the offence was exclusively triable, under a Local Council Act (Mad. Act I of 1866), by a Magistrate (2).

But an Act of the Local Council, investing Magistrates who were J. P.'s, with jurisdiction to try European British subjects, was held *ultra vires* (3) in Bombay. Act XXII of 1870 was

thereupon passed to validate such Acts. No laws of the Local Councils are now invalid merely for conferring on Magistrates, being J. P.'s, the same jurisdiction over such subjects as they may confer over Indian subjects (4). S. 459, *Codes, 1882—98*, reproduced ss. 2 and 4 of the Act, after repealing it, and has now been re-enacted as s. 528D with some modifications.

(D) JURISDICTION OF GOVERNMENT AND COURTS IN NATIVE STATES.

The powers of the Government of India to make laws and exercise jurisdiction over European British subjects in allied Native States were governed by Acts of Parliament (5).

Such subjects were amenable to the Supreme Courts for offences in allied Native States (6), and the Presidency High Courts inherited the same jurisdiction which the former possessed (7). By various Notifications under 28 and 29 Vic, c. 15, s. 3 (now G. I. Act, 1915, s. 109) criminal jurisdiction, original and appellate, over such persons in Native States, was conferred on all the Chartered High Courts (8).

The Legislature intended such persons, resident in Native States, to be subject to the same law in every respect as governed persons of the same class in the mofussil in British India (9).

(To be continued.)

E. H. MONNIER.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION Before CHATTERJEE AND CHUNG, JJ. S. A. No 2837 of 1920 NAWAB KHAJAH HABIBULLAH and ors., Plaintiffs-Appellants v. ABDUL GAFUR BHUIA and ors., Defendants-Respondents. The 7th December 1922

Bengal Tenancy Act (VIII of 1885, Bengal),

(4) 34 and 35 Vic, c. 84, rep. by G. I. Act, 1915, and re-enacted as s. 84 (c).

(5) 26 Geo. III, c. 57, s. 29 (rep. by Act XI of 1872); 28 and 29 Vic, c. 17 (rep. by G. I. Act, 1915) G. I. Act, 1915, s. 65 (b) *Ward v. Q.* (1890, 5 Mad 33, 34).

(6) *Reg. v. Reay*, (1872) 7 B. H. C. R. 6, 20, 21: *Q. E. v. Morton*, (1894) 9 Bom. 288, 296: *Q. E. v. Edwards*, (1885) 9 Bom. 333, 342.

(7) *Reg. v. Watkins*, (1865) 2 M. H. C. R. 444.

(8) See G. I. Act, 1915, s. 109

(9) 9 Bom. 288, 298 citing s. 8 of Acts XI of 1872 and XXI of 1879 and 28 and 29 Vic, c. 15, s. 3.

(2) *Reg. v. Donoghue*, (1870) 5 M. H. C. R. 277 (per *mag.*)

(3) *Reg. v. Reay*, (1870) 7 B. H. C. R. 6: *Reg. v. Donoghue*, (1870) 5 M. H. C. R. 277, left the point open.

sec. 32 (c), Court's discretion to take a shorter period than a full decennial period for comparison of average prices in suits for enhancement of rent.

Plaintiff instituted a suit in 1919 in the Munsif's Court at Iswarganj, Mymensingh, for enhancement of rent of a holding created in 1910, on the ground of a rise in prices. The Munsif dismissed the suit holding as follows:— "The rent of the *jama* was fixed so recently that the Court should not allow enhancement on the basis of any shorter period, having regard to the fact that there was an abnormal rise in the price on account of the European war, which is expected to come down in a few years." On appeal, the Subordinate Judge modified the decree slightly and the landlord preferred the present second appeal to the High Court:

Held—Having regard to the finding of the lower Appellate Court, it must be taken that the present holding was created in the year 1910. The suit was instituted in 1919. That being so, there was not a full decennial period before the institution of the suit. The Court may take a shorter period for comparison under sec. 32, cl. (c) of the Bengal Tenancy Act but it is discretionary with the Court to do so. In the circumstances of the case it cannot be held that the Court below was wrong in the view it took of the matter.

Babus Surendra Nath Guha and Ramendra Mohun Mozumdar for the Appellants.

Babu Prafulla Chandra Chakravarty for the Respondents.

J. N. R.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION. Before CHIEF JUSTICE AND RICHARDSON, J. L. P. No. 29 OF 1923 IN S. A. No. 1262 OF 1921. GOPESWAR RAY CHOWDHURY, Plaintiff-Appellant v. PEARY SUNDARI DASSYA and ors., Defendants-Respondents. The 18th July 1923

Suit for khas possession—Encroachment by Defendant in his character as tenant on landlord's adjoining land—Landlord's knowledge of encroachment.

The Plaintiff brought a suit for *khas* possession of a piece of land on establishment of his *putni* right thereto obtained in Pous 1319 B. S. alleging that he let out the land in suit to

one Nazir by erecting a hut on its western part leaving the eastern part waste as before with a jackfruit tree thereon and that subsequently one Kanchiram the predecessor of Defendants Nos. 1 to 4 who had his shop on the south of the land in suit won over Nazir to his side and dispossessed the Plaintiff. The Defendants contended that the suit-land formed part and parcel of their predecessor Kanchiram's holding, that the *maliks* were never in *khas* possession of it, that the suit was barred by limitation and that at any rate the Defendant's right as a tenant was not affected. The first Court decreed the Plaintiff's *putni* right but dismissed his claim for *khas* possession holding that he was entitled only to get fair and equitable rent from the Defendant. The lower Appellate Court affirmed the judgment of the first Court. In second appeal the Appellant's vakil urged amongst other points that the Defendant's possession was not within the knowledge of the Plaintiff and in support cited *Ishan Chandra v Raja Ram Ranjan*, 2 C. L. J. 125 (concluding portion):

Held per NEWBOULD, J.—That that portion of the ruling referred to a case "where the tenant encroaches and sets up title adverse to the entire interest of the landlord" but here the Defendant encroaches in his character as a tenant, the Plaintiff landlord was dispossessed only in a limited sense who ought to have brought his suit for *khas* possession within 12 years of dispossession. The appeal was dismissed. An appeal was preferred under the Letters Patent but was also dismissed.

Babu Dwarka Nath Chakravarty (with him *Babu Satis Chandra Chowdhury*) for the Appellant

None for the Respondents.

S. C. C.

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EDITORIAL NOTES—

ARTICLE—

Lord Haldane and the Judicial Committee "class

REPORTS (See Index.)

Certification of a Budget item by Bengal Government.

We notice that at a meeting of the Bengal Council held on the 15th of August last the Hon'ble Mr. Donald laid on the table a certificate from H E the Governor certifying Rs. 50,000 for the District Intelligence Branch of the provincial Police. The Hon'ble Mr. Stephenson explained to the Council that "this certificate of half a lakh for the District Intelligence Branch had been provided by savings in other branches of the Police Budget." So far so good. But we doubt whether the Government was justified in resorting to its extraordinary powers of certification in such cases instead of having recourse to the more constitutional course of submitting to the Council a supplementary statement for the adjustment of the budget grant under the head of Police and asking for the vote of the Council, which we are sure the Council would not have refused under the circumstances stated. This would have been the proper parliamentary procedure which in our view should always be resorted to except in grave emergencies. The parliamentary procedure is that no portion of any grant made under one head can be transferred to a different head without the leave of the House of Commons. This procedure is also strictly followed in the Legislative Assembly. For instance in March 1922, the Legislative Assembly had made a cut of 95 lakhs and 72 thousands in the demand for grants. The then Finance Member, Sir Malcolm Hailey, in giving effect to it found that the reductions recommended could not forth-

with be made under certain heads but under other heads larger reductions could be made and thus the recommendations of the Assembly for reduction could be fully complied with. Therefore on the 25th of September 1922 he placed before the Assembly a supplementary budget statement for the re-adjustment of the grants in this way and asked for the vote of the Assembly and the items were then considered and voted upon. The Assembly has been very keen about establishing parliamentary conventions for the regulation of its procedure and we should like the provincial Councils to be equally jealous of their constitutional privileges. We would also urge on the Local Governments to observe always the parliamentary procedure and not needlessly resort to the certification procedure. It is by establishing parliamentary conventions and not by waiting for parliamentary statutes that we can rapidly develop our constitution.

Caste system and Racial antagonism.

The *Pioneer* in a leaderette commenting on our article on the Kenya Settlement says: "A Calcutta legal commentator rebukes General Smuts for his references to the disabilities imposed by caste in India." The *Pioneer* proceeds to observe "The commentator might explain for General Smuts's benefit why a few days ago the Bombay Legislative Council should have thought it necessary to recommend that the 'untouchable' classes should be allowed to use public schools, courts, offices, dispensaries, public watering places, wells and dharmasalas built and maintained out of public funds or administered by bodies appointed by the Government or created by statute."

We are quite prepared to do it for the benefit of the *Pioneer*, if not of the Boer General.

We are not surprised at the mentality of the leader writer in the *Pioneer* which has blinded him to the real significance of the resolution recently passed by the Bombay Council. It is because of the militant-type of racial prejudice that he shares in common with the colonials and its aggressive exponent, General Smuts, that he has failed to appreciate that while the leaders of public opinion in India are in earnest about doing away with caste prejudices, the leaders of the ruling classes in the British Empire are now promoting and supporting a far more objectionable type of caste system for debarring the Asiatic people, of the intellectual and labouring classes alike, from the very ordinary civil rights of mankind, such as that of acquiring or holding property, enjoying the fruits of their labour and enterprise, liberty of trading and of living and carrying on business in the places which they have adopted as their homes.

The caste system of India never imposed any such disqualification on men of any race, creed or religion who adopted India as their home. The castes in India, in their origin, were partly vocational and partly sanitary. Nowhere in our civil law do we find any civil disqualification attached to them. The restrictions were of purely social character. The codes of *Manu* and *Yajñavalkya* did not even interdict inter-caste marriages. They only differentiated them on a more or less preferential scale. The issues of such marriages only occupied a lower social status. Is loss of social status in consequence of inter-marriages or undesirable marriages unknown in England? But in India too that was a matter of personal concern and not of law. Even those who were assigned a low social status by the Hindu law-givers by reason of such marriages, or others who belonged to even lower castes, were never disqualified by law from holding or acquiring property or assigned any location, as the so-called civilized and democratic legislators of the present day seek to do.

Hindu law or Hindu society might have regarded the inter-mixture of Aryan and non-Aryan blood undesirable but their superior culture, foresight, spirit of tolerance and sense of humanity prevented them from depriving the non-Aryans or the offsprings of inter-caste marriages of any civil right. Had it been other-

wise, the *Varna Sankaras* (offsprings of mixed marriages) would never have been such flourishing classes wielding large political and temporal powers both in ancient and modern India. It is in India that the Aryan and non-Aryan people have freely mingled and have evolved a moral civilization which is unique in the world. When Europe will be able to look at life and humanity from the angle of vision that our ancestors did, be it in the pre-Budhistic, Budhistic or the post-Budhistic (*vedantic*) days, then only will this unseemly strife of selfishness for material gain, which is the cause of so much misery and suffering in the modern world, abate and peace and goodwill amongst mankind again prevail.

We frankly admit that we too have drifted far from our ancient culture which gave us the highest ideals of humanity, and our ancient institutions have re-appeared amongst us in a degenerate form and we are paying the penalty for it. But caste exists everywhere in the world and perhaps in no less objectionable form, though it may not be of the stereotyped character that it has assumed in India. We are no apologists for the caste system as it prevails to-day, but all the same we must say in all fairness that the Indian caste system is far less obnoxious and aggressive and more rational than the present day racial and class hatred that is ever on the increase amongst the European nations. We have said in one respect caste in India was vocational. The other aspect of it was sanitary. The question of "untouchability" is intimately connected with the latter aspect. There was never any legal bar to any person entering the Kings' Court or other public places by reason of his caste. In the premier temples and places of public worship on this side of India, be it at *Kalighat*, *Puri*, *Gya* or *Benares*, Hindus of all castes are freely admitted. It is only in family and private-owned temples that they are refused admittance. In *patchalas*, primary schools, which once existed in almost every village in Bengal, the children of the zamindar, trader, shop-keeper and agriculturist, irrespective of caste or creed were freely admitted and the English schools which have taken their place now admit all without distinction.

May we ask how many Englishmen, who call themselves gentlemen, will send their

children to Board Schools in England? How many Englishmen in India will be prepared to admit that they commenced their education in the Board Schools? Do not class distinctions of a more galling nature based on one's calling in life exist in England? Those who live in such glass houses would do well not to pelt at us.

The rigour of our caste rules is, however, most rigid with regard to our kitchen, food and water reservoirs. The purpose of such restrictions were purely sanitary in their origin. People engaged in insanitary or unclean occupation were prevented from touching food or water for fear of contamination. In India it was intended for preventing the spread of infectious and epidemic diseases. Dr Napier and his colleagues of the School of Tropical Medicine in Calcutta, only recently, attributed the prevalence of Kala-azar amongst the Anglo-Indian community and the comparative immunity of Hindus, who live in a more congested part of this city, to the fact that the kitchen and kitchen-servants of the former are unclean and that sweepers who attend to the closet and drains, have a free access to the kitchen and other domestic work. All the same we must say that the caste system has outlined its original purpose in India and we should like to see more rational sanitary rules take its place and all unreasoned prejudices against the "untouchable" classes and social bar to their advancement in life removed.

LORD HALDANE AND THE JUDICIAL COMMITTEE.

The article of Viscount Haldane in the Empire Review for July last, on the functions of the Judicial Committee of the Privy Council, raises questions of supreme importance for the administration of justice. And as the eminent author occupies a position which enables and entitles him to give practical effect to his views, it is all the more necessary to inquire if those views are quite sound. Such inquiry, though somewhat audacious, has been forced upon the country, and I, therefore, submit in all humility, some observations on the doctrine propounded in that article. "The statesman is required as well as the Judge, if the proper balance in judicial interference is to be observed," says Lord Haldane; and

again, "We are far away here from the continental conception of a Judge as a mere interpreter of rigid codes." It would seem therefore that the interference of the Judicial Committee is not, and in the opinion of Lord Haldane, should not be, always regulated by the legal or judicial standard. And consequently, it is not enough for the members of the Committee to be learned lawyers; they must also be subtle statesmen. The non-legal grounds, an appreciation whereof requires statesmanship in the members, would, when analysed, resolve themselves into reasons of policy and expediency. Now, does the British system permit the intermeddling of statesmen in the administration of justice? Does it sanction a fusion of the functions of the Judge and the statesman as advocated by Lord Haldane?

It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only—the written from the statutes, the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority and upon the principles to be clearly deduced from them by sound reason and just inference, not to speculate upon what is the best, in his opinion, for the advantage of the community. Such was the opinion delivered by Baron Parke in the case of *Egerton v. Earl Brownlow*, before the House of Lords, in the year 1853 (4 H. L. C. at p. 123). Four years later, he, as Lord Wensleydale (the troubles of his life-peerage being over in the meantime), in delivering the judgment of the Judicial Committee, said as follows—

"If the result of our decision should be that these Appellants are to escape from justice, we shall regret it; but that is a matter which cannot influence our judgment. If the Mofussil Court has no jurisdiction now, by virtue of the East India Company's Regulations, to dispose of this case, they must escape justice, but we are not in any way to alter or construe differently the rules of the criminal law in consequence of the supposed justice of a particular case." (7 M. I. A. at p. 103).

Judicial attempts to override the law on various pretexts, have been made in the past, and the question involved has been regarded as sufficiently serious to elicit protests from

Judges themselves. An outspoken author, not unknown to fame, deals with the position thus :—

"To avow or insinuate that it might, in any case, be proper for a Judge to prevent a party from availing himself of an indisputable principle of law, in a Court of Justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall; and has a direct tendency to render all law vague and uncertain. . . What politicians call expedience often depends on momentary conjectures, and is frequently nothing more than the fine-spun speculations of visionary theorists or the suggestions of party and faction."

Again, Lord Watson who occupies, and if I may say so without impertinence, very justly occupies, a high place in the estimation of Lord Haldane, says :—

"In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy." [(1894) A. C. at p 553]

When sometime ago, the Governor in Council of Madras, acting judicially, declined on political grounds, to direct the trial of a suit, did the Judicial Committee countenance the procedure?

"The legal right to bring a suit and to have it determined by the proper Court created for the purpose of determining such suits, cannot be barred upon the considerations of policy or expediency which are urged by the judgment under appeal," said Lord Halsbury. (28 Mad 42).

Did any considerations of expediency weigh with Lord Macnaghten when he pronounced his memorable joint censure on the Judiciary and the Executive of New Zealand [(1903) A. C. at p. 188] or when he likened the Government of Madras to a "lawless mob" (22 Mad. at p 282)?

"Your Lordship must look hardships in the face rather than break down the rules of law," said Lord Eldon. (4 Camp. 419).

Lord Haldane has introduced the great name of Coke in another connection. And what was his conception of judicial functions?

"The law is the golden met-wand and measure to try the causes of your Majesty's subjects," was the reply of the proud Chief Justice to the pretentious King.

Would you interpolate "expediency" in the reply?

Is it not permissible now to contend that

neither does principle nor does authority support the claims of the ubiquitous and indispensable statesman as urged by Lord Haldane? Statesmanship in judicial administration means perversion of justice. It is akin to corruption. Let there be no misunderstanding. It is the short-sighted politician who is a source of danger, and not the real, genuine statesman who has an abiding faith in a moral government, and has, therefore, no antipathy towards justice. Are there any better or greater statesmen in the United Kingdom than the three Lords Justices who dealt with O'Brien's case? Has not a single decision obliterated a multitude of judicial sins? And has it not established the supremacy of law even at the sacrifice of a Home Secretary?

In view of the recent decisions of the Judicial Committee in some of the Indian cases with a political complexion, the pronouncement of Lord Haldane would be regarded as unfortunate. Is there no ideal, exalted enough for tumultuous times? Was not Lord Mansfield equal to any occasion?

"The constitution does not allow reasons of state to influence our judgments. God forbid it should! We must not regard political consequences, how formidable soever they might be if rebellion was the certain consequence, we are bound to say, 'Fiat justitia ruat cælum'." Case of John Wilkes, 19 How. St Tr. 1112.

TARAK CHANDRA CHAKRAVARTI.

Vakil's Library,
15th August 1923.

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REPORTS (See Index.)

The Governor's Speech proroguing the Bengal Legislative Council.

On Tuesday last H. E. Governor of Bengal prorogued the Bengal Legislative Council. In doing so he reviewed the career of the reformed Council at the end of two years and a half of its active life now about to expire. A lot of legislation has been got through during the period and some very important ones, like the Calcutta Municipal Bill. It is not expected in the Legislature in any part of the world that every member would have something to say or suggest with regard to every measure of legislation and much less to deal with its details. Measures of legislation are usually left for detailed consideration by such members as have a special or a working knowledge of the subject. Other members intervene in the debate when any question of principle is involved. For instance the question of communal representation in the Calcutta Municipal Bill was such a question. But in an infant representative institution like the present Council, the elected members are naturally anxious to show to their constituencies that they have not been inactive. The large number of amendments moved, resolutions discussed and questions asked, to which His Excellency referred, proceeded from this commendable zeal to please one's electorate and the public at large as well. It is quite excusable if it is overdone at times. We noticed the same spirit and tendency in the Legislative Assembly at the beginning but as time went on members got tired of the practice of discussing academic resolutions

or asking inconsequential questions. With regard to special legislation such as concerning labour, mines and the like, preference was given to those who were intimately acquainted with the question and who naturally took a leading part in the debates. But there are some inexpressible members in every legislature who wish to talk on every subject and unless they get a chance make a special grievance of it. But in the Bengal Council such eccentricities are by no means conspicuous. However, the public opinion with regard to it is that it is not as strong a body as it might have been but for the non-cooperation movement for boycotting the Council.

H. E. the Governor complained that "the real meaning of responsible Government is not fully appreciated either by the electorate or by the members of the Council." "Responsible Government" observed His Excellency "provides in effect a partnership between the Legislature and the Executive." We may be permitted to point out that in a "responsible Government," in the true sense of the term, it is the Legislature which is the predominant partner, but under the dvarchical form of Government which prevails here, it is the Executive who still maintain the whip hand of the administration. So if the ministers back up the Executive against popular views or demands, His Excellency should not be surprised, if they have been "classified" as he says, "as the bureaucracy and regarded as a fair target for invective".

But all the same it must be said that neither the elected members nor their electorate have yet realized the power they are able to exercise over the ministers directly and the bureaucracy indirectly if they choose to exercise such powers when the occasion requires. If and when a minister forfeits the confidence of the Council, the proper course for the members is to vote want of confidence in him, in which event, the Governor would be

bound under his Instrument of Instructions to remove him and replace him by one who commands the confidence of the House. When the Council has this power of removal of ministers but fails to exercise it because of a lack of unity or organising power, it is idle for them to complain of the ministers' shortcomings and consider that members have done their duty if only they have abused them sufficiently strongly. The Governor was right in suggesting that the elected members should form themselves into parties and control the ministers or get the Governor to replace them by others of their choice

It has been suggested in the public press that the Report of the Joint Parliamentary Committee leaves the ministers free to vote as they like and that they are not bound to support the Executive Government on every occasion. What the Joint Committee says has to be interpreted according to constitutional practice in other countries and so far as it may be applicable to the dyarchical form of Government which has been introduced in our provincial Governments. The Joint Committee refers to joint deliberations between the members of the Executive Council of the Governor and the ministers or in other words to the meetings of the Cabinet Council of the Governor. The ministers and the members of the Executive Council being equal in number, it was obviously the object of the Reform Scheme that the ministers will be able to control the action of the Executive in the following manner. If the ministers were opposed to any administrative policy or measure of the Executive Council they could oppose it at the Governor's cabinet meeting and vote against it. Thus the responsibility is ultimately shifted on to the Governor who by his casting vote could decide which view is to prevail. Assume that the Governor overrules the ministers by his casting vote. If the question is one of administrative detail and not of policy of any serious importance, the ministers may acquiesce in the decision of the Governor. But if the question is a momentous one which seriously affects public interest, then the ministers may either tender their resignation and thus compel the Governor to reconsider his decision and resign from the position he and his Executive Councillors had taken up. If he should not, the matter may be brought before the Council by their resignation or otherwise. If the Governor chooses such ministers as would support

his policy, the Council may then defeat the new ministers and compel them to resign and thus defeat the policy of Government.

Whether the ministers should exercise their powers or not, the Council has thus the constitutional power even under the present dyarchical form of Government of exercising control over the Governor and his Executive Council. But the first requisite for the exercise of such control will depend upon the capacity of the Council to form a party united on the basis of common interest and pledged to pursue a common policy. Lord Ronaldshay did not often consult the ministers on matters relating to reserved subjects. For instance when the Criminal Law Amendment Act was put into operation, it is believed, that the ministers were not consulted. The ministers could have then adopted the course we have indicated and thus brought about a reversal of the Government policy. H. E. Lord Lytton, however, announced in his speech that it has been his practice to submit all questions of policy to the joint deliberation of the ministers and his Executive Council. If the ministers and the people's representatives would in future exercise their constitutional rights in the manner we have indicated, then the bureaucracy may to a great extent be made responsible to the Legislature. It is not practicable that the Governor would then carry on his administration by certification. If he does, then dead-locks, obstruction and enforced dissolutions would be quite legitimate

We do not share the view that the Bengal Council acted irresponsibly by disallowing the division of Mymensing into two districts. The provincial budget then showed a deficit of one and a half crores. Such schemes for the duplication of district administration would have not only fastened a heavy initial outlay but also increased considerably the cost of administration. It is wiser to lose a few lakhs than to burden the provincial finance with much heavier recurring and non-recurring liabilities, when admittedly we cannot afford it. Lord Ronaldshay after proposing to restore the Midnapur partition scheme by certification had ultimately to abandon it, because the Provincial finance could not spare any money for such administrative changes. It is the Executive who acted irresponsibly in launching such schemes and incurring liabilities and not the Council. When our finances

improve and if the people desire such administrative changes, they may be brought about later on with the concurrence of the Council.

His Excellency mentioned that the development of works of public utility in connection with the transferred subjects, such as education, public health, sanitation, industries cannot be pushed on owing to the deplorable condition of our public finance. Whatever money we can now save or spare should be devoted to such purposes. We are glad to be assured by His Excellency that after all the Government and the University are likely to end the unedifying controversy in which they were so long engaged and settle the lines on which legislation should proceed for improving the University and secondary school education. But the Government must remember that the educated community in this country, and the parents and guardians of our youths, are much more vitally interested in the question of educational reforms than the minister and the Calcutta University as at present constituted. The ideal of every University is that it is a republic of learning where autocracy either internal or external is quite out of place.

LONDON NOTES

(FROM OUR CORRESPONDENT)

July 23rd. The following petitions were heard to-day by a Board composed of LORDS BUCKMASTER and SUMNER and DUFF, J. —

Reddi v Reddi (Madras)

Mr. Kenworthy Brown applied for special leave to appeal. Leave had been granted by the High Court but the Petitioner failed to deposit the sum required for printing charges, and his application for a certificate was refused. The Respondents had in the meantime obtained special leave to cross-appeal.

The Board gave special leave provided that security was lodged.

Mr. E. B. Raikes opposed the application.

Shah Zaid Hussain v. Md. Ismail (Allahabad).

Sir G. Lowndes, K. C. and Mr. W. Wallach applied for special leave to appeal. The suit was originally filed in 1904 and the judgment of the High Court on appeal was delivered in

February 1916. In May 1916 an application was made to the High Court for leave to appeal to the Privy Council, but owing to deaths and the consequent bringing on to the record of representatives of the deceased parties the application was not heard until March 1922. Leave was then refused, the Court stating that the matter was not of sufficient importance. Counsel stated that there were originally 79 Defendants who had now become 186 and that the delay was entirely due to the appointment of representatives. The suit was brought by a zamindar and related to 16 sites but the decision would affect 525 sites. The judgment of the High Court was erroneous being based on an alleged admission. No such admission was to be found on the record and there was an affidavit that it had never been made. Leave was granted, the Appellant to pay costs of the appeal in any event.

Maharaja Kesho Prasad Singh Bahadur v. Lakshmi Narayan Lal

Mr. Parikh applied for revivor of the appeal. Mr. Dube opposed.

It was suggested that having abated, the appeal was barred under the Indian Limitation Act.

Their Lordships ordered the appeals to be admitted and reserved the question of limitation and costs to be dealt with at the trial.

July 25th. Judgment was delivered by Mr. AMER J. in *Raja Srinath Roy v. Maharaja Pratap Uday Nath Sahu* (Patna). The appeal was dismissed.

G. D. M.

26-7-23

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before NEWBOLD, J. CIVIL REVISION NOS. 37 TO 39 OF 1923. KUMAR NARENDRA NATH MITTER Decree-holder, Petitioner v. ABDUL MOLLA and others, Opposite Party. The 21st May 1923.

Benqal Tenancy Act (VIII of 1885), sec. 170, cl. (3)—Transferee of non-transferable occupancy holding, it has an interest voidable on the sale and is entitled to deposit.

The question for decision in these Rules was whether the Opposite Party who was an unrecognised purchaser from the judgment-debtor was entitled to make a deposit under cl. (3) of sec. 170 of the Bengal Tenancy Act to prevent the sale of a non-transferable occupancy holding in execution of a decree for arrears of rent. This Rule was directed against an order of the Munsif of Baruipur, dated the 18th December 1922; allowing a deposit.

His Lordship made the Rule absolute, and held as follows —

"As regards the right of an unrecognised purchaser to make a deposit under this section there appears to be conflicting decisions of this Court. The case of *Nalin Behari Roy v. Pulmany Dass* (16 C. W. N. 421), supports the Petitioner's contention, while the case of *Ahammadulla Chowdhury v. Prayag Sahu* (20 C. W. N. 39), supports the contrary view. These cases and others were recently considered in the case of *Satyesh Chandra Sarkar v. Mahammad Ismail* (Civil Revision 591 of 1921), decided by Woodroffe and Suhrawardy, J.J., on the 9th August 1922. A short note of this case will be found in 26 C. W. N. 170 (notes portion). I have referred to the original judgments and I find that they support the contention on behalf of the Petitioner that the transferee of a non-transferable occupancy holding is not a person holding any interest voidable on the sale. I have no hesitation in following this decision.

I accordingly make these Rules absolute and set aside the orders passed by the Munsif in each case and direct that the execution cases do proceed according to law."

Babu Narendra Chandra Bose for the Petitioner.

Babu Hiralal Chakravarti for the Opposite Party.

H. C. S.

Rule made absolute

CIVIL APPELLATE JURISDICTION. Before NEWBOULD and RANKIN, JJ. S. A. No. 1737 of 1920. *MONMATHA KUMAR ROY*, Plaintiff-Appellant v. *JASODA LAL PODDER* and ors., Defendants-Respondents. The 15th June 1923.

Suit for khas possession—Transfer of non-transferable occupancy holding—Sub-lease by transferee to original tenant—Abandonment.

The Plaintiff brought a suit in ejectment against the Defendants Nos. 1, 2 and 3 in respect of a non-transferable occupancy holding alleging that the Defendants Nos. 2 and 3, the raiyats of the said holding, mortgaged the same to Defendant No. 1 who obtained a mortgage decree and in execution thereof purchased without the Plaintiff's consent the holding, got delivery of possession and subsequently sub-let the holding to Defendant No. 1. The Defendant No. 1 alone contested the suit, the other two Defendants did not appear. It was contended that the Defendants Nos. 2 and 3 being still in possession the claim for khas possession was not maintainable. The first Court held that as the Defendants Nos. 2 and 3 did not contest the suit the Plaintiff was entitled to khas possession against all the Defendants. The lower Appellate Court, on appeal by Defendant No. 1, upset the decision of the first Court rejecting the Plaintiff's prayer for khas possession against Defendants Nos. 2 and 3 holding that as the Defendant No. 1 was not in khas possession of the land it was useless to decide whether the Plaintiff was entitled to khas possession against him, but declared that the Defendant No. 1 had no title to the disputed land as against the Plaintiff. In second appeal by the Plaintiff it was contended on his behalf that Defendant Nos. 2 and 3 not having contested the suit the Plaintiff was entitled to khas possession against the Defendants. In High Court all the Defendants appeared and contested the appeal:

Held—That the Defendants Nos. 2 and 3 being sub-lessees under the transferee of a non-transferable occupancy holding the Plaintiff was not entitled to khas possession of the suit land against them who did neither abandon the holding nor repudiate the Plaintiff's right to receive rent although they did not contest the suit in the Courts below. 34 Cal. 689 and 24 C. W. N. 117 referred to.

Babas Surendra Nath Guha and *Surja Kumar Guha* for the Appellant.

Babus Jogesh Chandra Roy, Gopal Chandra Das and *Satis Chandra Chowdhury* for the Respondents.

Babu Biraj Mohon Majumdar for the Minor Respondents.

S. C. C.

Appeal dismissed with costs.

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[No 41.]

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“Undue preference” to passengers in Railways.

The judgments of Subrawardy and Cuming, JJ., of the Calcutta High Court in discharging the rule obtained by one Bhupendra Kumar Dutt for testing the legality of the conviction and order for the payment of a fine of Rs 5 against him by a Magistrate of Howrah for his having entered a third class compartment reserved for Europeans by the Bombay Mail of the E. I Ry and refused to leave it, are of considerable public interest. This is the first case of its kind in the Calcutta High Court. Mr Justice Subrawardy, though he agreed with Mr Justice Cuming in discharging the rule, yet the reasons he gave for so doing seem somewhat different. Mr Justice Subrawardy does not expressly hold that such reservation may not under any circumstances amount to “undue and unreasonable preference” which sec 42 (2) of the Railways Act expressly prohibits. The learned Judge in discharging the rule relies more on the fact that the accused had not shown that there was not sufficient accommodation in other compartments where he might have travelled. In so far the judgment of Mr Justice Subrawardy does not seem to us to be satisfactory. It casts a burden on the accused which is impossible for him or any railway passenger to discharge. Mr Justice Cuming, on the other hand, discharged the rule, being of opinion like many of the Judges of the Madras, Bombay and Allahabad High Courts that such reservation did not amount to “undue or unreasonable preference.” The

decisions of the Indian High Courts do not seem to us to be at all satisfactory and we shall give very obvious reasons for it.

It is difficult to see how such reservation does not amount to “undue and unreasonable preference.” Those who advocate this view both in the law Courts and before the Legislature argue that such reservation is meant for the mutual convenience of 3rd class European and non-European passengers who differ in the matter of food and habits. Further, it is said by the authorities from the Chairman of the Railway Board to the railway guard that there is no objection to Indians in European dress travelling in such compartments. We would readily concede that a Hindu or a Mahomedan who objects to certain articles of food taken by Europeans will not find it convenient or comfortable to travel in a small compartment reserved for Europeans and would not care to travel with them. But it is unreasonable that one who does not will not be permitted to travel in such compartment if he does not wear European dress.

So, after all, the prohibition amounts to a dress-bar. In the Provincial and the Central Legislatures in India, there is no dress-bar. Why should there be any in our railways? Now, let us examine the legality of the judgments in the light of the above facts. If the reservation is meant for mutual convenience and if an Indian is allowed to travel when wearing a shirt and shawl, how can it be legally held that he can be prosecuted and punished if he wore a *dhoti* and coat or *pajama* and *chapan* and entered a 3rd class compartment so reserved and refused to leave when there was spare accommodation in the compartment. When a European and an Indian passenger pay the same fare, it would certainly amount to undue preference if any exclusive privilege is given to men of any particular nationality or wearing any particular dress to travel in a compart-

ment to the exclusion of the others. By reservation marked "Europeans" the Railway authorities are only entitled to indicate that the compartment is set apart for persons of European habits. When all the seats are not reserved on payment by Europeans, to exclude an Indian would surely amount to showing "undue preference." Persons of different habits would naturally try to avoid travelling in such compartments. But those who do not object to travel with Europeans cannot, with any justification in law, equity or justice, be punished for insisting on travelling in such compartments. To hold otherwise would offend against the plain meaning of the expression "undue and unreasonable preference." We shall review the judicial decisions on this question in greater detail hereafter

We invite attention in this connection to the debate which took place on this very question in the Legislative Assembly on the 10th of March last, which we are sure will be found interesting. It will be noted, however, that the whole debate proceeded on the question of mutual convenience of passengers. The Government members defended the practice on the ground that it was followed on a very limited scale and never suggested that any punishment should be inflicted on any persons who travelled in such compartments in non-European dress. If they did, the remedy for it, as was suggested by Mr. Hassanally at the conclusion of his speech in moving the resolution, would be to get a short Act passed by the Assembly to get rid of the High Court decisions which favour such a view. The Hon'ble Mr. Innes, the member of the Viceroy's Executive Council, who is responsible for the Railway Administration, did not take his stand on any of these judicial decisions. He repudiated the suggestion that such reservation was based on any principle of racial discrimination, gave an assurance that such reservation would be reduced to the lowest possible limit and left it to time to correct it. He was certainly conscious that the Assembly would correct it, if the Railway Administration and the Judges continued to take an unreasonable view of the question and we are sure that the Governor-General would never dream of invoking his power of certification in interfering with such legislation.

We quote below the concluding portion of

the Hon'ble Mr. Inne's reply to Mr. Hassanally at the debate in the Assembly above referred to:—

"I do deprecate this attempt to show that these carriages are reserved in order to mark some distinction between a poor European and the Indian third class passenger, so as to show that the one is inferior to the other. Let me tell the House that there is absolutely no such idea at all. I would ask the House to remember that the Railway Administration regard this question, as their replies show, purely as a question relating to the convenience of their passengers. Those Railway Administrations which retain this discrimination say that they do it merely because of the difference in the habits between the European passengers and the Indian passengers and they think that by retaining this reservation they are consulting the convenience of the clients and that is the reason why this reservation is continued. It seems to me wrong especially at this time to try and make a racial question out of a small thing of this kind. As I say we have addressed the Railway Administrations, we have taken up the question with the Agents. The practice has been restricted to the narrowest possible limits, and I think that the wisest course is not to make too much of a question of this kind but to let time correct it. I think myself that possibly we could do more with regard to the intermediate class compartments. I do not see any reason myself—why intermediate compartments should be reserved and I am quite prepared to suggest to the Railway Administrations that they should consider very seriously whether there is any necessity to continue this distinction in respect of intermediate class compartments. I consulted some of the Administrations by wire and I have already had a wire from one Administration saying that it does not think it necessary to continue the distinction at least in respect of intermediate class compartments but it wishes to continue the reservation of third class compartments. I think that will show that the Railway Administrations themselves are tackling the subject in a reasonable way and I suggest that the House should leave it at that."

Relying on this assurance Mr. Hassanally withdrew the motion with the leave of the House.

CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

(Continued from p. clxvii).

SUMMARY.

The following is a summary of the existing rights of European British subjects with the alterations under the Racial Distinctions Act (XII of 1923) indicated in brackets:—

[IN THE HIGH COURT].—(1) Such subject are now amenable only to the general jurisdiction of the Chartered High Courts and the Chief Courts:—S. 4 (1) (j) [Exclusive jurisdiction of such High Courts abrogated in areas under the Judicial Commissioners, C. P., Oudh and Sind].

(2) Such subjects have the right of trial by jury, the majority of which are European or Americans:—S. 450 (1) [Right preserved: but corresponding right given to Indians].

(8) Acquittal by jury now final. [Appeal allowed to a Special Bench of the High Court in cases involving racial questions, under the new s. 449].

[IN THE COURT OF SESSIONS].—(1) An Indian Sessions Judge can try such subjects now [No change].

(2) Additional and Assistant Sessions Judges cannot now do so, unless themselves European British subjects, and further, unless the latter have held office for 3 years and are specially empowered:—S. 444 [Both restrictions removed. Indian Additional and Assistant Judges will have power to try them].

(3) Offences by such subjects punishable with death or transportation are now exclusively triable in the High Court:—S. 447. All offences punishable with imprisonment and fine are triable by the Court of Session, but the class of cases actually tried by it is limited in practice to offences adequately punishable with one year's imprisonment:—S. 449 (1) [All Indian Sessions Judges will have power to try such subjects for all offences though punishable with death or penal servitude: see the new s. 34A (a)].

(4) Right of trial by jury, the majority of which are Europeans or Americans, in cases triable by jury:—S. 450 (1) [Retained, but corresponding right given to Indians under the new s. 275].

(5) Right of trial by jury in cases triable with assessors:—Ss. 450 (1), (2) [Abrogated].

(6) Alternative right of trial, in the above case, with assessors the majority of whom are Europeans or Americans:—S. 450 (2) [Right of trial with all European or American assessors given, but Indians will have a corresponding right under the new s. 284A].

(7) A Sessions Judge can now inflict on such subjects only imprisonment for one year, fine or both: and if the offence cannot be adequately punished he has to transfer the case for trial to the High Court:—S. 449 [Any Indian Sessions Judge will be competent to pass sentences of death, penal servitude, imprisonment and fine, but not whipping, under s. 34A (a)].

[IN A PRESIDENCY MAGISTRATE'S COURT].—An Indian Presidency Magistrate can now try such subjects, (s. 443), for the same offences, and under the same procedure, and award the same sentences as in the case of an Indian accused:—S. 446 [Law unaltered].

[IN THE COURTS OF PROVINCIAL MAGISTRATES].—(1) An Indian Magistrate may take cognizance of an offence by such subject, but must send the case for inquiry or trial to a competent Magistrate:—S. 445 [He will have power to proceed

to inquiry or trial himself where he has jurisdiction over such subjects].

(2) An Indian District Magistrate is now competent to try such subjects, but no first class Magistrate, unless himself such subject and a justice of the peace, and no second or third class Magistrate, though an European British subject:—S. 443 [Indian District and first class Magistrates will have such power; and even an Indian second or third class Magistrate will be competent to try such subjects for offences punishable with fines not exceeding Rs. 50 under s. 29A].

E. H. MONNIER.

(To be continued.)

Correspondence.

LAWYERS AND LITERATURE.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

Lawyers ought to be grateful to Dr. Hridaydas Ghose, B.L., for his happy suggestion, and earnest attempt should be made to pick out men of literary pursuits from amongst the members of their hard and monotonous profession. As desired by him I request the favour of your publishing the names of some pleaders of literary fame of Chittagong in your renowned journal.

"Chittagong," the "Shoula Kiritani" and "Shagar Kuntala," mother-land of the late great poet Nabhi Chandra, is "meet nurse for poetic children." Her name and fame as the mother of poets is known throughout Bengal; and it has been proved by Moulvi Abdul Karim, a well-known member of the "Bangiya Shahitva Parishad."

Chittagong is in no way backward in this respect in comparison with other parts of Bengal. Even the Bar at Mofussil Patiya can boast of one who by his sweet and fiery verses has enriched the Bengalee language for the last 20 years. He is our Bipin Behari Nandy, the "Krittibash Dada" of Bani Jaladhar Sen. No doubt he is known to all the literary men of Bengal and is of established reputation but what profession, which Bar and what District he belongs to, is not known to all. In the midst of his extensive practice he has published one piece of poem, "Aurghya," two Idylls, "Shika" and "Nari," two well-known Kabayas, "Chandra Dhar" and "Chanda," one drama "Pratishta" and the

numental epic "Shapta-Kanda Rajasthan" the lines of Krittibash. All of his works have been highly appreciated by the literary public and journalists. This Bar can also boast of another junior and rising pleader Babu Ishna Kumar Sen who has written many dramas and novels. Two well-known publishing firms at Calcutta have undertaken to publish two of his works, "Bidhir-Badhan" and "Bhowanir Bhul" which will shortly be published.

Of the District Bar of Chittagong, Babu Sasanka Mohan Sen is known to all. He is not only a poet of high order but a fine essayist, sound philosopher and an eminent critic. By his contributions on the late poet Hem Chandra made as a student, he had secured a gold medal. His "Banga-Banee," a criticism of Bengalee literature, both ancient and modern, is a valuable contribution to the Bengalee language. His poetical works are "Sindhu sangit," "Shoila Shangit," "Shoiga and fortya" and "Shabitri." Having been appointed Professor to read papers on Bengalee literature in the University College, he has now joined the High Court Bar, Calcutta. Babu Rajani Ranjan Sen, B.L., the former law lecturer of the Chittagong College and an eminent member of the District Bar, is an able English writer. He has translated the "Balmikir Joy" of Haraprashad Shastri into English. His own original production "The Holy City of Benares" deserves commendation. He is so powerful a writer in English that many well-known journalists and scholars, both in and out of India, have spoken highly of him.

There are many other writers amongst leaders in this District whose names I shall be glad to send hereafter.

Yours truly,

FAZLUR RAHMAN KHAN, B.L.,
Pleader, Patiya.

10-8-23

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before
RANKIN and B. B. GHOSE, JJ. MIS. APP.
No. 404 of 1922 GOLAM YUSUF
MUNSHI and another, Appellants v.
RAM PROSAD MUKHERJEE and an-

other, Respondents. The 19th and 20th of July 1923.

Rent decree—Execution of—Special period of limitation, Art. 6, Sch. III, Bengal Tenancy Act.

The Appellants were tenants Defendants in a rent suit instituted by a co-sharer landlord, in which the Respondents, who were the other co-sharer landlords, were made *pro forma* Defendants. The Court passed a decree allowing 23 rupees and annas odd as rent due to the Petitioner in his share and directed that the tenants Defendants would pay the sum of Rs. 471 and annas odd to the *pro forma* Defendants as rent due in their share. The decree was passed on 30th January 1917, and after certain steps taken in 1919 and 1921, the present application for execution was made by the *pro forma* Defendants, on 10th January 1922, with regard to the sum of Rs. 471 payable to them under the decree. The defence was that the decree being for a sum of money not exceeding Rs. 500, and being obtained in a rent suit was barred under Art. 6, Sch. III of the Bengal Tenancy Act. The Courts below dismissed the objection of the judgment-debtors, holding that the decree was a joint decree, for a sum exceeding 500 in favour of the Plaintiff and *pro forma* Defendants, and as such did not come under the purview of Art. 6.

The judgment-debtors appealed to this Court and it was contended that the decree allowing several sums of money to separate individuals, could not be regarded as a joint decree, and even if the decree was joint, the execution petition was not triable under Or. 21, r. 15, C. P. Code.

Held—That the decree could not be said to be either a joint or a several decree, and it came under Exp. (I) of Art. 182 of the Indian Limitation Act. That the rules of limitation, especially those of special limitation, ought to be construed very strictly—and as the legislature has expressly laid down limits with regard to the value of the decree, it could not be said in the present case that the application was time-barred.

Babu Bijon Kumar Mukerji for the Appellants

Babu Probodh Kumar Das for the Respondents.

S. C. C. Appeal dismissed.

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REPORTS (See Index.)

Power of Court to deprive Plaintiff of right to sue afresh on his cause of action for persistent contempt of order to amend improper pleading.

The June number of the *Harvard Law Review* comments on a case, the facts of which, according to the Review, were as follows—In a suit to recover \$120,000,000 damages for an alleged conspiracy to deprive them of the use of a patent for a "Pork and Bean Biscuit," the Plaintiffs filed a four hundred-page petition which contained irrelevant matter, redundant allegations, personal episodes and criminal charges. The petition was for that reason struck off as were a second and third, the Court on the last occasion finding the Plaintiffs in contempt. A fourth petition being a repetition of the second, the Court, whose patience was by this time exhausted, dismissed the action "with prejudice". This, in the language of our Code, means that the order was meant to operate as a bar to a fresh suit on the same cause of action. By statute the Court had power only to dismiss "without prejudice" for improper pleading, but the Court in this instance purported to act in the exercise of its inherent power at common law. Our contemporary examines the validity of the order with reference to the question whether the order amounted to a denial of due process, in which case the order would be unconstitutional and would not bar a new action on the same cause. The opinion is expressed that "extinguishing a cause of action after giving a contemptuous Plaintiff four chances to state his

case properly is not a denial of due process." Cogent arguments of policy uphold the decision. An effective check must be put upon the party who repeatedly enters pleading that has been declared bad. Contempt must be adequately punished to preserve the respect due the Courts. The time of the Courts must be conserved for litigation prepared in the proper manner and not wasted in vexatious, useless proceedings. These safe-guards are necessary to protect the Court, litigants and the public. "Nevertheless," the reviewer thinks, "although not unconstitutional in exceptional cases, the remedy is a harsh one."

Suppose now, such a case occurred in this country? Under Or 6, r. 16 of the Civil Procedure Code, the Court in such a case would be justified in making an order for striking out the irrelevant or scandalous matter and, if these could not be separated from the rest of the pleadings, for amending the plaint. The case in question would appear to call for an order for amendment. Take it next that the Plaintiff refused to comply with the Court's order. Or 17, r. 3 would appear to be applicable in such a contingency, and under that rule, if a party fails to perform any act necessary to the further progress of the suit for which time has been allowed, the Court may notwithstanding such default proceed to decide the suit forthwith. But how?—if the very foundation of the suit be wanting. The Court would presumably be justified in saying that it being impossible to proceed with the suit upon the pleading as it stood the suit should be dismissed. But that would not be a decision on the merits and would not bar a fresh suit on the same cause of action. Sec 12 expressly provides that in order to bar a Plaintiff from instituting a further suit in respect of the same cause of action, there must be some rule enacted in the schedule of the Code expressly taking away this right. An order like the one passed in the case by the American Court would therefore, in the absence of such a provision in the

Rules, appears to be *ultra vires* and without jurisdiction. We do not remember having come across any Indian precedents dealing with this matter.

As to English precedents Oswald in his "Contempt of Court," cites the following case—

A replication was filed in Chancery extending to six score sheets, when all the pertinent matter might have been contained in sixteen. It appeared that one Richard Mylward, the Plaintiff's son, did "devise, draw and engross the said replication," whereupon Egerton, L. K., ordered "that the warden of the Fleet shall take the said Richard Mylward into his custody and shall bring him into Westminster Hall on Saturday next about ten of the clock in the forenoon, and then and there shall cut a hole in the midst of the same engrossed replication which is delivered unto him for that purpose, and put the said Richard's head through the same hole, and so let the same replication hang about his shoulder with the written side outward, and then, the same so hanging, shall lead the same Richard, bare-headed and barefaced, round about Westminster Hall Whilst the Courts are sitting and shall show him at the bar of every of the three Courts within the Hall, and then shall take him back again to the Fleet, and keep him prisoner, until he shall have paid £10 to Her Majesty for a fine, and 20 nobles to the Defendant for his costs in respect of the aforesaid abuse, which fine and costs are now adjudged and imposed upon him by this Court for the abuse aforesaid," *Mylward v. Wellden*, (1556) Reg. Lib. 8 Eliz B fo 678; Toth 101. (Oswald, Contempt of Court, 3rd Ed., p. 61)

We have no reason for doubting the authenticity of this report, but will any English or Indian Judge to-day have the courage to follow it?

CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

(Continued from p. clxxxix).

IN THE COURTS OF PROVINCIAL MAGISTRATES.

(3) In trials of summons and warrant cases before a District Magistrate an European British subject can now claim a jury trial, under s. 151 (1), even if the offence is ordinarily triable with assessors, though a first class Magistrate trying such

subject has to follow the ordinary procedure under Chs. XX, XXI and XXII as in the case of Indians [Above right of trial by jury rescinded]. New procedure substituted by Ch. XXXIII, in the case of offences punishable with imprisonment and tried outside Presidency towns, where racial issues arise, i.e., (a) where the European British subject is complainant or accused, and *vice versa*: (b) where both are so connected with the case as to require the adoption of the same procedure: see the new s. 443 (1). On a claim by such alleged subject, the Magistrate, who may be an Indian, will have to decide it [s. 443 (1)]. If he rejects the claim, an appeal lies to the Sessions Judge, who may also be an Indian and whose order is final. If the claim is allowed, the European British subject will be tried, under the new s. 445 (1), by a mixed Bench (one such subject and the other an Indian) with first class powers. On a difference of opinion the case will be sent, under the new s. 445 (2), to a Sessions Judge who may be an Indian. In warrant cases such subject is to be committed, under the new s. 446 (1), to the Court of Sessions (which may consist of Indians) even if the offence is not exclusively triable by it. The case will be tried under the ordinary procedure of that Court, and must be tried with a jury the majority of which are Europeans or Americans, and, on requisition, by assessors all of whom are so.—S. 446 (2) and proviso read with the new ss. 275 and 284A.

In cases not falling under Ch. XXXIII the procedure is the normal one under Chs. XX, XXI, XXII. Thus summons cases punishable with fine only, when the parties are (i) all European British subjects, (ii) such subject and an Indian, or (iii) the police and such subject will be tried under Chs. XX, XXII, and the trial may be held by an Indian District or first class Magistrate, and where the offence is punishable with fine up to Rs. 50, by an Indian second and third class Magistrate under s. 29A. So in warrant cases punishable with imprisonment between (i) European British subjects only, or (ii) the police and such subject, the latter will be tried under Chs. XXI, XXII, and may be tried by an Indian District and first class Magistrate, who will be competent to punish him to the same extent as an Indian accused under the new s. 34A (b). No doubt an European British subject may claim, under Ch. XLIVA, s. 528A, to be dealt with as such, but the only benefit he derives therefrom, in Magisterial trials, is exemption from whipping. In this class of cases, which constitutes the general class of cases that go to the Criminal Courts, the European British subject has lost the right

of trial by jury before a District Magistrate, and the benefit of a limited sentence in all cases. He is now on the same footing as an Indian accused. *In short he has surrendered all his rights with the illustrious exception of non-liability to a sentence of whipping.*

(4) The present limit of punishment awardable by a District Magistrate is 6 months' imprisonment, a fine of Rs. 2,000 or both, and by a first class Magistrate (competent to try him), imprisonment for 3 months, fine of Rs. 1,000 or both. [Under the new s. 34A (b) an Indian District or first class Magistrate can sentence him, precisely as in the case of an Indian accused, to 2 years, a fine of Rs. 1,000, or both]

APPEALS—(1) Such subject has now an optional right of appeal to the High Court on conviction by an Assistant Sessions Judge, a District and a first class Magistrate:—S. 408, prov. (a) [Right taken away. An appeal will lie to the Court of Session (and may be heard by an Indian Sessions Judge) on conviction by an Assistant Sessions Judge who may be an Indian (ss. 408, 409) and by a mixed Bench in summons cases.—[S. 445 (2)] though an appeal from a Sessions Judge in such cases will go to the High Court:—S. 445 (3). An appeal on conviction by a second or third class Magistrate who may be an Indian will lie to a District Magistrate (s. 407) who may also be an Indian].

(2) Such subject has an optional right of appeal to the High Court in petty cases and cases tried summarily (s. 416) [Right taken away]

(3) Though an appeal will be given, on conviction in a High Court to a Special Bench, an appeal will be allowed to Government in the case of an acquittal, in cases involving racial question (s. 449).

HABEAS CORPUS—

(1) Right of such subject, unlawfully detained within the local limits of the Appellate jurisdiction of a Chartered High Court, to be brought up before it (s. 456) [Right retained, but extended to Indians under the amended s. 491]

(2) Similar right, if so detained outside such limits, e.g., in Native States [Retained under the new s. 491A].

E. H. MONNIEP.

(Concluded.)

Correspondence.

CASTE SYSTEM AND RACIAL ANTAGONISM.

To
"THE EDITOR, 'CALCUTTA WEEKLY NOTES'"
SIR,

Under the above heading you were pleased to make elaborate observations in your issue of the 20th ultimo. Would you permit me to point out that the whole view of the caste system as it prevails in India has not been presented. It is not a fact that in all, "the premier temples and places of worship on this side of India," Hindus of all castes are freely admitted. For instance, at Puri the so-called untouchables are not allowed to enter the temple, but have to come away after making obeisance to the "Patitodhar Jagannath" at the entrance of the shrine. No doubt in one respect caste was vocational, the arrangement might also have been sanitary. But the sanitary aspect of the system does not explain why the trading and cultivating castes are looked upon with disfavour and hatred by the high castes of Bengal. So you will allow me to point out that caste prejudices and caste hatred owe their origin to want of dignity of labour.

All manual works requisite for the up-keep of society must be dignified before we may hope for disappearance of hatred towards the so-called lower castes of Hindus.

I have the honour to be,

Sir,

Your most obedient servant,
GOUR MOHUN ROY.

Howrah,
Bar Library,
5th September 1923

Reviews.

THE INDIAN EVIDENCE ACT. By Tarapada Banerjee, B.L. Fifth Edition by A. C. Ghose, M.A., B.L. M. C. Sarkar & Sons. 90/2A, Harrison Road, Calcutta, 1923. Price Rs. 9.

This is a carefully prepared and revised edition of a work of established reputation. The commentaries on the sections have, so far as we have been able to test, been brought up-to-date and in parts re-written. The introduction and the appendices have been retained. With its improved get up, the popularity of this handy and at the same time exhaustive commentary on the Indian Evidence Act with the members of the profession is assured. The

book is moderately priced for its bulk and contents.

THE INDIAN EVIDENCE ACT. By Surendra Kumar Ray, B.L. Fine Art Press, 41-A, Grey Street, Calcutta, 1923. Rs. 3-4.

This is a reprint of the Act with brief case notes which without pretending to be exhaustive attempt to give within a short compass the leading ideas underlying the sections of the Act as elucidated by judicial decisions. It should prove useful to students, and practitioners should find it more useful than the bare Act.

CODE OF CRIMINAL PROCEDURE, ACT V OF 1898, as amended to 1st September 1923, indicating alterations (Weekly Notes Edition). By E. H. Monnier and J. Chaudhuri, Barristers-at-Law. Weekly Notes Office, 3, Hastings Street, Calcutta. Price Rs. 3.

Material and far-reaching alterations have been made in the Code of 1898 by five enactments all passed in 1923. The Legislature might have, but has not, passed a consolidating Act embodying all these amendments, which task has thus been left to individual initiative and enterprise. The distinguishing feature of the present edition is that it not merely consolidates the amendments but by manipulating the printing and by means of foot-notes, enables one to have the text both before and after amendment for ready comparison. This will undoubtedly facilitate the handling and the correct application of the amended Code during the transitional period which must pass before the full effect of the changes made is generally realised.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

TESTAMENTARY AND INTESTATE JURISDICTION.
Before MR JUSTICE GREAVES IN THE
GOODS OF ARDESHIR CURSETJEE
MAJAI. The 28th August 1923.

Will in the handwriting of the testator—No signature—Name in the usual exordium—Succession Act, sec. 50.

The deceased, a Parsee, died leaving a Will, written in his own handwriting. There was

no signature appended to it except his name appearing at the beginning as the usual exordium "I Ardeshir Cursetjee Majai, etc., etc., do make my last Will." There was evidence that the testator contemplated the name at the beginning as his signature with the design of authenticating the instrument.

An application was made on behalf of the two executors named in the Will for the admission of the Will to probate.

Mr. S. C. Bose for the Petitioners.—The name occurring in the exordium "I Ardeshir Cursetjee Majai, etc." is sufficient signature for authenticating the Will. The testator intended this to be his signature and the Will was in his handwriting.

In England before 1838, this was sufficient signature under the Statute of Frauds (29 Car 2, C. 3). Refers to Jarman on Wills, 4th Ed., page 79; Williams on Executors, 11th Ed., page 56.

Cites *Coles v. Trecothick*, 9 Ves Jr 234 at pp 248-49.

There is no reported authority on this point in India.

Sec 50 of the Indian Succession Act requires only that the testator shall sign and does not say anything about the position of the signature.

Sec 5 of the Statute of Frauds required similarly that the instrument should be signed by the party devising.

The law in England was, however, changed after 1838 by St I, Vict. c 26 and the provision in Sec 9 of the enactment requires that the signature must appear at the foot or end of the Will.

Cites *Amarendra v Kashinath*, 27 Cal. 169, an authority for the proposition that the position of the signature is immaterial for the purposes of the Will under Indian Law.

Held—That there was sufficient signature and the Will should be admitted to probate.

Messrs N C Gupta & Co., Solicitors for the Petitioners
M. N. G.

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Calcutta High Court.

(CIVIL REVISIONAL.)

Ula Mia v. Maulvi Abdul Rihman bond—Material alteration
Whether Plaintiff can succeed on the basis of the original consideration—S 91 of the Indian Evidence Act.

REPORTS (See Index.)

ORIGINAL SIDE

The High Court, Original Side, will be closed on the Annual Vacation (including Janma Ashtomi, Mahalaya, Durga and Lakshmi Pujas, Fateha-Doaz-Dahom, Kali Puja and Bhadradiwya) on and from Friday, the 31st August, to Saturday, the 10th November 1923, both days inclusive, and will resume its sittings on Monday, the 12th November 1923.

The offices of the Court, Original Side, will be closed for general business on the Annual Vacation on and from Friday, the 14th September, to Thursday, the 8th November 1923, both days inclusive.

One Judge will remain in town for urgent business and arrangements will be made for the attendance of such superior and subordinate officers as may be required for the disposal of urgent business.

The first motion-day after the holidays will be Wednesday, the 14th November 1923.

By Order,
S C MITRA,
Offg Registrar.

HIGH COURT, O S;
The 11th August 1923.

APPELLATE SIDE

It is hereby notified that the High Court, Appellate Side, will be closed for the Annual Vacation from Friday, the 31st August, to Saturday, the 10th November, 1923, both days inclusive.

The Hon'ble Mr Justice Cuming and the Hon'ble Mr Justice Page will sit as the Vacation Judges, except during the following Court and Gazetted (Executive) holidays, viz :—

Gazetted holiday on account of Monday, the 3rd September 1923.
of Janmastami.
Gazetted holiday on account of Tuesday, the 9th October 1923.
of Mahalaya.

Gazetted holidays on account of Durga and Lakshmi Pujas and Fateha Doaz-dahom Sunday to Thursday, the 14th to 26th October 1923.

Gazetted holidays on account of Kali Puja Wednesday and Thursday, the 7th and 8th November 1923.

Court holiday on account of Bhadradiwya Saturday, the 10th November 1923.

Notice as to the days on which the Vacation Bench will sit for the hearing of motions and cases in which Vakils are engaged, and as to the distribution of business, will be given from time to time.

The Office of the Appellate Side will be closed for the Vacation from Tuesday, the 9th October, to Saturday, the 10th November 1923, both days inclusive.

Such Bench Clerks, Editors, Translators, Assistants and Typists as may be required will attend throughout the Vacation, except on the Court's sanctioned holidays and the Gazetted holidays above specified.

N G A EDGLEY,
Registrar

The 6th August, 1923

“Undue Preference” to passengers in Railways.

Mr Justice Subhawardy, in his judgment in the railway case to which we have already referred, while giving effect to the Railway Company's contention that they have the power to reserve compartments for Europeans, makes it clear that the exercise of such power is subject to the proviso that it must not amount to an “undue and unreasonable preference” within the meaning of sec. 42 (2) of the Railways Act. In his view, reservation for a particular class of passengers is a preference and may be considered undue and unreasonable in certain circumstances, as, for example, where a passenger belonging to another class cannot secure a seat in any other compartment. The onus of proving the undue and unreasonable character of the preference in a particular case, he places on the passenger and here we are unable to agree with him. Having regard to the fact that the Railway Company are much better acquainted

with the condition of the passenger traffic in the train than a passenger, the *onus* should be placed on them to prove that reservation by them of a compartment for a particular class was proper and not unreasonable. Further, it is the Railway Company who are seeking to exercise the extraordinary power of excluding the public from occupying seats in a particular compartment—a power which has not been given to them expressly by any of the provisions of the Railways Act—and they should be called upon to produce evidence for the purpose of showing that they have not exercised their power in an undue and unreasonable manner to the detriment of the travelling public.

The Allahabad High Court took an extreme view of the powers of Railway Administrations to reserve compartments for a particular class of passengers. In the case of *Emperor v. Brijbasilal* (I. L. R. 42 Allahabad, p. 327), the learned Judges held that sec. 109 of the Railways Act was wide enough to authorise Railway Administrations to reserve accommodation for a particular class of passengers by the name of that class. As regards the question of "undue and unreasonable preference," Walsh, J., observed as follows — "It is faintly suggested and appears to have been argued before the Magistrate that in any case a reservation is a preference forbidden by secs. 42 and 43 of the Act. In our view, this contention is hardly worthy of notice. The sections referred to belong to a chapter of the Act which deals with goods traffic and rates charged upon traders and a special tribunal is appointed for the decision of questions thereunder. None of the ordinary criminal or civil courts have jurisdiction to deal with questions of preference under that portion of the Act." The logical consequence of the position assumed here by the learned Judge is that the Railway Companies can make whatever arrangements they like for accommodating passengers and that no Court has jurisdiction to decide any question of "undue and unreasonable preference" with regard to such arrangements.

This extreme view of the power of Railway Companies to reserve compartments did not commend itself to the Bombay High Court where the question came up for consideration in the case of *Emperor v. Narayan Krishna Gopte* (I. L. R. 47 Bombay, p. 465). In that case Martin and Crump, JJ., held that the

Railway Company has a general power of reserving accommodation for the use of passengers, under which individual seats or compartments might be reserved for actual or for prospective passenger, but that such power must not be exercised so as to give undue preference or to cause undue prejudice to any particular passenger traffic, whether individual or collective, the question whether an undue preference has been given or an undue prejudice caused, being a question of fact in each case. Shah, Acting C. J., dissenting from the decision of the learned Judges, held in this case that the reservation for Europeans did amount to an undue preference and observed as follows in the course of his judgment —

"What appears to me to be a probable result of this manner of reserving accommodation for one class of passengers is that a passenger outside that class would be unable to travel by a particular train for want of room on account of overcrowding whereas there would be room in the train for a person of that class who may not have expressed any desire to travel and who may not travel at all by that train. That is a result which according to the evidence is not uncommon. When a compartment is reserved in pursuance of general instructions, leading to such results, it cannot be said to be legally reserved, so as to constitute an entry therein an offence punishable under sec. 109. The accident that a particular train was not crowded and that there was room for the accused on that particular occasion elsewhere in the train does not seem to me to afford any answer to the real question in the case. If the evidence in this case is accepted, as it has been accepted, it shows that the exercise of this power involves the result that some passengers outside the class of passengers for whom the compartment is reserved would be left over without any accommodation in the train, whereas a passenger of that particular class at that station or any of the following stations would get accommodation, and if there be no such passenger the compartment would remain unoccupied."

This short review of the decisions shows how the law has been differently interpreted by different Judges, rendering an amendment absolutely necessary. In our opinion, it is high time for the Legislative Assembly to intervene and to declare the law on uncertain terms, so that the Railway Companies may know the limitations of their power to reserve compartments and the public may know what rights they possess while travelling on railways. In the debate which took place on Mr. Hassanally's motion on this subject in the Legislative Assembly Hon'ble Mr. Innes appealed to the members "not to make too much of the question but let time correct it." We are bound to say that "time will not correct it," unless the Railway Companies are prepared to act reasonably. In view of the strong feeling e

tertained by Indians on the question, the proper course for the Railway authorities is not to overstrain their powers under the Railways Act, whatever they may be, but to take the middle course, as we suggested in our last issue, viz., to reserve compartments for Europeans, but not to interfere with any one who chooses to travel in the compartment and certainly not to prosecute people who insist on travelling in the compartment. If, however, they are not prepared to adopt this course, the Legislative Assembly should consider the question of amending the existing law so as to bring it into line with the demands of public opinion.

Reviews.

INDIAN CONTRACT ACT • By Faiz B. Tyabji, M A Student's Edition by S. R. Dongerkery, B A., LL B. Thacker, Spink & Co., Calcutta and Simla, 1923. Price Rs. 9.

Mr Tyabji's Commentary on the Indian Contract Act has been abridged and adapted for the use of students in the present 'Student's Edition' by Mr. Dongerkery. The task has been ably and judiciously performed by the Editor. The get-up of the book is commendable, but the price, which is not incommensurate with the get-up, seems just too high for students.

THE ELECTION RULES Containing the Bengal Electoral Rules, the Bengal Electoral Regulations and the Indian Elections Offences and Inquiries Act with explanatory notes and commentaries. Second Edition • By Rushindra Nath Sarkar, M.A., B.L., M.L.C. and Sudhansu Sekhar Mukherjee, B.L. A. K. Sarkar, 7, Old Post Office Street, Calcutta, 1923.

The appearance at this juncture of a second edition of this handy manual on the election procedure of Bengal is very opportune. All amendments to the Rules and Regulations made up to date have been incorporated, and the commentary revised and brought up to date. It should prove useful to candidates for election as members of the Bengal Legislative Council and their supporters and to voters and persons interested in the coming election generally. As a book of ready reference it has already proved its value to members of the Council and the careful revision to which it has been subjected in the present edition will undoubtedly add to its usefulness.

CONFESSIONS AND EVIDENCE OF ACCOMPLICES. By Rai Prasanna Narayan Chaudhuri Bahadur, B.L., Government Pleader, Pabna. Third Edition. M. C. Sarkar & Sons, Law Publishers and Book-sellers, Calcutta, 1923. Price Rs. 10.

His position as Government Pleader provided the author with unequalled opportunities to observe the working in practice of the provisions in the Criminal Procedure Code relating to the making and recording of confessions as well by police officers as by Magistrates and Judges, and the utilization or otherwise of accomplices' evidence by both classes of public servants, and he has made the fullest use of his experience and the knowledge and insight gathered by the practical handling of these materials for trial in criminal cases. Add to this, a thorough knowledge of the law in principle as well as in detail and a complete mastery of the case-law, both English and Indian, which make themselves evident at every page of the treatise. The book has naturally grown in bulk with successive increases in its scope, the present edition covering over 700 pages. Much the greater part of the work had been printed by the time the recent amendments of the Criminal Procedure Code obtained the assent of the Governor-General. These amendments have since been incorporated. In view of the bulk of the book and the variety of its contents, the elaborate subject index furnishes the necessary key to enable the volume to be used as a book of ready reference.

THE LAW OF BENAMI. By Radharomon Mookerjee, B.L., Second Edition. Calcutta. R. Cambray & Co, Law Book-sellers and Publishers 10, Hastings Street, Calcutta, 1923. Price Rs. 6.

The author laid the profession under a deep debt of gratitude by presenting it with perhaps the most systematic and exhaustive treatise on a branch of Indian law which owing to its importance specially called for independent treatment. Thoroughly revised and brought up to date, the present edition will undoubtedly maintain the place its predecessor effectively secured in the estimation of judicial officers and legal practitioners.

THE INDIAN ARBITRATION ACT (IX OF 1899). By Gopaldas Jhamatmal Advani. Karachi. Bharat Electric Printing Works, 1923.

We welcome this ably executed commentary on an Act of daily use and application in the principal centres of commerce in India, and

is quite in the fitness of things that it should sail from Karachi. Rules framed by the High Courts and the Chambers of Commerce and the allied provisions of the Civil Procedure Code and the English Arbitration Act and the relevant provisions of the Stamp Act are given in appendices. It may well claim to be a handy and fairly complete hand-book upon the Act and is bound to be appreciated as such.

THE LAW OF COMPROMISE IN BRITISH INDIA.
By Ramlal Srivastava, B. A., Pleader Hardoi,
Indh. Job Press, Cawnpore, 1923

This is a digest of the law of compromise arranged under suitable heads and would have been more useful if it had been better got up. The book should have been divided into chapters and chapter headings given on the tops of the pages. The very great pains which the author has evidently taken over his work will receive better appreciation if these defects of mechanical execution are removed.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION Before
NEWBOULD and RANKIN, JJ. CIVIL REVISION
No 56 of 1923. DULA MIA, Petitioner v. MAULVI ABDUL RAHAMAN
and another, Opposite Party Heard on
21st May 1923 and judgment on 31st May
1923.

Bond—Altering a document—Material alteration—Effect of—Whether Plaintiff can succeed on the basis of the original consideration—Sec. 91 of the Indian Evidence Act.

The Petitioner in this case was the Defendant in a Small Cause Court suit in which the Plaintiff based his claim on a simple bond purported to have been executed by the Defendant

Petitioner in favour of one Maszulla, a benamdar of the Plaintiff. In order to prevent the bar of limitation the Plaintiff further relied on a payment of interest entered by the Defendant on the back of the bond. The defence *inter alia* was that the original bond was for Rs. 15 and not for Rs. 25 as alleged and that the document had been materially altered by the Plaintiff.

The Small Cause Court Judge found that the bond was altered as alleged by the Defendant but decreed the suit reducing the claim to Rs. 15.

It was argued on behalf of the Petitioner that the material alteration would vitiate the whole bond and that no suit could be founded on it. The alteration of the bond had destroyed the evidence of his debt and as the terms of the alleged contract had been reduced to the form of a document no other evidence except the document itself would be admissible. Reliance was placed on I L R 33 Cal 812, *Gour Chandra Das v. Prosanna Kumar Chandra*, and sec. 91 of the Indian Evidence Act. It was further argued that as no reference could be made to the altered bond the endorsement on the back of the bond would be of no avail to save limitation.

The Opposite Party mainly relied on S C W N 56 and contended that there was no bar to Plaintiff's falling back upon the original consideration and establishing it by oral evidence.

Held—That, even apart from the question of merger, sec. 91 of the Evidence Act would not permit this course, unless a separate agreement was proved, independent of the contract in writing. The Rule was made absolute.

Babu Radhabinod Pal (with Babu Hem Kumar Bose) for the Petitioner.

Babu Radhika Ranjan Guha for the Opposite Party.

S. C. C.

Rule made absolute.

[END OF VOL. XXVII.]

